CONSTITUTIONAL COURT OF SOUTH AFRICA

[2008] ZACC 13
Case CCT 89/07

THINT (PTY) LTD	Applicant
versus	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
INVESTIGATING DIRECTOR: DIRECTORATE OF SPECIAL OPERATIONS	Second Respondent
JOHAN DU PLOOY	Third Respondent

Case CCT 91/07

JACOB GEDLEYIHLEKISA ZUMA	First Applicant
MICHAEL HULLEY	Second Applicant
versus	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
INVESTIGATING DIRECTOR: DIRECTORATE OF SPECIAL OPERATIONS	Second Respondent
DIRECTOR OF PUBLIC PROSECUTIONS (DURBAN AND COAST LOCAL DIVISION)	Third Respondent

Heard on : 11-13 March 2008

Decided on : 31 July 2008

JUDGMENT

LANGA CJ:

Introduction

[1] This case concerns various search and seizure warrants issued purportedly in terms of section 29 of the National Prosecuting Authority Act[1] (the Act) by a judge. It concerns the validity of the terms of those warrants and the lawfulness of the manner of their execution. Finally, it raises a question about the appropriate relief for an unlawful search and seizure operation in the context of the fight against serious, complex and organised crime.

[2] The two applications before this Court were heard together by direction of the Chief Justice. They are applications for leave to appeal against two judgments handed down by the Supreme Court of Appeal on 8 November 2007.[2] In both judgments, that Court held by a majority that the application for, issue, and execution of, the respective warrants were lawful. The orders respectively overturned the judgment of Hurt J in the Durban High Court[3] and confirmed the judgment of Du Plessis J in the Pretoria High Court.[4] The applicants now apply to this Court to have the two orders of the Supreme Court of Appeal set aside.

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[1] Act 32 of 1998.

[2] *Thint (Pty) Ltd v National Director of Public Prosecutions* [2008] 1 All SA 229 (SCA) and *National Director of Public Prosecutions v Zuma and Another* [2008] 1 All SA 197 (SCA) (the SCA Zuma judgment).

[3] *Zuma and Another v National Director of Public Prosecutions and Others* 2006 (1) SACR 468 (D); [2006] 2 All SA 91 (D).

[4] *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* Case No 268/2006 of the Pretoria High Court, 4 July 2006, unreported.

[3] In the first application, the applicant is Thint (Pty) Ltd (Thint), a company incorporated in South Africa and carrying on business in Pretoria. In the second application, the applicants are Mr Jacob Zuma[5] (Mr Zuma) and Mr Michael Hulley (Mr Hulley), the current attorney of Mr Zuma. The first and second respondents in both applications are the National Director of Public Prosecutions (NDPP) and the Investigating Director of the Directorate of Special Operations (Investigating Director). The third respondent in the first application is Mr Johan Du Plooy (Mr Du Plooy), a Senior Special Investigator in the employ of the Investigating Director. The third respondent in the second application is the Director of Public Prosecutions in Durban. The respondents are referred to interchangeably as the state or the prosecution.

Complaints to the Judicial Service Commission

[4] After judgment was reserved in these cases on 13 March 2008, certain events occurred that resulted in a complaint being lodged with the Judicial Service Commission (JSC) by Judges of this Court. The complaint was against the alleged conduct of a Judge from one of the High Courts, the basis of which was that he had allegedly tried improperly to influence two Judges of this Court to decide these cases in favour of one of the parties in these cases. It is now common cause that the High Court Judge did visit the Judges of this Court. There is a dispute about the content of the discussions that took place during the visits. The High Court Judge has in turn lodged a counter-complaint against the Judges of the Constitutional Court alleging

[5] At the time of the issue and execution of the search warrants that are the subject matter of these proceedings, Mr Zuma was the Deputy President of the African National Congress.

improper conduct on their part which amounted to a violation of his constitutional rights. The basis of his complaint is the issuing by the Judges of this Court to the media of a statement about their complaint to the JSC, which is also common cause. The two complaints are the subject of an inquiry by the JSC and it is not necessary or desirable to go into detail for present purposes.

[5] After the complaints had been lodged, Mr Zuma's attorney, Mr Hulley, wrote to the Chief Justice expressing concern about the possibility of this judgment being delayed consequent upon the complaints before the JSC as well as possible negative implications for Mr Zuma. Responding to this, directions were issued by the Chief Justice inviting the parties, if they so wished, to make submissions arising out of Mr Hulley's letter. The parties have made their submissions, with none of them expressing a direct concern that the cases would not be decided fairly consequent upon the events leading up to the complaint to the JSC. Indeed the state indicated expressly that it had no concerns in relation to the fairness of the proceedings. The response of the applicant Thint, however, contains a criticism of the procedure followed by the Court in laying the complaint against the High Court Judge.

[6] It is necessary therefore to address the question whether the alleged improper approaches have had any effect on the content of the judgments being delivered in these cases or on the way in which they have been decided. All the members of the Court who sat in the two applications now before us (as well as in two applications heard simultaneously, which concerned a letter of request to Mauritian authorities for

documents relating to Thint and Mr Zuma), have considered their position in the light of the events mentioned above and their responsibilities as Judges of this Court. We are satisfied that the alleged acts that form the basis of the complaint to the JSC by Judges of this Court have had no effect or influence on the consideration by the Court of the issues in these cases and in the judgments given. It is recorded in the statement of complaint that there is no suggestion that any of the parties in these cases have had anything to do with the alleged conduct that forms the basis of the complaint by the Judges of the Court. The issues relating to the complaint have accordingly been kept strictly separate from the adjudication process in these cases. It is however important to emphasise that the cases have been considered and decided in the normal way, in accordance with the dictates of our Oath of Office and in terms of the Constitution and the law, without any fear, favour or prejudice.

Application for condonation

[7] The state filed its opposing affidavits to both applications for leave to appeal two days late. It has applied for condonation, stating that it had proved impossible to answer the applications within the ten day period permitted by the Rules of this Court. This was because of the sheer volume of the work involved and the limited availability of counsel over the summer holiday period. The applicants do not oppose this application. It is my view that it would be in the interests of justice to grant condonation given the overwhelming public importance of the case, the lack of prejudice to the applicants, and the relatively short delay.

Disputes of fact

[8] Before traversing the factual background, it is necessary to resolve a preliminary issue. Various disputes of fact appear in the record. It is trite that factual disagreements in motion proceedings are to be dealt with in accordance with the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,[6] which stipulates that, subject to certain exceptions, a court should rely only on evidence given by the deponents for the respondents. In deciding which parties count as the respondents in the two applications now before this Court, it is necessary to draw a distinction between disputes of fact relating to the authorisation of search warrants in terms of section 29 of the Act and disputes of fact relating to the subsequent execution of those warrants.[7]

[9] The former disagreements relate to the facts placed before a judge in chambers as part of an application for the issue of a warrant in terms of section 29. There is persuasive authority for the proposition that, where such an application is brought ex parte, it is by its nature provisional and subject to subsequent reconsideration after all the parties who have an interest have been heard.[8] Therefore, where a party subsequently challenges the ex parte issue of a warrant, it may be correct for the purposes of the rule in *Plascon-Evans* to treat that party as the respondent, even where the challenge takes the form of a fresh application on notice of motion. As will

[6] 1984 (3) SA 623 (A) at 634E-635C, discussed and approved in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 53.

[7] In my view, Farlam JA correctly drew this distinction at para 19 of the SCA Zuma judgment, above n 2.

[8] *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) at paras 2 and 44-8.

become apparent, however, it is unnecessary for the purposes of the applications before this Court to decide this question finally, because none of the material factual disputes falls into this category.

[10] The latter disagreements are different because they are factual disputes concerning what happens during the execution of a warrant. Where a party challenges the lawfulness of a warrant's execution on notice of motion and disputes of fact arise, that party remains the applicant, and the prosecution must accordingly be treated as the respondent under the *Plascon-Evans* rule. As far as this category of factual disputes is concerned, it is the state's version that must be accepted. That is the approach I take to the various factual disagreements arising in these two applications which relate to the execution of the warrants.

Factual background

[11] On 6 November 2000 the Investigating Director instituted a "preparatory investigation" in terms of section 28(13) of the Act,[9] which was aimed at determining whether there were reasonable grounds to conduct an investigation, in terms of section 28(1)(a), into allegations of corruption and fraud in connection with government contracts for the supply of armaments. By 24 August 2001 the Investigating Director had decided to launch an investigation contemplated by section 28(1), and Mr Du Plooy was designated to conduct it in terms of section 28(2)(a). In terms of section 28(2)(b), a person thus designated exercises all the powers of the Investigating

[9] The text of the relevant provisions of section 28 is set out below at para 34.

Director under sections 28 and 29. In October 2002 the investigation was extended to include inquiries into suspected offences of fraud, corruption, theft and tax evasion by Mr Schabir Shaik (Mr Shaik) and various companies controlled by him. On 2 June 2005 the Durban High Court convicted Mr Shaik and his companies of corruption and fraud, and sentences of imprisonment and the payment of fines were imposed.[10] Originally, Thint had been indicted together with Mr Shaik and his companies, but the charges against it were withdrawn on 11 October 2004, before the trial commenced, for reasons that are not germane to the present matter. The convictions and sentences of Mr Shaik and his companies were largely upheld by the Supreme Court of Appeal[11] and by this Court.[12]

[12] On 20 June 2005 the NDPP decided to prosecute Mr Zuma for corruption related to the offences committed by Mr Shaik and his companies. Mr Zuma appeared in the Durban Magistrates' Court on 29 June 2005, but the matter was postponed for further investigation. On 8 August 2005 Mr Du Plooy extended the scope of the section 28 investigation to include fraud and tax offences allegedly committed by Mr Zuma.[13]

[10] *S v Shaik and Others* 2007 (1) SACR 142 (D); [2005] 3 All SA 211 (D).

[11] *S v Shaik and Others* 2007 (1) SA 240 (SCA); 2007 (1) SACR 247 (SCA); [2007] 2 All SA 9 (SCA).

[12] *Shaik and Others v S* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC).

[13] On 4 November 2005, after the search and seizure operations at issue took place, the indictment of Mr Zuma was served on Thint and Thint Holding (Southern Africa) (Pty) Ltd, joining them as co-accused and summoning them for trial in the Pietermaritzburg High Court together with Mr Zuma. On 1 December 2006, after the High Court judgments in the present matter were handed down but before the respective appeals were heard by the Supreme Court of Appeal, the investigation was extended further to include instances of racketeering and money laundering in contravention of the Prevention of Organised Crime Act 121 of 1998, allegedly committed by Mr Zuma, Thint, Thint Holding (Southern Africa) (Pty) Ltd, and other persons associated with Mr Shaik.

[13] On 11 August 2005 Mr Du Plooy prepared an affidavit in support of an application for 21 search and seizure warrants to be issued in terms of subsections 29(5) and (6) of the Act.[14] The purpose of the proposed search and seizure operations was to obtain evidence in relation to the investigation of the crimes of which Mr Zuma, Thint, and another company, Thint Holding (Southern Africa) (Pty) Ltd, were suspected. In his affidavit, Mr Du Plooy emphasised the need for surprise in order to reduce the risk of the removal or destruction of any evidence on the relevant premises. On 12 August an application was made in chambers to Ngoepe JP of the Pretoria High Court in terms of section 29(4). On the same day the Judge President issued the majority of the warrants sought in Mr Du Plooy's affidavit, but only after their wording had been modified in order to specify the offences which were the subject of the investigation. The remaining warrants were issued on 15, 18 and 26 August 2005 respectively.

[14] On 16 August 2005 the Acting Investigating Director, Mr Mngwengwe, executed a written authorisation naming the various officials who were to conduct the search and seizure operations. On the morning of 18 August, most of the warrants were executed simultaneously at various premises throughout the country. Approximately 250 members of the Directorate of Special Operations participated in the operation. They seized approximately 93 000 documents as well as computer equipment. Soon thereafter, during November 2005, Mr Zuma and the Thint

[14] The text of the relevant provisions of section 29 of the Act is set out below at para 35.

companies were indicted to stand trial on 31 July 2006 in the Pietermaritzburg High Court.

The warrants

[15] The two applications now before this Court concern only six of the warrants. These were executed at:

(a) Thint's office in Pretoria;

(b) Mr Zuma's flat in Killarney, Johannesburg, which was occupied by two of his sons, his daughter and the wife of one of his sons when the warrant was executed;

(c) Mr Zuma's residence at the Nkandla Traditional Village in Nkandla, KwaZulu-Natal;

(d) Mr Zuma's former offices at the Union Buildings, Pretoria;

(e) Mr Zuma's former offices at the Department of Economic Development and Tourism, Durban;[15] and

(f) Mr Hulley's offices in Durban.

[16] These six warrants were in identical terms, except for the particulars relating to the premises to be searched. They read as follows:

"SEARCH WARRANT

(Section 29(5) of the National Prosecuting Authority Act, No. 32 of 1998)

[15] Unlike the other five warrants, which were issued on 12 August 2005 and executed on 18 August, this warrant was issued by Ngoepe JP on 26 August and executed on 8 September 2005.

> TO**:** The Investigating Director: Directorate of Special Operations or any person authorised by him/her in writing
>
> WHEREAS it appears to me from information on oath setting out the nature of the investigation, that there exists a reasonable suspicion that an offence/offences has/have been or is/are being committed, to wit, Corruption in contravention of Act 94 of 1992, Fraud, Money Laundering in contravention of Act 121 of 1998 and/or the commission of tax offences in contravention of Act 58 of 1962, or that an attempt was or had been made to commit such an offence/offences, and the need, in regard to the investigation, being an investigation into allegations of corruption, fraud, money laundering and/or the commission of tax offences for a search and seizure in terms of the above-mentioned section, of any object as per Annexure A, which has a bearing, or might have a bearing, on the investigation in question.
>
> AND WHEREAS it appears to me from the said information on oath that there are reasonable grounds for believing that an object(s) having a bearing or which might have a bearing on, or is/are connected with the investigation, is (are) on or in the premises or suspected to be on or in the premises of
>
> . . . .
>
> YOU ARE HEREBY AUTHORISED to enter the said premises during the daytime and there to inspect and search and make such enquiries that you may deem necessary, examine any object found on or in the premises which has a bearing or might have a bearing on the investigation in question and, against the issue of a receipt, to seize anything on or in the premises which has a bearing or might have a bearing on the investigation, or if you wish, to retain it for further investigation or for safe custody, (including inspecting, searching and seizing computer-related objects in the manner authorized in Annexure B) and to remain on the said premises and to complete the abovementioned inspection, search, enquiries, examination and seizure during the nighttime if necessary."

[17] Annexure A, which was referred to in the first paragraph of the preamble, was also phrased in identical terms in all four warrants executed at premises connected to Mr Zuma,[16] and consisted of 23 numbered paragraphs as follows:

[16] Warrants (b), (c), (d) and (e) at para 15 above.

"1. Any notes, minutes of meetings, diary entries, records of telephone conversations and any other correspondence, e mails, faxes, computer entries or documentation which have or might have a bearing on or are connected with any gift, payment, loan, or other benefit, direct or indirect, monetary or otherwise, which Schabir Shaik or any of the Nkobi entities, or Thétard, or any other person or entity within the Thomson-CSF/Thales/THINT group, directly or indirectly gave, intended to give or agreed to give to Zuma or his family, and any receipt of, or agreement to receive such by Zuma.

2. Any notes, minutes of meetings, diary entries, records of telephone conversations and any other correspondence, e mails, faxes, computer entries or documentation which have or might have a bearing on or are connected with any assistance of whatever nature that Zuma directly or indirectly gave, intended to give or agreed to give to Schabir Shaik or any of the Nkobi entities, or Thétard, or any other person or entity within the Thomson-CSF/Thales/THINT group, including any references to the following:

    - The Renong group of Malaysia, including Tan Sri Halim Saad and David Wilson
    - The Point Development
    - The Eco-Tourism School, including Deva Ponnoosami and Prof John Lennon
    - Minister Steve Tshwete and Grant Scriven of the Venson group
    - Ronald Coopersmith
    - Fouad Alghanim
    - The Kosi Bay Development and Jeffrey Crane of Crane Africa
    - United Bank PLC and Belo Osagie

3. Any notes, minutes of meetings, diary entries, records of telephone conversations and any other correspondence, e mails, faxes, computer entries or documentation which have or might have a bearing on or are connected with Shaik's appointment as Zuma's financial adviser, economic adviser or special economic adviser.

4. Notes, minutes of meetings, diary entries, records of telephone conversations and any other correspondence, e mails, faxes, computer entries or documentation which Zuma and his secretaries, assistants or colleagues would have compiled, which have a bearing or might have a bearing on Shaik's role with Zuma regarding visits to Malaysia and the Malaysian

government, including any business generated in favour of Shaik and the Nkobi group as a result of such visits.

5. Zuma's diaries for the period 1995 to date, and any electronic diaries, notes, or other correspondence, e mails, faxes, computer entries or documentation which Zuma and his secretaries, assistants or colleagues would have compiled and which indicate his movements, meetings and engagements, including travel plans, flight records and credit card records.

6. Notes, minutes of meetings, diary entries, records of telephone conversations and any other correspondence, e mails, faxes, computer entries or documentation which Zuma and his secretaries, assistants or colleagues would have compiled, which have a bearing or might have a bearing on meetings, correspondence or other contacts with Shaik, Thétard, Perrier, de Jomaron or any other person connected with the Nkobi or Thomson/Thales entities, including the entity African Defence Systems (Pty) Ltd.

7. Notes, minutes of meetings, diary entries, records of telephone conversations and any other correspondence, e mails, faxes, computer entries or documentation which Zuma and his secretaries, assistants or colleagues would have compiled, which have a bearing or might have a bearing on the partnership with or acquisition of, or intended partnership or acquisition of the entity African or Altech Defence Systems (Pty) Ltd (ADS), including contacts, meetings or correspondence with or regarding Peter Watt of Altron or Craig or Bill Venter of Altech.

8. Notes, minutes of meetings, diary entries, records of telephone conversations and any other correspondence, e mails, faxes, computer entries, financial records or documentation which Zuma and his secretaries, assistants or colleagues would have compiled, which have a bearing or might have a bearing on Zuma's financial position, including Zuma's financial obligations to third parties, including banks and other financial institutions, arrangements concerning such obligations, payments from third parties to Zuma, and arrangements concerning such payments, including payments from and arrangements concerning Jurgen Kogl and his entity Cay Nominees, Nora Fakude-Nkuna and her entity Bohlabela Wheels and Vivian Reddy, Edison Health and/or Development Africa Trust.

9. Notes, minutes of meetings, diary entries, records of telephone conversations and any other correspondence, e mails, faxes, computer entries or documentation relating to any allegations of corruption in respect of the arms

acquisition process and which have a bearing or might have a bearing on the investigation.

10. Notes, minutes of meetings, diary entries, records of telephone conversations and any other correspondence, e mails, faxes, computer entries or documentation which Zuma and his secretaries, assistants or colleagues would have compiled in reaction to reports regarding the contents of the encrypted fax.

11. Notes, minutes of meetings, diary entries, records of telephone conversations and any other correspondence, e mails, faxes, computer entries or documentation which Zuma and his secretaries, assistants or colleagues would have compiled in reaction to the prosecution and trial of Shaik and his related companies.

12. In general, any notes, minutes of meetings, diary entries, records of telephone conversations and any other correspondence, e mails, faxes, computer entries or documentation which Zuma and his secretaries, assistants or colleagues would have compiled in relation to the request to pay the bribe of R500 000, any actual payment of the bribe, or the objectives requested of Thomson-CSF in return for the bribe, namely

    - Protection of Thomson-CSF during the current investigations in respect of project SITRON (the corvette programme), including the letter signed by Zuma as leader of government business dated 19 January 2001 and addressed to Gavin Woods, and including Zuma's reaction to the ongoing investigation concerning the arms acquisition process, Shaik and the Nkobi group and the Thomson/Thales group.
    - Continued support of Zuma for future Thomson projects.

13. Any financial records of whatever nature, including ledgers, cash books, company registers, share registers, share certificates, bank documents, notes, minutes of meetings, diary entries, records of telephone conversations and any other correspondence, e mails, faxes, computer entries or documentation in connection with arrangements relating to ADS dividends.

14. Any notes, minutes of meetings, diary entries, records of telephone conversations and any other correspondence, e mails, faxes, computer entries, financial records/plans or documentation which Zuma and his secretaries, assistants or colleagues would have compiled in relation to the Nkandla building project, including its planning and financing.

15. Any notes, minutes of meetings, diary entries, records of telephone conversations and any other correspondence, e mails, faxes, computer entries,

financial records plans or documentation which Zuma and his secretaries, assistants or colleagues would have compiled in relation to the Jacob Zuma Education Trust Fund, specifically regarding funding sought from third parties.

16. Any notes, minutes of meetings, diary entries, records of telephone conversations and any other correspondence, e mails, faxes, computer entries, financial records/plans or documentation which Zuma and his secretaries, assistants or colleagues would have compiled in relation to the Development Africa Trust, including any amounts that Zuma owed Development Africa and payments to/from Development Africa and/or Vivian Reddy.

17. Any financial records of whatever nature, including ledgers, cash books, company registers, share registers, share certificates, bank documents, notes, minutes of meetings, diary entries, records of telephone conversations and any other correspondence, e mails, faxes, computer entries or documentation in connection with arrangements relating to any Nkobi or Thomson/Thales entity and the arms acquisition process.

18. Any records of whatever nature relating to any foreign bank accounts held by Zuma, Shaik or any of the Nkobi or Thomson/Thales entities which have a bearing or might have a bearing on the investigation.

19. Any records of whatever nature relating to any interests held by Zuma or Shaik in any entity (company, close corporation or trust) which has a bearing or might have a bearing on the investigation.

20. Any financial records of whatever nature, including ledgers, cash books, company registers, share registers, share certificates, bank documents, notes, minutes of meetings, diary entries, records of telephone conversations and any other correspondence, e mails, faxes, computer entries or documentation in connection with Zuma's association with Shaik or any of the Nkobi or Thomson/Thales entities.

21. Any financial records of whatever nature, including ledgers, cash books, company registers, share registers, share certificates, bank documents, notes, minutes of meetings, diary entries, records of telephone conversations and any other correspondence, e mails, faxes, computer entries or documentation in connection with payments made on behalf of Zuma's family members (children and wives) by any of the abovementioned Nkobi entities or Shaik.

22. Any records of whatever nature relating to Zuma's tax returns to the South African Revenue Service which have a bearing or might have a bearing on the investigation.

> 23. In general any records or financial records of whatever nature, including ledgers, cash books, company registers, share registers, share certificates, bank documents, notes, minutes of meetings, diary entries, records of telephone conversations and any other correspondence, e mails, faxes, documentation, or electronic computer data which have a bearing or might have a bearing on the investigation. Electronic computer data includes computers, laptops, stiffies, hard drives, compact discs, data cartridges, backups, electronic devices and any other form in which electronic information can be stored or saved. Records of telephone conversations include cell phone data stored in any cell phones."

[18] Annexure A to the warrant executed at the offices of Thint consisted of 22 paragraphs that followed very closely, with the necessary changes, the wording of paragraphs 1 to 21 and 23 as set out above. Annexure A to the warrant executed at Mr Hulley's offices contained only two numbered paragraphs. The second was phrased identically to paragraph 23 above, while the first read:

> "1. Any records of whatever nature that Hulley and Associates received from Schabir Shaik and any of the Nkobi entities or any other source in approximately July 2005 concerning the affairs of Jacob Zuma, and specifically records kept or compiled by Schabir Shaik in his capacity as financial advisor to Jacob Zuma."

[19] Annexure B, which was referred to in the authorising paragraph, was also phrased identically for all six warrants as follows:

> "1. Making two mirror images (complete disc copies) of computers, laptops, notebooks or hard drives, or any other electronic device on which information can be stored or saved, such as stiffies, compact discs and floppies.
> 2. Making digital images of any of the above for identification purposes.

3. Seizing computer hardware and software components and computer manuals necessary to facilitate forensic analysis.
4. Thereafter, and at a location removed from the premises, conducting searches by way of forensic analysis to identify and retrieve all information which has a bearing, or might have a bearing, on the investigation in question."

The search at the offices of Thint

[20] Investigators seized various items from Thint's offices, including documents and computers. Ms Govender, who had been employed since 2003 as the personal assistant of Mr Moynot, a director of Thint, was present during the search. She said in her affidavit before the High Court that she was aware that certain correspondence between Thint and its lawyers was confidential and privileged and that she had been told by Mr Moynot which documents stored on her computer were in this class. She claimed privilege in respect of certain documents in a filing room, calling in the assistance of Thint's attorney. After some negotiations with the investigators who executed the search, those documents were by agreement dealt with in terms of section 29(11) of the Act.[17]

[21] There was a dispute of fact about whether Ms Govender claimed privilege in respect of information stored on her computer. The investigators who were present deny that she did. As this dispute concerns the execution of the search warrant, I shall accept the investigators' version as correct, in accordance with the approach to factual disagreements set out above.[18]

[17] That section is set out in full below at para 35.

[18] Above at paras 8-10.

[22] On the day after the search, Thint's attorney wrote to the Investigating Director, recording that Thint did not consent to the seizure of documents or information that "might be protected by attorney/client privilege". The letter requested an undertaking that copies of such information would not be made "should they appear anywhere on the mirror images [of the seized computer hard drives] that might be made". He also requested the return of all copies that might already have been made.

[23] It is important to note that, since the execution of the search, Thint has had ready access to everything on the hard drive of Ms Govender's computer. That is because, first, the investigators conducting the search made a mirror image of her computer's hard drive and left the original in Thint's offices. Secondly, on 7 March 2006, Advocate George Baloyi (Mr Baloyi), a Deputy Director of Public Prosecutions in Pretoria, made available to Thint's attorneys CDs and/or DVDs containing copies of all deleted items that were recovered from that mirror image by forensic experts. Despite such access, to date Thint has not claimed privilege in respect of any particular document or item that was seized.

The search at Mr Hulley's office

[24] The background to the formulation of the warrant executed at Mr Hulley's office is as follows.[19] On 19 July 2005, about six weeks after Mr Shaik's conviction of corruption and fraud in the Durban High Court, his attorney, Mr Reeves Parsee (Mr

[19] Annexure A of the warrant executed at Mr Hulley's office is described at para 18 above.

Parsee), sent a letter to the prosecutors informing them that Mr Shaik had resigned as Mr Zuma's financial advisor and that he had accordingly forwarded all Mr Zuma's documentation to his new attorney, Mr Hulley. The letter did not say whether the documentation was in hard copy or in electronic format or both and did not specify by what means or when it had been forwarded to Mr Hulley. The prosecutors therefore did not know whether it still existed in a separate parcel or whether it had been integrated into other documents at Mr Hulley's office.

[25] The prosecution states that the purpose of the search was confined to seizing these documents. Advocate Anton Steynberg (Mr Steynberg), a Deputy Director of Public Prosecutions at the KwaZulu-Natal regional office of the Directorate of Special Operations, stated on oath that Mr Johannes van Loggerenberg (Mr Van Loggerenberg), the leader of the team assigned to the search of Mr Hulley's offices, was instructed that—

> "if the documentation could be readily identified as being from Reeves Parsee, he should seize only that documentation. He was instructed not to search the premises unless it was strictly necessary to locate this documentation."

[26] I now turn to record what happened when the warrant was executed at Mr Hulley's offices. Although there were further disputes of fact concerning this, I shall rely only on the version of the prosecution, in accordance with the approach to factual disagreements set out above.[20]

[20] Above at paras 8-10. This was the approach taken by Hurt J in the Durban High Court, above n 3 at 489b of the SACR and 108e of the All SA report, and by the Supreme Court of Appeal in the SCA Zuma judgment, above n 2 at para 19.

[27] Mr Van Loggerenberg and his team of seven searchers arrived at the office before Mr Hulley did. One of the members of the team was Advocate Willie Muller, a senior state advocate of the office of the National Prosecuting Authority, whose specific role was to deal with matters relating to privilege during the operation, should any claim to privilege be made. When Mr Hulley arrived at 07h35, he was given a copy of the warrant which he read. Mr Hulley then informed Mr Van Loggerenberg that he could assist the search team by showing them the documents he had received from Mr Parsee. He took Mr Van Loggerenberg to his filing offices where he pointed out two boxes that were still sealed. There was an inventory attached to the side of each box. Mr Hulley asked whether he could copy the inventories. Mr Van Loggerenberg agreed he could, and Mr Hulley then did so. The boxes were then seized and Mr Hulley was given a receipt for them. Throughout this process, Mr Hulley was entirely co-operative and he did not suggest that any of the documents contained in the boxes was or might be privileged. He then left for the airport. The members of the search team checked the contents of the boxes against their inventories and left at 09h00, having completed their task.

[28] On his way to the airport, Mr Hulley telephoned Mr Steynberg and said that he wanted to challenge the lawfulness of the searches and that for that purpose he needed a copy of the affidavit pursuant to which the warrants had been obtained. After contacting the leader of the prosecution, Advocate William Downer (Mr Downer), Mr Steynberg told Mr Hulley that he could obtain a copy of the affidavit from the

registrar of the Pretoria High Court. Mr Hulley asked Mr Steynberg whether all of the documents could be sealed and lodged with the registrar until the lawfulness of the search and seizure had been determined. Mr Steynberg responded that he would check with Mr Downer but that the law did not make provision for the documents to be lodged with the registrar for that purpose. Mr Steynberg then spoke to Mr Downer, who agreed with that approach. When he arrived in Johannesburg, Mr Hulley again spoke with Mr Steynberg who told him what Mr Downer had said and suggested that he contact Mr Downer directly.

[29] Mr Hulley then telephoned Mr Downer and asked him to stop the searches so that he could obtain a copy of the affidavit used in support of the application for the search warrants and have an opportunity to apply for a court order declaring the search of his offices to be unlawful. Mr Downer declined the request. Mr Hulley then asked him what would happen if any of the documents was privileged. Mr Downer replied that Mr Hulley should decide which documents he considered to be privileged. Mr Downer also said that it did not seem to him that any of the documents could be privileged because they had emanated from Mr Parsee who had said that they were documents Mr Shaik had held in his capacity as Mr Zuma's financial advisor. Mr Downer specifically stated in his affidavit that Mr Hulley made no further request of him and did not claim privilege in respect of any of the documents seized from his offices.

[30] Later that day Mr Hulley spoke with Mr Baloyi, who was asked to furnish him with a copy of the papers filed in support of the application for the search warrants. Mr Hulley explained that he needed time to study those papers in order to decide whether to mount a challenge to the warrants. He asked Mr Baloyi to persuade Mr Downer to agree that the documents taken from his offices be deposited with the registrar pending that decision. He did not claim privilege in respect of any of the documents. Messrs Baloyi and Hulley agreed to meet the following morning, which they did. Mr Baloyi gave Mr Hulley a copy of Mr Du Plooy's affidavit and told him that his request could not be acceded to.

[31] The next day, on 19 August 2005, Mr Hulley sent a fax to Mr Steynberg stating:

> "As per our prior telephonic consultation with your Messrs Downer and Baloyi we confirm that we are of the view that a certain privilege attaches to the entire body of documents seized from our offices.
>
> In the event we are further of the view that in terms of the provisions of the National Prosecuting Authority Act that such documents ought to be lodged with the Registrar of the High Court in these circumstances."

[32] Mr Steynberg replied by fax as follows on 22 August:

> "The search and seizure operation conducted at your offices on 18 August and our subsequent telephone conversations refer.
>
> I am informed by the DSO [Directorate of Special Operations] members who conducted the search that you pointed out to them the documents described in the search warrant, namely the financial documents relating to Mr Zuma that were

> forwarded to you by his former financial manager, Mr Schabir Shaik, via his attorney Mr Reeves Parsee. No other documents were read or seized by the DSO members, nor were your offices physically searched.
>
> I am informed further that at no stage did you or any of your staff indicate to the members present that the documents seized were, or might be, privileged.
>
> In the abovementioned circumstances, we are of the view that such documents constitute evidentiary material that is highly relevant to the current investigation and that no legal privilege attaches to such documents.
>
> We are therefore of the view that there is no reason in law why these documents should be handed to the registrar for safekeeping and accordingly we decline to do so."

[33] Mr Hulley has to date made no attempt to explain further or clarify his claim that "a certain privilege attaches to the entire body of documents". Moreover, although he has had ample opportunity to find out whether any of the documents taken from his office is indeed privileged, Mr Hulley has at no stage claimed that any specific document or item is in fact privileged.

The statutory framework

[34] Before considering the judgments of the lower courts in these two applications, it will be convenient to set out the statutory framework. The key statutory provisions in this case are to be found in sections 28 and 29 of the Act. The relevant parts of section 28 provide as follows:

> "Inquiries by Investigating Director
>
> (1) (a) If the Investigating Director has reason to suspect that a specified

offence has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may conduct an investigation on the matter in question, whether or not it has been reported to him or her in terms of section 27.

(b) If the National Director refers a matter in relation to the alleged commission or attempted commission of a specified offence to the Investigating Director, the Investigating Director shall conduct an investigation, or a preparatory investigation as referred to in subsection (13), on that matter.

(c) If the Investigating Director, at any time during the conducting of an investigation on a matter referred to in paragraph (a) or (b), considers it desirable to do so in the interest of the administration of justice or in the public interest, he or she may extend the investigation so as to include any offence, whether or not it is a specified offence, which he or she suspects to be connected with the subject of the investigation.

. . . .

(13) If the Investigating Director considers it necessary to hear evidence in order to enable him or her to determine if there are reasonable grounds to conduct an investigation in terms of subsection (1)(a), the Investigating Director may hold a preparatory investigation."

[35] The relevant parts of section 29 provide as follows:

"Entering upon premises by Investigating Director

(1) The Investigating Director or any person authorised thereto by him or her in writing may, subject to this section, for the purposes of an investigation at any reasonable time and without prior notice or with such notice as he or she may deem appropriate, enter any premises on or in which anything connected with that investigation is or is suspected to be, and may—

(a) inspect and search those premises, and there make such enquiries as he or she may deem necessary;

(b) examine any object found on or in the premises which has a bearing or might have a bearing on the investigation in question, and request from the owner or person in charge of the premises or from any

person in whose possession or charge that object is, information regarding that object;

(c) make copies of or take extracts from any book or document found on or in the premises which has a bearing or might have a bearing on the investigation in question, and request from any person suspected of having the necessary information, an explanation of any entry therein;

(d) seize, against the issue of a receipt, anything on or in the premises which has a bearing or might have a bearing on the investigation in question, or if he or she wishes to retain it for further examination or for safe custody: Provided that any person from whom a book or document has been taken under this section may, as long as it is in the possession of the Investigating Director, at his or her request be allowed, at his or her own expense and under the supervision of the Investigating Director, to make copies thereof or to take extracts therefrom at any reasonable time.

(2) Any entry upon or search of any premises in terms of this section shall be conducted with strict regard to decency and order, including—

(a) a person's right to, respect for and the protection of his or her dignity;

(b) the right of a person to freedom and security; and

(c) the right of a person to his or her personal privacy.

(3) No evidence regarding any questions and answers contemplated in subsection (1) shall be admissible in any subsequent criminal proceedings against a person from whom information in terms of that subsection is acquired if the answers incriminate him or her, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsection (12).

(4) Subject to subsection (10), the premises referred to in subsection (1) may only be entered, and the acts referred to in subsection (1) may only be performed, by virtue of a warrant issued in chambers by a magistrate, regional magistrate or judge of the area of jurisdiction within which the premises is situated: Provided that such a warrant may be issued by a judge in respect of premises situated in another area of jurisdiction, if he or she deems it justified.

(5) A warrant contemplated in subsection (4) may only be issued if it appears to the magistrate, regional magistrate or judge from information on oath or affirmation, stating—

(a) the nature of the investigation in terms of section 28;

(b) that there exists a reasonable suspicion that an offence, which might be a specified offence, has been or is being committed, or that an attempt was or had been made to commit such an offence; and

(c) the need, in regard to the investigation, for a search and seizure in terms of this section,

that there are reasonable grounds for believing that anything referred to in subsection (1) is on or in such premises or suspected to be on or in such premises.

. . . .

(7) (a) Any person who acts on authority of a warrant issued in terms of this section may use such force as may be reasonably necessary to overcome any resistance against the entry and search of the premises, including the breaking of any door or window of such premises: Provided that such person shall first audibly demand admission to the premises and state the purpose for which he or she seeks to enter such premises.

(b) The proviso to paragraph (a) shall not apply where the person concerned is on reasonable grounds of the opinion that any object, book or document which is the subject of the search may be destroyed, tampered with or disposed of if the provisions of the said proviso are first complied with.

. . . .

(9) Any person executing a warrant in terms of this section shall immediately before commencing with the execution—

(a) identify himself or herself to the person in control of the premises, if such person is present, and hand to such person a copy of the warrant or, if such person is not present, affix such copy to a prominent place on the premises;

(b) supply such person at his or her request with particulars regarding his or her authority to execute such a warrant.

(10) (a) The Investigating Director or any person referred to in section 7(4)(a) may without a warrant enter upon any premises and perform the acts referred to in subsection (1)—

(i) if the person who is competent to do so consents to such entry, search, seizure and removal; or

(ii) if he or she upon reasonable grounds believes that—

(aa) the required warrant will be issued to him or her in terms of subsection (4) if he or she were to apply for such warrant; and

(bb) the delay caused by the obtaining of any such warrant would defeat the object of the entry, search, seizure and removal.

(b) Any entry and search in terms of paragraph (a) shall be executed by day, unless the execution thereof by night is justifiable and necessary, and the person exercising the powers referred to in the said paragraph shall identify himself or herself at the request of the owner or the person in control of the premises.

(11) If during the execution of a warrant or the conducting of a search in terms of this section, a person claims that any item found on or in the premises concerned contains privileged information and for that reason refuses the inspection or removal of such item, the person executing the warrant or conducting the search shall, if he or she is of the opinion that the item contains information which is relevant to the investigation and that such information is necessary for the investigation, request the registrar of the High Court which has jurisdiction or his or her delegate, to seize and remove that item for safe custody until a court of law has made a ruling on the question whether the information concerned is privileged or not.

(12) Any person who—

(a) obstructs or hinders the Investigating Director or any other person in the performance of his or her functions in terms of this section;

(b) when he or she is asked in terms of subsection (1) for information or an explanation relating to a matter within his or her knowledge, refuses or fails to give that information or explanation or gives information or an explanation which is false or misleading, knowing it to be false or misleading,

shall be guilty of an offence."

The judgments of the Durban and Pretoria High Courts

[36] On 6 October 2005 Messrs Zuma and Hulley applied to the Durban High Court seeking relief in respect of seven warrants. (The attacks on two of the warrants have

since become moot.) On 15 February 2006 Hurt J declared five search warrants invalid and the searches pursuant to them, at Mr Hulley's office and the four premises connected to Mr Zuma, unlawful. The court ordered the NDPP and other respondents to return to the applicants all items seized under the warrants, together with all copies that had been made, and to pay the costs of the application.[21]

[37] Hurt J's decision was based on three separate grounds. First, he held that the prosecution had not shown, as section 29(5)(c) required, that there was a need for search and seizure in terms of the section. The material put before Ngoepe JP did not contain a persuasive explanation for the necessity of such an operation. In Hurt J's view, it was doubtful whether additional evidence was needed for the purposes of the investigation, but even if further evidence were necessary, it had not been shown why an invocation of the powers of subpoena in terms of section 28 of the Act were insufficient for this purpose.

[38] Second, the warrants were overly vague in two respects. They did not describe the suspected offences with sufficient particularity and so did not "convey intelligibly to . . . [the] searched the ambit of the search [they] authorise[d]" as is required by *Powell NO and Others v Van der Merwe NO and Others*.[22] Hurt J interpreted this principle to require that the warrants should have specified the suspected offences exactly, as well as when and by whom they were allegedly committed. Furthermore, the warrants were unduly vague because they all contained what the judge called a

[21] Above n 3.

[22] 2005 (5) SA 62 (SCA); [2005] 1 All SA 149 (SCA) at para 59.

"catch-all paragraph",[23] which, he opined, effectively authorised an unbounded search of the premises in question.

[39] The third ground for Hurt J's decision was that the Investigating Director should have been aware that attorney-client privilege might have been jeopardised during the course of the search of Mr Hulley's offices, which could have resulted in a violation of Mr Zuma's fair trial rights.[24] This should have been prevented by an explicit reference in the warrant to section 29(11) or by bringing that provision to Mr Hulley's attention when the warrant was served on him.

[40] On 5 January 2006 Thint and Mr Moynot (together with Mrs Moynot) applied to the Pretoria High Court for similar relief, in respect of the warrant executed at Thint's offices, to that granted by Hurt J. On 4 July 2006 Du Plessis J held that the application for the warrant, its issue, and its subsequent execution were all lawful.[25] The judge found, first, that Mr Du Plooy had complied with his duty to make full disclosure of the material facts in his application for the warrants to Ngoepe JP. Second, the warrants were not invalid for want of an explicit reference to section 29(11) of the Act, as there was no need for such a reference either in principle or on the facts of the case. Third, the affidavit sufficiently established a reasonable need in all the circumstances for a search and seizure warrant. Fourth, the terms of the

[23] It is reproduced above at para 17, and appears there as para 23 of annexure A of the four warrants executed at premises connected to Mr Zuma. Para 2 of annexure A of the warrant executed at Mr Hulley's office is identical, as is para 22 of annexure A of the warrant executed at Thint's offices.

[24] In terms of section 35(3) of the Constitution of the Republic of South Africa, 1996.

[25] Above n 4.

warrant were not fatally overbroad, because they did not authorise anything more than the Act itself authorised and they conveyed intelligibly to both searcher and searched the ambit of that authority. The catch-all paragraph, moreover, was not fatal because it was qualified by a requirement that anything seized under it had to have at least a possible bearing on the investigation. Finally, the right to privilege in respect of computer documents could not aid Thint, because on the respondents' version Ms Govender did not claim privilege, but in any event Thint had failed to claim privilege subsequently in respect of any particular item despite being well placed to do so.

The judgments of the Supreme Court of Appeal

[41] Following the decisions of Hurt J and Du Plessis J in the Durban and Pretoria High Courts, the state and Thint respectively appealed to the Supreme Court of Appeal. Argument in respect of the appeals was heard on 28 and 29 August 2007, and two separate judgments were handed down on 8 November 2007. In both, the court held by a three-two majority that the application for, issue, and execution of, all the respective warrants were lawful. The first judgment overturned the order of Hurt J, while the second judgment confirmed the order of Du Plessis J. The reasons in respect of both appeals were provided in the first judgment; the second judgment merely referred to the first.

[42] In both instances the minority judgment was written by Farlam JA, with whom Cloete JA concurred. In essence, the minority held the second ground advanced by Hurt J as alone determinative of the appeals: the warrants read on their own were

defective because they did not intelligibly convey to the searched person the ambit of the authorised search and seizure operation, in breach of the principle enunciated in *Powell*.[26] Although the operative part of the warrants conferred the power to examine and thereafter to seize only items which had or might have a bearing on the investigation in question, the terms of the investigation itself were so general that it was impossible to ascertain what the warrants covered.

[43] In reaching this conclusion, the minority held that the *Powell* principle of intelligibility meant that the warrant must itself, without reference to any extraneous document, objectively define the ambit of the authorised search at the time it is carried out. It rejected the prosecution's argument that the scope of a warrant need only be objectively delineable if and when subsequently challenged in court after the searched person has had sight of the affidavit on the strength of which the warrant was issued. It held further that the searched person's knowledge of the investigation in question was irrelevant to the intelligibility of a search warrant. The purpose of requiring a warrant's intelligibility to the searched person at the time of execution was, the minority held, to enable him or her to ascertain the items to which a search could lawfully be directed and thereby to enable him or her to take steps immediately to minimise the invasion of his or her rights to privacy and property.

[44] The minority then accepted the prosecution's alternative submission that the High Court orders should be varied to ensure the preservation of the evidence seized

[26] Above n 22.

under the warrants. It held that the originals of the seized documents should be returned to the applicants, but that copies be kept under seal by the registrar of the High Court so that a subsequent criminal trial court could ultimately decide whether those copies should nevertheless be admitted as evidence, despite having been unlawfully obtained, in terms of section 35(5) of the Constitution. This, the minority held, was a just and equitable order in terms of sections 38 and 172(1) of the Constitution, because it successfully balanced the competing constitutional imperatives involved.

[45] The majority decision in both appeals was written by Nugent JA, with whom Ponnan and Mlambo JJA concurred. The majority held in contrast that the warrants were not defective and therefore that the seized items need neither be returned to the applicants nor preserved with a High Court registrar.

[46] The majority's key disagreement with the minority concerned the proper interpretation and application of the principle of intelligibility laid down in *Powell*. The majority emphasised that the starting point was what the Act required, and not principles enunciated in case law concerning warrants issued in terms of different legislation. Nevertheless, warrants by their nature have to comply with two further criteria of validity: They have to be capable of being understood, and they can authorise no more than is permitted by the authorising statute itself. *Powell's* case, the majority held, merely restated these principles and did not, as the minority effectively held, establish a novel principle that all warrants must necessarily contain all the

information required to identify what may be searched for without travelling outside the warrant. *Powell* also did not establish, as a matter of law, that the failure to specify in a warrant the exact offence that is suspected, renders it unduly vague. The warrant declared invalid in that case was distinguishable from the warrants in these appeals; so, in the end, *Powell* was not directly applicable.

[47] The majority accordingly held that it is not the law that a warrant issued in terms of section 29 of the Act must on its face contain information that enables the searched person to identify exactly what may be seized. All that is required is that the warrant must be capable of objective delineation, and extrinsic evidence may be used to establish its meaning with certainty. The Act does not explicitly require anything further, and it should also be interpreted to require implicitly that no additional information about the investigation be given to searched persons, for at least five reasons. First, it is impossible to circumscribe what information should be given with certainty; second, it would be impossible to place searched persons in a position of total certainty and the law should not be interpreted to require empty gestures in that direction; third, disclosing the full nature of the investigation would undermine its prospects of success; fourth, search and seizure operations are not dependent on the co-operation of searched persons, so the searched persons need not be placed in a position of total certainty; and fifth, it would be nonsensical always to require disclosure of information in a warrant when searches are sometimes permitted without any warrant or any disclosure at all.

[48] The majority applied these principles to the warrants in question and found them to express intelligibly and with sufficient certainty the scope of the authority they conferred: They permitted a search for and seizure of all the species of material referred to in the annexures, all of which were capable of being identified as having, or possibly having, a bearing on the investigation in question. What the investigation entails and whether items seized have or might have a bearing on it were objective facts capable of being ascertained. Moreover, the catch-all paragraphs did not differ materially from the other paragraphs in the annexures.

[49] As far as the "need" for a warrant in terms of section 29(5)(c) was concerned, the majority held that Hurt J set the bar too high by requiring the prosecution to show in every case that the material could not be obtained by invoking the powers of subpoena under section 28. It held that his approach would undermine the success of investigations into serious and complex crime in terms of the Act. On the facts of this case, Mr Du Plooy's affidavit clearly established a need for search and seizure in terms of section 29.

[50] Finally, as to the question of privilege, the majority held that the fact that the warrants did not expressly refer to section 29(11) did not constitute sufficient reason for their invalidation. Moreover, the execution of the warrants at the offices of Mr Hulley and Thint was not unlawful for any failure in regard to privilege. The applicants failed to show that special precautions to avoid disclosure of privileged

information, above and beyond those required by the Act, were called for in the circumstances.

The indictment of Mr Zuma and the Thint companies

[51] During November 2005 Mr Zuma and the Thint companies were indicted to stand trial on 31 July 2006 in the Pietermaritzburg High Court. During June or early July 2006 the prosecution applied for a postponement of that criminal trial. One of the main grounds relied on in the postponement application was that the state intended to appeal against the judgment of Hurt J, which had declared the searches and seizures unlawful. Msimang J refused that application on 20 September 2006, but the prosecution declined to withdraw the charges and the matter was struck from the roll. Subsequently, on 28 December 2007, the National Prosecuting Authority served a fresh indictment on Mr Zuma and the Thint companies alleging the commission of racketeering, corruption, fraud, money laundering and tax offences, and summoning them to appear before the Pietermaritzburg High Court on 4 August 2008. This second indictment was drafted after the state had had the opportunity to consider all the documents seized under the ostensible authority of the warrants now under consideration.

The parties' submissions

[52] Having set out fully the factual background, the terms of the warrants, the statutory framework, and the relevant litigation history, I am now in a position to consider the grounds of the appeal.

[53] Although Thint advanced argument separately from Mr Zuma and Mr Hulley, I present all of the arguments in a unified form to avoid repetition. The overall scheme of the applicants' submissions is that the approach of the majority of the Supreme Court of Appeal is flawed; the minority's approach to the validity of the search warrants is preferable; but the minority erred in making a preservation order; instead, all items seized and copies thereof should immediately be returned to the applicants. The specific reasons advanced for these conclusions are as follows.

[54] The applicants first argue that leave to appeal should be granted. The issue and execution of the warrants implicates the rights to privacy and property in terms of sections 14 and 25 of the Constitution respectively, which provide the normative substratum for interpreting sections 28 and 29 of the Act through the prism of the Constitution. Mr Zuma also submits that his right to dignity in terms of section 10 of the Constitution was infringed and that his fair trial rights in terms of section 35 were threatened. Moreover, it is in the interests of justice to grant leave to appeal, because the constitutional issues are important, the underlying dispute concerning alleged criminal offences by Mr Zuma is of great public importance, and there is a reasonable prospect that this Court will reverse or materially alter the order of the Supreme Court of Appeal.

[55] The applicants then assert that the application to Ngoepe JP for the issue of the warrant in terms of section 29 of the Act was flawed in material respects. First, Thint

argues that the prosecution made out no case to Ngoepe JP for dispensing with notice to Thint. A warrant should not be issued ex parte unless the applicant establishes that it would defeat the object of that warrant if notice were to be given to the affected party. Mr Du Plooy did not attempt to make out such a case. Second, the ex parte application was flawed because it failed to disclose various material facts concerning Thint's past co-operation with the prosecution, Mr Moynot's substitution for Mr Thétard as a director of the company, and the latter's relocation to Mauritius. This amounted to a breach of the duty of utmost good faith required of all ex parte applicants. Third, the applicants question whether the application to Ngoepe JP established the need for a search and seizure operation, as is required by section 29(5)(c). They submit that the law requires prosecuting authorities to establish that there is no other reasonable way to gain access to the subject matter of the search, and that the prosecution failed to explain why it could not have obtained the evidence through the less restrictive means of a subpoena under section 28. Fourth, they argue that Mr Du Plooy's affidavit did not make out a case for such a wide search. The affidavit should have justified the need to seize every class of item specified in annexure A, but in fact failed even to mention some of the classes there specified.

[56] The applicants also argue that the terms of the warrants, considered in the abstract at the time of their issue, were fatally overbroad and vague and therefore were not intelligible to the searched persons, as is required by *Powell's* case.[27] In this regard they argue, first, that the majority of the Supreme Court of Appeal was

[27] Above n 22 at para 59.

incorrect to hold that the meaning of the warrants could legitimately be ascertained with reference to external sources, such as Mr Du Plooy's affidavit; instead, the minority was correct to hold that warrants must themselves be intelligible on their own terms and without any outside aid. Second, the warrants were so broadly phrased that they effectively authorised an unlimited search of the various premises. They should have specified the particular offences under suspicion. It follows that the warrants did not convey to the reader what may be searched for and seized. Third, Thint argues that the prosecution merely adopted a "one size fits all" approach to the issue of the various warrants, and thereby failed to tailor them sufficiently to the individual circumstances of the persons connected to the premises searched. Fourth, Messrs Zuma and Hulley argue that the inclusion of paragraphs 9, 10 and 11 in annexure A betrayed the prosecution's unlawful and illegitimate attempt to gain access to Mr Zuma's prospective defences in what at the time of the warrants' issue was merely a probable upcoming criminal trial.

[57] The applicants' next set of submissions concern what they consider to have been the prosecution's unlawful disregard for their legal professional privilege. First, they assert that the warrants were all unlawful for want of an explicit reference to the statutory protection for privilege in terms of section 29(11) of the Act. Alternatively, the persons conducting the search and seizure operation should have drawn that provision to the attention of the persons in charge of the relevant premises. This is particularly important where the offices of legal practitioners are searched, as in Mr Hulley's case. The refusal of the prosecution team to seal and lodge with the registrar

the items seized from Mr Hulley's office after Mr Hulley requested this, and after his subsequent claim by fax that "a certain privilege" attached to all those documents, was unlawful.

[58] Finally, the applicants submit that if either the application for, issue, or execution of, the warrants was unlawful for any of the above reasons, the search and seizure operation as a whole should be set aside, and all the items seized and copies thereof should immediately be returned to them. In this regard, they argue that it would be improper for this Court to make an order for the preservation of these items by a High Court registrar until the upcoming criminal trial of Mr Zuma and the Thint companies. A preservation order, they assert, would amount to a continuing violation of their privacy and property rights that could not be justified. They also submit that it would, in effect, afford the prosecution an advantage as a result of acting unlawfully; an advantage that they would not have secured had they not acted at all. Accordingly, only the return of all items would vindicate their constitutional rights.

[59] The state resists all of these arguments. It starts by asserting that, regardless of the constitutional issues raised and the applicants' prospects of success, it would not be in the interests of justice to grant leave to appeal. It maintains that it was not necessary to notify the applicants of the application for the search warrants, that Mr Du Plooy's affidavit disclosed all material facts, and that the application clearly made out the need for the search and seizure operation in terms of section 29. It argues, moreover, that the warrants were neither overbroad nor unduly vague whether

considered on their own or in the light of Mr Du Plooy's affidavit. In this regard, there was compliance with the requirement of intelligibility laid down in *Powell*. It submits that they complied at all times with their duties to respect the applicants' legal professional privilege, and in particular that there was no need for the warrants to have included an explicit reference to section 29(11) of the Act. They argue, further, that there was nothing untoward about the manner in which the warrants were executed at Mr Hulley's and Thint's offices. Finally, they submit, in the alternative, that should this Court decide for any reason that the search and seizure operations be set aside, it would be appropriate to grant a preservation order.

The legal issues

[60] It appears from the above that at least nine legal issues arise. First, is it in the interests of justice to grant leave to appeal? Second, should the prosecution have notified the applicants of the application for the issue of the warrants? Third, did the prosecution fail to disclose various material facts in that application? Fourth, did Mr Du Plooy's affidavit establish the need for a search and seizure operation under section 29 of the Act? Fifth, should the affidavit have expressly justified the need to seize every class of items mentioned in annexure A? Sixth, were the warrants overbroad or unduly vague? Seventh, were the warrants themselves unlawful for any other reason, including the inclusion of the catch-all paragraphs, the inclusion of paragraphs 9, 10 and 11 of annexure A, or the lack of an explicit reference to section 29(11) of the Act? Eighth, were the warrants executed in a way that provided insufficient protection for the applicants' legal professional privilege? And finally, if

the search and seizure operations were unlawful for any reason, should this Court grant a preservation order or should the seized items be returned to the applicants?

[61] I turn now to deal with the first of these questions.

Leave to appeal and the interests of justice

[62] The prosecution argues that, regardless of whether the applicants' arguments bear reasonable prospects of success, it is not in the interests of justice to grant leave to appeal. It bases this submission on several grounds. First, this case concerns "justice in theory" not "justice in fact", because the applicants have made no attempt to establish that they have suffered any actual prejudice despite having had ample opportunity to do so. Second, the applicants launched these proceedings for one purpose only, namely, to prevent the state from using the seized items as evidence against Mr Zuma and the Thint companies in a subsequent criminal trial. They thereby are trying to circumvent the application of section 35(5) of the Constitution, which is the way the Constitution chooses to balance the various competing interests when deciding whether or not to admit unlawfully obtained evidence. This is particularly invidious, they argue, given that the evidence is incriminating of Mr Zuma and the Thint companies, and for that reason it is of great public importance that the truth emerges. Third, this form of preliminary litigation unduly delays the commencement of criminal trials and therefore should be strongly discouraged. The trial court, rather than preliminary courts, is best placed to balance the varying public and private interests at stake, namely, the public and private interests in the emergence

of truth, the applicants' interests in their privacy and property, and the accused persons' fair trial rights. Leave to appeal should therefore be refused to allow the trial court to do so in this case.

[63] There is certainly a great deal of merit in these arguments, but I do not agree that it would be in the interests of justice for leave to appeal to be refused in these applications. There are several reasons for my conclusion. The first reason is that, were this Court to refuse leave to appeal, the Supreme Court of Appeal decision that the warrants and searches and seizures were lawful would stand and would in all probability bind any subsequent trial court. It would follow that the seized evidence would have been lawfully obtained and section 35(5) would have no application. The relevant, competing interests would not fall to be balanced at all. It seems to me that the argument that the trial court is best placed to balance those interests is relevant only to the question whether or not a preservation order should be granted. The same is true for the argument that the seized evidence is very important, which merely goes to indicate that, if the items were indeed unlawfully obtained, they should nevertheless be preserved so that the trial court can decide whether or not to admit them anyway.[28]

[64] The second reason why it is in the interests of justice to grant leave to appeal is that it would be desirable to settle the law regulating overbreadth and undue vagueness of search warrants issued in terms of the Act. It is in the public interest to clarify the requirement of intelligibility laid down in *Powell*, and to consider whether

[28] I address the question of a preservation order below at paras 216-24.

it is reconcilable with the approach of the majority of the Supreme Court of Appeal in these applications.

[65] I nevertheless do agree with the prosecution that this Court should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of section 35(5). Allowing such litigation will often place prosecutors between a rock and a hard place. They must, on the one hand, resist preliminary challenges to their investigations and to the institution of proceedings against accused persons; on the other hand, they are simultaneously obliged to ensure the prompt commencement of trials. Generally disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials start sooner rather than later. There can be no absolute rule in this regard, however. The courts' doors should never be completely closed to litigants. If, for instance, a warrant is clearly unlawful, the victim should be able to have it set aside promptly. If the trial is only likely to commence far in the future, the victim should be able to engage in preliminary litigation to enforce his or her fundamental rights. But in the ordinary course of events, and where the purpose of the litigation appears merely to be the avoidance of the application of section 35(5) or the delay of criminal proceedings, all courts should not entertain it. The trial court would then step in and consider together the pertinent interests of all concerned. If that approach is generally followed the state would be sufficiently constrained from acting unlawfully by the application of section 35(5) and by the possibility of civil and criminal liability. The nature and degree of unlawfulness of the search warrant is an important factor to be

borne in mind for the purposes of a decision under section 35(5). It is for this reason that the same court should consider the unlawfulness of the warrant and its impact.

[66] The suggestion that section 34 or section 38 of the Constitution might be infringed by courts that adopt the approach commended in the preceding paragraph is not justified. Section 34 of the Constitution[29] requires a dispute that can be resolved by law to be determined by a court that is independent and impartial. The court that hears the criminal trial will be both independent and impartial. Section 38 of the Constitution[30] confers the right on any person who alleges an infringement of or threat to a right in the Bill of Rights to approach a competent court and the court may "grant appropriate relief". It will be appropriate for a court not to entertain proceedings which are brought in terms of section 38 simply in order to avoid the application of section 35(5) or to achieve a delay in criminal proceedings.

[67] Despite these observations, I do not think that a stop should be put to the litigation in this particular case, for the two reasons advanced above. This approach is bolstered by the fact that constitutional issues have indeed been raised and that it is in

[29] Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[30] Section 38 of the Constitution provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members."

the interests of justice that the lawfulness of these warrants be finally determined. I therefore hold that it is in the interests of justice to grant leave to appeal.

The proper approach to the merits

[68] Before considering the eight legal issues that remain, it is necessary first to set out both what I consider to be the proper approach to these matters, and the applicable constitutional principles.

[69] It is important to note that in the two applications now before me, the applicants do not challenge the constitutionality of the relevant statutory provisions.[31] This is perhaps unsurprising in view of the fact that this Court, in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: in re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*,[32] unanimously held that section 29(5) of the Act was not inconsistent with the Constitution. That decision explained the duty of courts, imposed by section 39(2) of the Constitution,[33] first to interpret legislation, so far as its language will allow, so as to promote the spirit, purport and objects of the Bill of Rights, before determining whether that legislation unjustifiably violates a fundamental right:

> "It is necessary [before considering the constitutionality of legislation], to ascertain the proper meaning of the relevant provisions in the Act . . . . The Constitution

[31] These are set out in full above at paras 34-5.

[32] [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (2) SACR 349 (CC); 2000 (10) BCLR 1079 (CC).

[33] Section 39(2) provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

> requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution. . . . [J]udicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section. . . . It follows that where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved. Only if this is not possible should one resort to [a declaration of unconstitutionality and an appropriate remedy]."[34]

[70] The Court then held that, although the provisions of section 29 of the Act clearly constituted a limit to the right to privacy conferred by section 14 of the Constitution,[35] section 29(5) of the Act, properly interpreted to promote constitutional values in accordance with section 39(2), provided sufficient safeguards against an unwarranted invasion of that right. Accordingly, the limitation of the privacy right by section 29(5) was reasonable and justifiable.[36]

[71] In this case, given that all the parties accept that sections 28 and 29 of the Act are consistent with the Constitution generally, and with the right to privacy in particular, I am instead called upon to interpret those provisions in order to promote the spirit, purport and objects of the Bill of Rights, that is, "through the prism of the Bill of Rights."[37]

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[34] Above n 32 at paras 20, 22-3 and 26. See also *Van Rooyen and Others v The State and Others (General Council for the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (2) SACR 222 (CC); 2002 (8) BCLR 810 (CC) at para 88.

[35] Above n 32 at para 20.

[36] Id at para 55.

[37] Id at para 21.

[72] It should be recalled that this approach immediately places limits on the degree to which this Court can read new requirements into the legislation. In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*,[38] this Court held unanimously:

> "There is a clear distinction between interpreting legislation in a way which 'promote[s] the spirit, purport and objects of the Bill of Rights' as required by s 39(2) of the Constitution and the process of reading words into or severing them from a statutory provision which is a remedial measure under s 172(1)(b), following upon a declaration of constitutional invalidity under s 172(1)(a). . . . What is now being emphasised is the fundamentally different nature of the two processes. *The first process, being an interpretive one, is limited to what the text is reasonably capable of meaning.* The latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid."[39] (Emphasis added.)

The relevant constitutional principles

[73] Although these cases concern the proper interpretation and application of section 29 of the Act as opposed to its constitutional validity, the constitutional setting remains important because it guides the process of interpretation and application in terms of section 39(2) of the Constitution.[40]

[38] [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC).

[39] Id at para 24.

[40] Above n 33.

[74] In *Hyundai* this Court made the point that section 29 strikes a balance between protecting the privacy interests of individuals on the one hand and not interfering with the state's constitutionally mandated task of prosecuting crime on the other:

> "There is no doubt that search and seizure provisions, in the context of a preparatory investigation, serve an important purpose in the fight against crime. That the state has a pressing interest which involves the security and freedom of the community as a whole is beyond question. It is an objective which is sufficiently important to justify the limitation of the right to privacy of an individual in certain circumstances. The right is not meant to shield criminal activity or to conceal evidence of crime from the criminal justice process. On the other hand, State officials are not entitled without good cause to invade the premises of persons for purposes of searching and seizing property; there would otherwise be little content left to the right to privacy. A balance must therefore be struck between the interests of the individual and that of the State".[41] (Footnote omitted.)

[75] Both these interests are important and neither can be sacrificed. The Court went on to describe the importance of the state's powers under section 29 in the fight against crime:

> "It is a notorious fact that the rate of crime in South Africa is unacceptably high. There are frequent reports of violent crime and incessant disclosures of fraudulent activity. This has a seriously adverse affect not only on the security of citizens and the morale of the community but also on the country's economy. This ultimately affects the government's ability to address the pressing social welfare problems in South Africa. The need to fight crime is thus an important objective in our society, and the setting up of special investigating directorates should be seen in this light. The Legislature has sought to prioritise the investigation of certain serious offences detrimentally affecting our communities and has set up a specialised structure, the investigating directorate, to deal with them. For purposes of conducting its

[41] Above n 32 at para 54.

> investigatory functions, the investigating directorates have been granted the powers of search and seizure."[42] (Footnote omitted.)

[76] The privacy of the individual is no less important. Section 14 of the Constitution entrenches everyone's right to privacy, including the right not to have one's person, home, or property searched, possessions seized or the privacy of his or her communications infringed.[43] These rights flow from the value placed on human dignity by the Constitution.[44] The courts therefore jealously guard them by scrutinising search warrants "with rigour and exactitude".[45]

[77] It must be borne in mind, however, that in Thint's case we are concerned with the search of the offices of a company. As a corporate entity, Thint does not bear human dignity and thus its rights of privacy are much attenuated compared with those of human beings.[46]

[78] Although a search and seizure operation will inevitably infringe a person's right to privacy,[47] the Act provides considerable safeguards which ensure that the

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[42] Id at para 53.

[43] The full text of section 14 is as follows:

> "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."

[44] *Bernstein and Others v Bester and Others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 at para 77; *Hyundai* above n 32 at para 18.

[45] *Powell* above n 22 at para 50.

[46] See *Hyundai* above n 32 at para 18 and *Magajane v Chairperson, North West Gambling Board and Others* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC) at paras 42-3.

[47] *Hyundai* above n 32 at para 20.

infringement goes no further than reasonably necessary in the circumstances.[48] Furthermore, the requirement of judicial authorisation for search warrants is only one aspect of a broader scheme which ensures that the right to privacy is protected.

[79] First, a judicial officer will exercise his or her discretion to authorise the search in a way which provides protection for the individual's right to privacy.[49] Second, once the decision to issue the search warrant has been made, the judicial officer will ensure that the warrant is not too general nor overbroad, and that its terms are reasonably clear. At the third stage, the right to privacy may still be vindicated by a reviewing court, which can strike down overly broad warrants and order the return of objects which were seized in terms thereof. Finally, the criminal trial must be fair, and an accused person is entitled to object to any evidence or conduct that may render the trial unfair.

[80] Understanding the range of protections for the right to privacy at the different stages of a criminal investigation and trial is important. Courts must take care that in ensuring protection for the right to privacy, they do not hamper the ability of the state to prosecute serious and complex crime, which is also an important objective in our constitutional scheme.[50]

A preliminary consideration of the correct approach to section 29

[48] Id at para 52.

[49] Id at paras 36-43.

[50] Id at para 53.

[81] There are four matters that arise for consideration in this preliminary discussion: first, the importance of the fact that it is a judicial officer who issues the search warrant; second, the requirements that must be met before a search warrant may be issued; third, the approach of the courts to the terms of search warrants; and fourth, the circumstances in which a search warrant may be set aside by a court upon application.

[82] Section 29(5) requires that a magistrate, regional magistrate or judge issue the search warrant. The fact that the decision as to whether a warrant is to be issued is taken by an impartial and independent judicial officer has been recognised as an important consideration in determining the constitutionality of search powers. In the leading Canadian case of *Hunter v Southam Inc*, Dickson J reasoned in this regard:

> "The purpose of a requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior. For such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner. At common-law the power to issue a search warrant was reserved for a justice. . . . While it may be wise, in view of the sensitivity of the task, to assign the decision whether an authorization should be issued to a judicial officer, I agree with Prowse JA that this is not a necessary precondition for safeguarding the right enshrined in s. 8. The person performing this function need not be a Judge, but he must at a minimum be capable of acting judicially."[51]

[51] *Hunter v Southam Inc* [1984] 2 SCR 145 (SCC) at 161-2. See also *Inland Revenue Commissioners and another v Rossminster Ltd* [1980] 1 All ER 80 (HL) at 87 and *Park-Ross and Another v The Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C) at 169-71; 1995 (1) SACR 530 (C) at 552-4; 1995 (2) BCLR 198 (C) at 218-20.

[83] This Court too has recognised that requiring a search warrant to be issued by a judicial officer is an important part of the protection of fundamental rights and, in particular, the right to privacy.[52] The Court has also analysed the nature of the task a judicial officer must undertake when deciding whether to issue a search warrant (at the same time as it was considering the nature of the tasks bestowed upon a person conducting a commission of inquiry) as follows:

> "The performance of such functions ordinarily calls for the qualities and skills required for the performance of judicial functions – independence, the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the basis of a consideration of relevant information. The same can be said about the sanctioning of search warrants, where the judge is required to determine whether grounds exist for the invasion of privacy resulting from searches."[53] (Footnote omitted.)

[84] It is not necessary to decide in this case whether and in what circumstances it is permissible for persons other than judicial officers to issue search warrants. That question does not arise here. For present purposes it is sufficient to note that the task of issuing a search warrant is clearly judicial in character. This is underscored in the present context by the fact that section 29(4) specifically requires judicial

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[52] See *Hyundai* above n 32 at para 35, where the Court reasoned:

> "Subsections (4) and (5) of section 29 are concerned with authorisation by a judicial officer before a search and seizure of property takes place. The section is an important mechanism designed to protect those whose privacy might be in danger of being assailed through searches and seizures of property by officials of the State. The provisions mean that an Investigating Director may not search and seize property, in the context of a preparatory investigation, without prior judicial authorisation."

[53] *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) at para 34.

authorisation. It is in this light that I consider the individual challenges to the issue of the search warrants later in this judgment.

[85] The second issue for discussion is what must be established in order for a judicial officer to issue a search warrant. In *Hyundai*, this Court carefully analysed this question. In that case, the Court was concerned with the issue of a search warrant in the context of a preparatory investigation in terms of section 28(13). The considerations referred to in that case are equally applicable in the situation where a warrant is sought under section 29(5) in the context of a criminal investigation such as the present. After a thorough analysis of the section and the constitutional rights in issue, the Court concluded as follows:

> "The warrant may only be issued where the judicial officer has concluded that there is a reasonable suspicion that such an offence has been committed, that there are reasonable grounds to believe that objects connected with an investigation into that suspected offence may be found on the relevant premises and, in the exercise of his or her discretion, the judicial officer considers it appropriate to issue a search warrant. These are considerable safeguards protecting the right to privacy of individuals. In my view, the scope of the limitation of the right to privacy is therefore narrow."[54]

[86] Section 29(5) thus requires a judicial officer to be satisfied, first, that there is a reasonable suspicion that an offence, which might be a specified offence in terms of the Act,[55] has been committed; and secondly, that there are reasonable grounds to

[54] Above n 32 at para 52. As set out above in para 67 of this judgment, the Court went on to consider whether the limitation of the right to privacy was justifiable in the circumstances and concluded it was.

[55] Section 1 of the Act defines a "specified offence" as—

> "any matter which in the opinion of the head of an Investigating Directorate falls within the range of matters as contemplated in section 7(1)(a)(aa) or any proclamation issued in terms of section 7(1)(a)(bb) or (1A)".

believe that an item that has a bearing or might have a bearing on the investigation[56] is on or is suspected to be on the premises to be searched. Finally, the judicial officer must consider whether it is appropriate to issue the search warrant. The decision to issue the search warrant clearly involves the exercise of a discretion, as the reasoning in *Hyundai* makes plain. Factors relevant to the exercise of that discretion will include the material set out in the affidavit seeking the search warrant and the text of the warrant itself. Section 29(5) requires that affidavit to state the nature of the inquiry, the suspicion which gave rise to the inquiry, and the need, in regard to the inquiry, for a search and seizure in terms of the section.

[87] One more point needs to be made about the proper approach of a judicial officer considering the appropriateness of a search and seizure. It could be contended that a search and seizure operation is necessarily more invasive than a summons and interrogation procedure in terms of section 28.[57] On that basis, it could be argued that a judicial officer charged with the responsibility of deciding whether to issue a search warrant must issue a warrant only if what is sought to be achieved cannot be achieved in terms of section 28. This is not necessarily the correct approach. There may be circumstances in which the section 28 procedure may be more appropriate. And there may be others in which the section 29(5) procedure may better serve the interests of the prosecution and of justice. The section 28 procedure, in particular the

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This provision, read with sections 7(1) and (1A) of the Act, makes it clear that what is envisaged are offences committed in an organised fashion and similar serious offences.

[56] See the text of section 29(1) above at para 35.

[57] This procedure is briefly described and the relevant legislative provisions are set out below at n 80.

interrogation, could in certain instances be much more invasive than a search and seizure operation in which the provisions of section 29(2) are properly observed.

[88] Once the judicial officer is of the view that a warrant should be issued, he or she will have to consider the terms of the warrant to be issued. Thus the third issue for consideration arises. As Cameron JA noted in the leading case of *Powell*,[58] the courts have always paid close attention to the terms of a warrant to ensure that they are neither too general, nor vague or overbroad. After analysing the relevant case law on the approach of courts to the terms of search warrants over the past 100 years, he summarised the relevant principles as follows:

> "These cases establish this:
>
> (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 for 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

[58] Above n 22.

> itself specify its object, and must do so intelligibly and narrowly within the bounds of the empowering statute."[59]

[89] The final issue to be considered in this preliminary section is the approach of a court that must determine a challenge to the lawfulness of the issue of a search warrant under section 29(5). In supplementary written submissions filed after the close of the hearing, the state submitted that the decision to issue a search warrant is an administrative one which falls within the terms of the Promotion of Administrative Justice Act.[60] The applicants, on the other hand, submitted that it is a judicial discretion and does not fall within the scope of administrative action. This latter approach accords more with the jurisprudence of this Court.

[90] As mentioned above, this Court has pointed out that the decision to issue a search warrant involves the exercise of skills similar to those required for the performance of judicial tasks:

> "independence, the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the basis of a consideration of relevant information."[61]

It went on in the same judgment to state that the issuing of a search warrant is an "essentially judicial" function.[62] This accords with the approach in Canada as well.[63]

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[59] Id at para 59.

[60] Act 3 of 2000.

[61] See *Heath* above n 53 at para 34.

[62] Id at para 39.

[63] See *Hunter v Southam Inc* above n 51 at 162-4.

[91] How then should a court faced with a challenge to the issue of a search warrant approach the question? The answer is to be found in this Court's judgment in *Hyundai*. The Court made plain that there were two jurisdictional facts for the issue of a search warrant: the existence of a reasonable suspicion that a crime has been committed, and the existence of reasonable grounds to believe that objects connected with an investigation into that suspected offence may be found on the relevant premises.[64] The Court went on to state that once the jurisdictional facts are present, the judicial officer issuing the search warrant then exercises a discretion to issue the warrant. That discretion must be exercised judicially.

[92] When considering whether a warrant should be set aside, therefore, a court will determine, first, whether on the record the objective jurisdictional facts were present. If they were not, then a court will set aside the search warrant.[65] If the jurisdictional facts were present, then a court will consider the exercise of the discretion by the judicial officer to issue the warrant. In order to determine the approach that a court

[64] Above n 32 at para 52 (quoted in full above at para 85).

[65] Contrast this approach to that under section 21 of the Criminal Procedure Act 51 of 1977, where courts faced with challenges to the issue of search warrants have repeatedly held, when considering the requirement that an applicant for a search warrant establish, inter alia, reasonable grounds for believing that an offence has been committed, that a court is not entitled to treat that requirement as an objective jurisdictional fact. See, for example, *Mandela and Others v Minister of Safety and Security and Another* 1995 (2) SACR 397 (W) at 404h-405b; *Van der Merwe v Minister van Justisie en 'n Ander* 1995 (2) SACR 471 (O) at 476g-477i; *Control Magistrate, Durban v Azanian Peoples Organisation* 1986 (3) SA 394 (A) at 400F; *Ndabeni v Minister of Law and Order and Another* 1984 (3) SA 500 (D) at 513C-D; and *Divisional Commissioner of SA Police, Witwatersrand Area, and Others v SA Associated Newspapers Ltd and Another* 1966 (2) SA 503 (A) at 511G-512A. For a different view, see *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order and Others* 1994 (1) SA 387 (C) at 392I-393A; 1993 (2) SACR 625 (C) at 630c-e.

will take to the exercise of that discretion, it is necessary to classify the type of discretion under consideration.[66]

[93] One of the core considerations when classifying the discretion is whether in making the decision it is possible that there could be a legitimate difference of opinion as to the proper outcome of the exercise of the discretion.[67] In this case, it seems clear that the discretion to issue the warrant is a matter upon which different judicial officers may reasonably and legitimately disagree. An appellate court, therefore, may not interfere with the discretion simply because it would have reached a different conclusion to that reached by the judicial officer issuing the warrant. It may only set aside the warrant if it is persuaded that the discretion has not been exercised judicially, or flowed from a wrong appreciation of the facts or the law.[68]

[94] With this preliminary analysis of the law complete, it is now necessary to turn to consider the merits of the case before me.

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[66] See *Giddey NO v J C Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) at para 19 and cases cited there. See also *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) at paras 110-1 and *Mabaso v Law Society, Northern Provinces, and Another* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 20.

[67] See *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 800D-F, where Grosskopf JA, for a unanimous court, noted as follows:

> "Henning 'Diskresie-uitoefening' in 1968 *THRHR* 155 at 158 quotes the following observation concerning discretionary powers:
>
> > '"[A] truly discretionary power is characterised by the fact that a number of courses are available to the repository of the power" (Rubinstein *Jurisdiction and Illegality* (1956) at 16).'
>
> *The essence of a discretion in this narrower sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him.*" (Emphasis added.)

See also *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W) at 804G-808A; [1999] 4 All SA 505 (W) at 509h-512j.

[68] See *Giddey* above n 66 at para 19.

Should the applicants have been notified of the state's application for the warrants?

[95] As mentioned above,[69] Thint submits that the application for a search warrant in terms of section 29 of the Act was flawed. Its first basis for this submission is that the prosecution failed to make out a case to Ngoepe JP for dispensing with notice of the application to it (Thint). For this reason alone, it argues, the relevant search warrant falls to be set aside. This contention is based on an understanding that a judge issuing a search warrant on the basis of an ex parte application has to be satisfied that a proper case for not serving the application on the person affected by the search warrant has been made out. This presupposes that notice of such application is the default position, unless a case to the contrary is made out. Thint's position is that a case for dispensing with notice had not, and, bearing in mind Thint's previous co-operation with the prosecution, could not have, been made out.

[96] I assume, for the purpose of resolving this case, the correctness of the position postulated in *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others*,[70] namely, that an application for the issue of a warrant is an ex parte application that can lead, in the first instance, only to provisional orders that are subject to reconsideration after all the parties who have a direct and substantial interest in the order have been heard. That said, it is clear, for the textual and principled reasons set out below, that the default position for an application in terms of section 29 of the Act must be that it is made *without* notice to the affected parties.

[69] At para 55.

[70] Above n 8 at paras 44-8.

[97] We must first have recourse to the provisions of the Act. Section 29(4) states that the premises referred to in section 29(1) may only be entered (subject to certain exceptions) under a search warrant "issued in chambers". This indicates that, ordinarily, the procedure is one without notice. Section 29(1) itself states that the Investigating Director may enter and search premises "without prior notice or with such notice as he or she may deem appropriate". The placing of the words "without prior notice" first is a clear indication that the intention of the legislature was that the default position would be that prior notice is not required, while the words "as he or she may deem appropriate" lends support to this conclusion: It is the prerogative of the investigator to determine whether and how notice need be given. While this provision relates to the giving of notice subsequent to the issue of a search warrant, and Thint's concern relates to the giving of notice *prior* to such issue (that is, at the application stage), it nevertheless implies that ordinarily the procedure is one without notice.

[98] The above interpretation is in accordance with common sense: There is normally a risk that, if suspects and their associates receive notice of an impending search, it is not unlikely that they will remove or destroy the evidence sought.[71] It may well be that the more serious the crime, the more likely it will be that suspects or their associates will remove or destroy incriminating evidence. In the absence of such

[71] The risk of evidence being removed or destroyed is also a factor to be considered when determining the need for a search warrant in terms of section 29(5)(c) of the Act (as opposed to issuing a summons under section 28), as discussed below at paras 118-34.

inherent risk, a judicial officer may justifiably require notification of the party to be searched, for the Act does not preclude this. However, in the ordinary course, the provision of notice to affected parties has the potential to frustrate the purpose of the detection and investigation of serious, complex and organised crimes, evidence of which is often to be found in documentary form or stored on computers, which can be easily destroyed or altered.

[99] In this case, the inherent risk was present. In his application for the search warrant, Mr Du Plooy explained at length the need for all the searches to take place at the same time and that their purpose might be defeated if the suspects were alerted to them. Furthermore, while Thint had, to a limited extent, co-operated with the prosecution in the past, the incriminating evidence previously obtained by the state was obtained by way of search. This suggests that there was at least a possibility that Thint might not have been co-operative if notice of the impeding search had been given to it.

[100] In the circumstances, there was no compelling reason to require the state to depart from the ordinary procedure of no notice. While Mr Du Plooy may not have explicitly stated that notice would not have been appropriate, the provisions of his affidavit show that this was indeed the case. In my view, it cannot be said that the application was flawed on this ground.

Did the state fail to disclose material facts in its application to Ngoepe JP?

[101] The applicants next seek to impugn the search warrants on the basis that the ex parte application for the search warrants failed to disclose material facts which ought to have been disclosed.

[102] It is our law that an applicant in an ex parte application bears a duty of utmost good faith in placing all the relevant material facts before the court.[72] The duty of good faith requires a disclosure of all material facts within the applicant's knowledge. The Supreme Court of Appeal reiterated in *Powell* that an applicant for a search warrant is "under a duty to be ultra-scrupulous in disclosing any material facts that might influence the Court in coming to its decision."[73] However, an investigator cannot be expected to disclose facts of which he or she is not aware. The duty is also limited to the disclosure of facts that are material. In a complex and vast case such as the present, there can be no crystal-clear distinction between facts which are material and those which are not. There will always be room for debate. It follows that, in cases such as the present, an applicant for a search and seizure warrant will inevitably have to make a judgement as to which facts might influence the judicial officer in reaching its decision and which, although connected to the application, are not sufficiently relevant to justify inclusion. The test of materiality should not be set at a level that renders it practically impossible for the state to comply with its duty of disclosure, or that will result in applications so large that they might swamp ex parte judges.

[72] See, for example, *National Director of Public Prosecutions v Kyriacou* 2004 (1) SA 379 (SCA); [2003] 4 All SA 153 (SCA) at para 18; *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA); [2002] 2 All SA 255 (A) at para 21; *Frangos v Corpcapital Ltd and Others* 2004 (2) SA 643 (T) at 649C-D; [2004] 2 All SA 146 (T) at 151d-e; and *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E-349B.

[73] Above n 22 at para 42.

[103] Thint's basis for attacking the warrants in this context relates to Mr Du Plooy's failure to disclose Thint's previous co-operation in the investigation and Mr Thétard's relocation to Mauritius. First, Thint argues that Mr Du Plooy failed to inform Ngoepe JP of documentation which had been obtained from Thint by way of a summons in terms of section 28 of the Act with the co-operation of Thint through its attorneys. Second, Thint argues that Mr Du Plooy failed to disclose fully the extent of Thint's previous co-operation in relation to the section 28 investigation, which included it making available to the Directorate of Special Operations, during 2001, its computer information and computer materials. If Mr Du Plooy had made these disclosures, Thint argues, Ngoepe JP would have questioned the need for the authorisation of a search warrant, particularly one issued ex parte and on the terms it was issued.

[104] In my view, these submissions have no merit. Mr Du Plooy did in fact disclose Thint's previous co-operation by describing the questioning of Mr Thétard which occurred at an early stage in the investigation. Particulars were also given of the search and seizure operations undertaken in 2001 at the premises of the Thint group of companies in France and Mauritius, and of the documentation obtained from Thint's premises in Midrand by way of subpoena and with the co-operation of Thint acting through its attorneys. I am not persuaded that Mr Du Plooy erred materially by failing to provide more detail on these earlier investigations and Thint's previous co-operation. As I elaborate below, it seems highly unlikely that the outcome of the

application would have been different had these disclosures been made. By August 2005 Thint was one of the prime suspects in the ongoing investigation. This fact was made clear in Mr Du Plooy's affidavit in the application for the warrants. Thint is presumed to be innocent, but a possibility exists that it may not be. It is not far-fetched to suggest that the possibility exists that a prime suspect in an investigation may be reluctant to furnish investigators with all the relevant evidence.

[105] On my reading of the record of these applications, there is no evidence of any co-operation between Thint (or any person on its behalf) and the state before May 2001. The evidence is that Thint's attorney, Mr Driman, was instructed to give full co-operation after the section 28 summonses had been received. It is important to note that the summonses had all been served in 2001 and that the summons of Mr Thétard was served in July 2001. Mr Driman confirms that a mass of documentation and computer information was made available after and pursuant to summonses being served. In my view, this information would have made little difference to the outcome of the application for the warrants, for two reasons.

[106] First, the information was made available only after summonses had been issued and it is plain that nothing material or incriminating was found. The real possibility therefore exists that documentary and other material had been removed from the premises before any co-operation was offered.

[107] Second, Mr Thétard was not fully co-operative in response to the 2001 summons. The record suggests that he was in South Africa and not in Mauritius at the time. Yet, in response to the summons served on him in July 2001, he produced all his diaries except the one for the year 2000. The point is that nothing incriminating was discovered in the diaries he produced; the diary with incriminating information is the one he took to Mauritius.

[108] On behalf of Thint, much reliance was placed on the statement by Advocate Gerda Ferreira (Ms Ferreira), in an application for a search and seizure and a *commission rogatoire* made by the prosecution to the Mauritian Ministry of Justice in October 2001, that Mr Thétard had relocated to Mauritius in "the second quarter of 2000". This seems to imply that Mr Thétard took his 2000 diary with him to Mauritius when he relocated there. A close examination of the record reveals no direct evidence as to Mr Thétard's whereabouts in 2001; the record suggests that he had not relocated entirely to Mauritius and so Ms Ferreira's statement may not be fully correct. It should be noted that the issue concerning Mr Du Plooy's non-disclosure of Mr Thétard's relocation was not raised by Thint in its founding affidavit before the Pretoria High Court. If Mr Thétard had in fact relocated to Mauritius in the second quarter of 2000, one would have expected this to have been pointed out in its founding affidavit. Yet, the point was only raised in its replying affidavit before that court after Ms Ferreira's averment had been discovered.[74]

[74] Thint's founding affidavit before the Pretoria High Court was made on 9 December 2005, whereas its replying affidavit was made on 27 March 2006, in which Ms Ferreira's averment is first mentioned.

[109] The record before us suggests that Mr Thétard was in South Africa for significant periods at least until June 2001. He consulted with Mr Driman, he provided certain documents, he was present at the interrogation, and the section 28 summons was served on him at a Johannesburg address. He provided the state with his diaries for 1997, 1998 and 1999 and specifically withheld his diary for the year 2000. According to the state, this was because the meeting between Mr Zuma, Mr Shaik and Mr Thétard during March 2000, which was evidenced by the 2000 diary and which was central to one of Mr Shaik's convictions, served finally to confirm Mr Zuma's willingness to participate in a corrupt exercise.

[110] It should be mentioned that the mere fact that Mr Thétard handed over his 2000 diary when he was requested to do so during the search and seizure operation at Thint's offices in Mauritius on 9 October 2001, a fact heavily relied upon by Thint, does not necessarily indicate a willingness to co-operate with state investigators generally. Had he not handed the diary over voluntarily, the searchers would probably have located and seized it themselves – an outcome that would have worked to his disadvantage. It follows that his handing over the diary may have been motivated equally by self-interest as by a desire to co-operate. Thus, this fact is of little relevance one way or the other.

[111] Thint also complains that Mr Du Plooy failed to inform Ngoepe JP that when Mr Thétard had relocated to Mauritius, Mr Moynot succeeded him. The substance of Thint's complaint here is that Mr Moynot had been more willing to co-operate during

the investigation than his predecessor, Mr Thétard, and that this would have had a bearing on Ngoepe JP's decision to issue the warrants.[75] I cannot agree with this submission. It seems unlikely that more detail on Mr Thétard's relocation would have affected Ngoepe JP's decision to issue the warrants. Moreover, given the layered factual matrix of the present case, with an investigation spanning several years, there will always be room for debate as to what facts should have been included in the application for the search warrants. The test for disclosure should not be set in such a way that it fails to recognise that a judgement has to be exercised by the authorities who seek a search warrant. For the reasons stated above, I cannot uphold Thint's complaint in this regard.

[112] Messrs Zuma and Hulley also contend that the application failed to disclose material facts. Their submission is that Mr Du Plooy ought to have disclosed in his application for the warrants that—

> "there was a grave risk, if not a substantial certainty, that privileged documents would be seen, examined or seized during the course of the search and seizure operations, and in particular that claims to privilege might be made",

which would have caused Ngoepe JP to require that a reference to section 29(11), the statutory procedure for dealing with privileged documents discovered during a search,

[75] In this regard, Thint placed great weight on the fact that the state said in a letter that "Mr Moynot has at all times offered the investigating teams his characteristically kind and affable co-operation."

be incorporated into the warrants. I consider this provision in greater depth below.[76] For the moment, however, it suffices to say the following.

[113] There is always a risk that privileged documents may be discovered during a search, wherever the search takes place, and any judge who issues a search warrant will appreciate this. Section 29(11) is a legislative tool established to manage the situation that arises when privilege is claimed in respect of items discovered during a search. It provides for a procedure to be followed where a person who is being searched claims that items which have been discovered during the search are privileged. That procedure provides that, if the investigator considers the items to be relevant to and necessary for the investigation, the investigator shall request the registrar of the High Court having jurisdiction to seize and remove the items and keep them in safe custody until a court has determined whether they are privileged.[77]

[114] Section 29(11) in no way undermines the ordinary common-law protection accorded to privileged documents.[78] Should investigators seize documents that are privileged, but no claim of privilege is made at the time of the search so that section 29(11) does not come into operation, the ordinary rules governing privileged documents will continue to apply. The state will therefore not be able to use the privileged documents in any criminal proceedings, and any derivative evidence obtained as a result may also be excluded (depending on the application of section

[76] Below at paras 186-90.

[77] See above at para 35 for the full text of section 29(11).

[78] See below at paras 183-5 for a discussion of the common-law right to legal professional privilege.

35(5) of the Constitution by the trial court). There may also be the risk that the unlawful seizure of privileged documents in egregious circumstances could result in the trial court ruling that the trial itself is unfair.

[115] Section 29(11) thus comes into operation if a claim of privilege is made during a search. In those circumstances, it provides a procedure which enables the state to have the status of the documents quickly determined without the disadvantages inherent in waiting for the criminal trial court to make that determination during the state's case. Section 29(11), therefore, is a procedure created to facilitate the work of the prosecution. It in no way impairs the right of an accused person to claim privilege when documents are subsequently tendered.

[116] I am accordingly of the view that it was not necessary for the state to say anything in its affidavit about the risk of attaching privileged documents. As I have said above, that is a risk inherent in every search. The relevant common-law rules regulate the consequences of any seizure of privileged documents, in order to protect the privilege. Section 29(11) is merely a procedure established to short-cut the process of determining whether or not documents are privileged when privilege is claimed during a search. I shall return to consider that procedure more fully later. At this stage, I need merely say, on an overview of all the facts, that I am satisfied that the state discharged the duty of utmost good faith by disclosing all material facts within its knowledge when making the application for the search warrants. The applicants' challenge on this ground must fail.

[117] Lastly, it should be mentioned that if I had found that the state had failed in its duty to disclose all material facts, this Court would in any event have been able to exercise its discretion to preserve the orders granted by Ngoepe JP, provided there were very cogent practical reasons to do so.[79] It seems to me that, considering the nature of this vast and complex investigation, this might well be a case where very cogent practical reasons exist for the exercise of discretion condoning non-disclosure. However, in the light of the conclusions I have come to in the preceding paragraphs, and having held that the respondents did not fail to disclose material facts, it is not necessary for me to consider this point further.

Did the state establish a "need" for a search and seizure operation?

[118] The third ground upon which the applicants argue that the application for the search warrants was flawed is that it failed to establish a need for a search and seizure operation, in terms of section 29(5)(c) specifically. The need for a search in terms of this provision can be demonstrated only, so the argument went, where less invasive procedures, such as obtaining the evidence in terms of section 28 of the Act[80] or a search in terms of the Criminal Procedure Act,[81] will not yield the evidence required.

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[79] See Van Winsen et al *Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa* (4ed) (Juta, Cape Town 1997) 367 and *Schlesinger v Schlesinger* above n 72 at 348D-350C.

[80] This section allows the summoning of a person to answer questions or produce documents for the purposes of an investigation in terms of Chapter 5 of the Act (a process referred to interchangeably in this judgment as a subpoena). Subsection (6) provides as follows:

> "For the purposes of an investigation—
> (a) the Investigating Director may summon any person who is believed to be able to furnish any information on the subject of the investigation or to have in his or her possession or under his or her control any book, document or other object relating to that subject, to appear before the Investigating Director at a time and place specified in the summons, to be questioned or to produce that book, document or other object;

[119] In the Durban High Court, Hurt J proposed a test for "need", which was to ask whether resort to section 29 (bearing in mind the nature of this remedy) was "reasonable in all the circumstances".[82] It would be difficult to disagree. However, the judge then went on to state that "it cannot be reasonable if there are other, less drastic means available to the investigating authority which may succeed."[83] The applicants submit that this test is the correct one. They submit that the state must demonstrate in the context of section 29 that there is no reasonable prospect that "the

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(b) the Investigating Director or a person designated by him or her may question that person, under oath or affirmation administered by the Investigating Director, and examine or retain for further examination or for safe custody such a book, document or other object: Provided that any person from whom a book or document has been taken under this section may, as long as it is in the possession of the Investigating Director, at his or her request be allowed, at his or her own expense and under the supervision of the Investigating Director, to make copies thereof or to take extracts therefrom at any reasonable time."

[81] Above n 65. See Chapter 2, which provides a range of measures by which a search can take place. See for example section 21, which provides:

"(1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued—
(a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or
(b) by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such articles in the possession or under the control of any person or upon or at any premises is required in evidence at such proceedings.

(2) A search warrant issued under subsection (1) shall require a police official to seize the article in question and shall to that end authorise such police official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises.

(3)
(a) A search warrant shall be executed by day, unless the person issuing the warrant in writing authorizes the execution thereof by night.
(b) A search warrant may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority.

(4) A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant."

[82] Above n 3 at 484d of the SACR and 104a-b of the All SA report.

[83] Id at 484d-e of the SACR and 104b of the All SA report. This test was also quoted with approval in *Ferucci and Others v Commissioner, South African Revenue Service, and Another* 2002 (6) SA 219 (C) at 235B-H.

powers under s 28 would probably not result in the evidence being obtained."[84] In so submitting, the applicants rely on a decision of the New Zealand Court of Appeal, *Tranz Rail Ltd v Wellington District Court*.[85]

[120] In that case, the court was concerned with the interpretation of section 98A(2) of the New Zealand Commerce Act, 1986, which provides that a search warrant may be issued by specified judicial officers if they are satisfied "that there are reasonable grounds to believe that it is necessary" for the purpose of determining whether a contravention of the Act has taken or is taking place. In approaching the interpretation of this provision, Tipping J noted that there was another provision in the statute which provided an inquiry process for the discovery of documents.[86] He held that the word "necessary" in section 98A(2) must be read in the light of this alternative procedure.[87] He also noted that section 21 of the New Zealand Bill of Rights Act, 1990 protects citizens from "unreasonable searches".[88]

[121] Tipping J then held that the word "necessary" in section 98A(2) involved four inter-related considerations:

> "First, there must be evidence giving rise to at least a reasonable suspicion that a contravention of the Act is taking or has taken place. Secondly, access to the documents or other materials the subject of the proposed search, must be reasonably

[84] Above n 3 at 484c of the SACR and 103i-j of the All SA report.

[85] [2002] 3 NZLR 780 (CA).

[86] That is, section 98. Id at para 13.

[87] Id at para 27.

[88] Id at para 28.

> required for the purpose of the Commission's investigation. In this respect the compass of the warrant . . . must be no greater than is reasonably required. Thirdly, the proposed search warrant must have a realistic prospect of bearing fruit as regards its proposed subject-matter and location. Fourthly, and this will often be the most problematic factor, there must be no other reasonable way of gaining access to the subject-matter of the search."[89]

[122] The court went on to conclude, on the facts of that case, that the affidavits that had supported the application for a search warrant had insufficiently disclosed the extent of co-operation by Tranz Rail, the subject of the search, with the authorities prior to the issue of the search warrant.[90] Accordingly, the court concluded that the investigating authorities had not established that the information they sought could not be attained by less invasive means.

[123] It is clear that the test set out in *Tranz Rail* turns not only on the specific wording of section 98A ("necessary") but also on section 21 of the New Zealand Bill of Rights. I am not persuaded that the same test should be adopted here. The language of section 29(5) of our Act is different to that contained in the New Zealand statute and our constitutional text, too, is different.[91]

[124] We should start with a consideration of the wording of section 29(5) itself.[92] That section provides that a warrant may only be issued if it appears to the judicial officer issuing the warrant that there are reasonable grounds for believing that an

[89] Id at para 29.

[90] Id at paras 23-6.

[91] The full text of section 14 of our Constitution is set out above at n 43.

[92] See above at para 35 for the full text of section 29(5).

object or document that has a bearing or might have a bearing on the investigation is present on the premises in respect of which the search warrant is sought. The investigators must place information on oath before the judicial officer setting out the nature of the section 28 investigation, asserting that there "exists a reasonable suspicion that an offence" has been or is being committed or attempted, and stating "the need, in regard to the investigation, for a search and seizure". It should be clear that the language of section 29(5) simply requires investigators to set out the "need" for the search by indicating why they think the warrant should be granted. That information must be taken into account by the judicial officer when deciding whether it is appropriate to issue a search warrant.[93]

[125] The real question is whether the state needs to go as far as establishing that no other less invasive means will produce the documents or items sought. As counsel for the state submitted, the test proposed by the applicants will, in many cases, render the provisions of section 29 unworkable. When one considers that section 29 is used only to investigate serious crimes, including fraud and corruption, which bear heavy penalties of imprisonment, there is a real possibility that a request under the section 28 summons procedure will not result in the furnishing of incriminating items. Moreover, to ask the state to establish that a summons in terms of section 28 would not result in the production of the incriminating items would effectively require the state to prove something that could hardly ever be proved: that a subpoena would not yield the evidence. The effect would probably be that in each case, the state might

[93] See above at paras 85-7.

have to follow section 28 first and then, and only if that failed, seek a search warrant under section 29. Proceeding in such a manner would destroy any element of surprise and would often, as found by the Supreme Court of Appeal, "altogether undermine an investigation".[94] The interpretation preferred by Hurt J would inevitably provide accused persons who are dishonest with an opportunity to cover their tracks. This does not reflect an appropriate balance between the constitutional imperative to prevent crime and the duty to respect, promote, protect and fulfil the rights in the Bill of Rights.

[126] Instead, the judicial officer should determine whether it is appropriate to issue a search warrant by asking the following question: Is it reasonable in the circumstances for the state to seek a search warrant and not to employ other less invasive means? This would not require the state to prove that less invasive means will not produce the document, something which, as I have said above, may be well nigh impossible to do. Rather, it will require a judicial officer to consider whether there is an appreciable risk, to be judged objectively, that the state will not be able to obtain the evidence by following a less invasive route. This is not dissimilar to the approach proposed by the majority in the Supreme Court of Appeal which concluded that section 29(5)(c) requires the state to show that the material sought "cannot be expected in the ordinary course to be produced voluntarily."[95]

[94] The SCA Zuma judgment above n 2 at para 104.

[95] Id.

[127] In answering this question, the judicial officer must take into account the constitutional interests or rights that may be limited by the search and seizure.[96] A judicial officer would also be entitled to take into account the following two considerations. First, it is generally not improbable, given that serious crime which bears heavy penalties is under investigation, that those implicated in the crime might well not produce incriminating evidence when requested to do so. Second, if notice is given in circumstances where a reasonable suspicion of the commission of a crime exists (as there must be before a search warrant may be obtained), and there is a reasonable suspicion that incriminating items may be found on particular premises (again, as there must be), it may well result in the destruction or concealment of the incriminating materials.

[128] In my view, this approach takes into account not only the need to protect constitutional rights, but also the practicalities and difficulties of law enforcement in the context of combating serious and organised crime. The test I propose makes the destruction or concealment of this material more difficult and is a justifiable limitation of the right to privacy. I cannot accept that privacy must be upheld even if that entails a real risk of the disappearance of evidence in serious corruption cases.

[129] In my opinion, in the present case, the state showed the need for a search and seizure operation sufficiently to persuade the judicial officer that it was reasonable to issue the search warrant: Obtaining the evidence was necessary because, while the

[96] For a similar approach reflecting concern for the rights implications of a search, see *Descôteaux et al v Mierzwinski and Attorney-General of Quebec et al* 141 (1982) DLR (3d) 590 (SCC) at 616-7.

state was already in possession of certain evidence, further payments from Mr Shaik to Mr Zuma had to be investigated and various new lines of enquiry had to be followed. Moreover, the state had become aware that Mr Hulley had been sent financial records previously held by Mr Shaik in his capacity as financial advisor to Mr Zuma. It being the prerogative of the investigator to determine the ambit of his or her investigation, it is not for a judicial officer to say that evidence should not be sought.[97] A judicial officer may only refuse an application to obtain evidence by means of a search and seizure.

[130] I now turn to the question whether it is necessary for the state to show that no other means are available to obtain the information sought by search and seizure. It would be naïve to assume that the response of the suspects would necessarily have been to yield the required information freely, or that they would do nothing to cover their tracks between the date on which the subpoena was received and the date on which it was to be complied with. Indeed, the state's prior experience with associates of the suspects in this case suggested the opposite: Information had not been forthcoming and comprehensive where it had been sought by way of section 28 of the Act. Furthermore, the crimes of which Mr Shaik had been convicted, and in which Mr Zuma and Thint have been implicated, involve pre-meditation and dishonesty. These factors must be taken into consideration. They do not engender confidence that those involved would respond honestly to a subpoena. Accordingly, the state could not assume with confidence that the applicants would be fully truthful and honest in

[97] See the SCA Zuma judgment above n 2 at para 103.

response to a section 28 summons. There was at the very least an appreciable risk that they might not be, and that was sufficient to establish the "need" for a section 29 search and seizure. It is true that some element of dishonesty might reasonably be expected of people who are reasonably suspected to have committed a crime involving dishonesty. Of course, it would be unfair to say that all people who are suspected of committing crimes of dishonesty should not be trusted. I must emphasise, however, that this judgment is to the effect that there is an appreciable risk that people who are suspected of the dishonest, sophisticated and complex crimes involved here will take measures (which could be equally sophisticated and complex) to avoid conviction.

[131] I have already discussed Mr Thétard's failure to produce the crucial diary in response to the section 28 summons, despite having produced his diaries for other years. His evidence in relation to the encrypted fax – an important item of evidence in the conviction of Mr Shaik – was that it was simply a note he had made which he thereafter crumpled and threw into a waste-paper basket. It was only later that the interrogation of his secretary revealed that the encrypted fax had in fact been sent by him to his principals overseas. Mr Thétard subsequently deposed to an affidavit confirming that the encrypted fax had been sent but on the condition that he himself would not be prosecuted. That affidavit was used in evidence in the trial of Mr Shaik.

[132] Reliance by Thint on the fact that the state had complimented Mr Moynot's "kind and affable co-operation" also does not assist its case at all.[98] This is because

[98] See above n 75.

there is nothing in the statement to suggest that Mr Moynot had actually given the prosecution all the information at his disposal even if it was incriminating in relation to his employer, Thint. In the light of these facts, I am satisfied that there was an appreciable risk that a procedure, less invasive than a search and seizure and dependent on the voluntary co-operation of Thint, would not have worked.

[133] There is also reason to believe that the full, voluntary co-operation of Mr Zuma may not have been forthcoming. Early in the investigation, he denied attending a crucial meeting during March 2000, a meeting which was evidenced by the encrypted fax and also by Mr Thétard's 2000 diary. According to the judgment in the trial of Mr Shaik, Mr Zuma did attend that meeting.[99] That, in my view, is sufficient to throw doubt on whether Mr Zuma would have been fully frank and honest in response to a section 28 procedure. Mr Zuma cannot be said to be guilty based on the findings of the court that tried Mr Shaik. However, the fact that Mr Shaik has been convicted of various counts of corruption and fraud relating to certain of his dealings with Mr Zuma would, in the mind of the prosecutor and the judicial officer issuing the warrant, raise doubt as to the veracity of Mr Zuma's denials. There must at the very least be a real risk that a person who is suspected to have been involved in corruption and who is, on reasonable grounds, believed to have provided false information in response to questions by the state, would not preserve the integrity of incriminating documents if he knew that the documents were being sought.

[99] Above n 10 at 213d-e and 217a-b of the SACR, and 273h-i and 277c-d of the All SA report.

[134] For all these reasons, it cannot be said that when Ngoepe JP exercised his discretion to issue the warrants in respect of Thint and Mr Zuma he did not do so judicially, or did so on a wrong appreciation of the facts or the law. My view, accordingly, is that the contention of Thint and Mr Zuma on the ground of "need" must fail. I shall deal with the question whether there was a need for a search of Mr Hulley's offices later in this judgment.[100]

Did Mr Du Plooy's affidavit have to deal expressly with every class of document referred to in the search warrants?

[135] It was pointed out on behalf of Thint that the warrants authorised the seizure not only of material concerning dealings between Thint and Mr Zuma, but also of material concerning dealings involving other persons or entities not mentioned at all in Mr Du Plooy's affidavit. During oral argument, Thint submitted that its warrant was invalid because it allowed the seizure of material concerning persons or entities that were not mentioned in the affidavit. I cannot agree. It is evident from the terms in which the alleged crimes were described in Mr Du Plooy's affidavit that they were sufficiently wide to include persons or entities not mentioned in the affidavit itself. Ngoepe JP had before him the affidavit of Mr Du Plooy as well as the draft warrants, and would have known that documents concerning the persons and entities mentioned in them could be material to the alleged crimes. In the circumstances, to require each and every person or entity mentioned in the warrants to be mentioned in the affidavit

[100] Below at para 202.

in support of the search and seizure application would be over-technical. This ground, too, cannot be upheld.

Were the terms of the warrants valid?

[136] The next set of arguments advanced by Thint, Mr Hulley and Mr Zuma concern the legal validity of the search warrants, considered on their face at the time of their issue by Ngoepe JP. Their central submission is, in essence, that the warrants were unduly vague and overbroad in that they did not sufficiently circumscribe the searches they authorised and, therefore, in effect authorised too broad a search of the various premises. They argue that the scope of the searches was not defined with sufficient particularity to render the warrants intelligible to the searched persons. The warrants, so the argument goes, should have specified exactly what the alleged offences were, as well as where, when and by whom they were suspected to have been committed.

[137] It is my view that the warrants' validity must be assessed both in the light of the common-law principle laid down in *Powell* that "[a] warrant must convey intelligibly to both searcher and searched the ambit of the search it authorises",[101] and in the light of the requirements of section 29 of the Act, interpreted so as to promote the spirit, purport and objects of the Bill of Rights,[102] taking into account the relevant constitutional principles.[103] Given that the parties accept that the applicable legislative provisions pass constitutional muster, we are restricted to what they are reasonably

[101] Above n 22 at para 59.

[102] I explain the technique of interpreting legislation in conformity with the Constitution in some detail above at paras 68-72.

[103] I explain the relevant constitutional principles above at paras 73-8.

capable of meaning.[104] We therefore should respect, within constitutional limits, the fact that the words of section 29 of the Act reflect how the legislature has chosen to balance the competing interests involved. The starting point must be the statutory provisions and I now turn to interpret them.

The relevant provisions of section 29 of the Act[105]

[138] The following observations are appropriate in relation to the empowering provisions of section 29 of the Act. The first is that it appears from the wording of section 29(1) that investigators are given extremely wide powers of search and seizure. An investigator may look for, examine, copy, or seize any item found on or in the premises "which has a bearing or might have a bearing on the investigation in question". Taken literally, this is an extraordinarily broad power. It seems to suggest that anything whatsoever (whether a document, photograph, email or piece of jewellery, for example), which may be said merely to be *possibly* relevant to the investigation, may be examined and seized, and that only items that definitely have no bearing on the investigation in question may not. This literal approach would go so far as to suggest that anything which has not yet been examined by an investigator necessarily falls into the category of an item that "might have a bearing". This, in turn, seems to imply that section 29(1) itself authorises a complete examination of every item on or in the premises in question in order to see whether it "might have a bearing".

[104] Above n 38 at para 24.

[105] These are set out in full above at para 35.

[139] This approach to section 29(1) is overly literal. Granting such an unbounded power would seemingly authorise an unlimited search, which would be inimical to the constitutional right to privacy. The better interpretation, in my view, is to recognise that the empowering provisions of section 29(1) are qualified by section 29(2), which provides that any search operation in terms of section 29 shall be conducted with strict regard to decency and order, including the searched person's fundamental rights to dignity, freedom and security of the person, and personal privacy. All investigators bear a legal duty, when they execute a search and seizure warrant, to treat any persons present on the searched premises with the respect that their constitutional rights require. It is my view, furthermore, that investigators should keep this duty in mind even when no one happens to be present at the searched premises at the time of the search.

[140] The question thus arises how the extremely wide powers granted by section 29(1) should be reconciled with the equally important duty to have strict regard to decency, order, dignity, freedom of the person, and privacy as imposed by section 29(2). This tension reflects the need to strike a balance between the privacy and other personal interests of individuals on the one hand and the public interest in the fight against crime on the other, both of which are relevant constitutional principles. Before I explain how that balance must be struck, however, three considerations must be kept in mind.

[141] First, it must be emphasised that the right to apply for warrants for search and seizure in terms of the Act is a special power entrusted to a small number of senior officials in the National Prosecuting Authority and is for the investigation of serious crimes, including organised crime.[106] Accordingly, the balance must be struck in a way which renders these powers effective for the purposes they have been designed to serve, namely, the investigation and prosecution of serious and complex crime.

[142] Second, it is also important that an investigator is authorised to request information about any item on the searched premises from persons present.[107] It is possible that these enquiries may help the investigator to find the relevant items more quickly, or persuade the investigator not to examine or seize a particular item for the reason that it has no bearing on the investigation in question. This is one way in which the execution of a search warrant may be kept within acceptable bounds.

[143] Third, however, it should be noted that a section 29 warrant authorises the investigator to act unilaterally in executing the search and seizure operation. This flows from section 29(7) of the Act, which authorises the use of force where necessary, and from section 29(12), which provides that it is an offence to obstruct a search or to fail to answer questions asked in terms of subsection (1). While a

[106] Sections 26(1) and 29(1) make it clear that the powers of search and seizure may only be exercised by an Investigating Director or someone acting under his or her written authority. Section 29(1) also makes it clear that the powers may only be used for purposes of an "investigation" in terms of section 28(1) into a "specified offence" (although the investigation may be extended to connected offences that are not specified offences and a search and seizure operation may be conducted for purposes of a preparatory investigation). The definition of a "specified offence" in section 1 read with sections 7(1) and (1A) makes it clear that what is envisaged are investigations into organised crime and other serious and complex offences.

[107] Sections 29(1)(b) and (c) of the Act.

searched person may in certain cases collaborate and aid the investigator, as in fact was the case during the search of Mr Hulley's offices, the legislation envisages a unilateral exercise of power that is not dependent on such collaboration.

[144] These, then, are the considerations to be taken into account in determining how a proper balance should be struck between the need to combat serious crimes and the obligation to respect privacy and dignity in the context of a search and seizure operation in terms of section 29. Investigators should always have a clear idea, by virtue of their knowledge of the scope of the investigation and the terms of the search warrant, of what kinds or classes of items might have a bearing on the investigation. Investigators must have a reason to believe that an item might have a bearing on their investigation. Concomitantly, they should also have a fair idea of what kinds of items will be entirely irrelevant to that investigation. Therefore they should, at the very least, always limit their search to avoid examining the latter classes of items. They are never entitled simply to search through everything present in the hope that something relevant might be found.

[145] This, however, does not mean that investigators must always know in advance exactly what they are likely to be able to examine or seize. If, during the course of a search, they come across an unforeseen item, they will have to exercise their judgement about whether it might have a bearing on the investigation, taking into account their duty to respect the privacy, dignity and freedom of the persons searched. It would often be appropriate for them to request information about the item from

searched persons to aid that judgement, but they are not obliged to do so nor are they obliged to believe the answer given. If an investigator, having considered all the relevant factors, has no reason to believe that the item might have a bearing on the investigation, he or she should refrain from examining or seizing the item.

[146] This approach, in a nutshell, may be described as follows: Investigators should restrict their search, examination, and seizure to those classes of items that they have reason to believe might have a bearing on the investigation in question. That reason may flow from prior knowledge of the investigation, or it may occur to an investigator during the course of the search or emerge during a conversation with persons at the searched premises, but a reason they must have. That reason, moreover, should also be sufficiently plausible to outweigh the countervailing risk that the item might be irrelevant to the investigation and examining it would amount to an invasion of privacy. Section 29 should not be interpreted to authorise the examination or seizure of an item in circumstances where there is no reason to believe that it might have a bearing on the investigation.

[147] This approach, in my view, gives appropriate recognition to the conflicting constitutional principles at play and, at the same time, respects the language of section 29 of the Act. I find support for it in *Hyundai*,[108] in which it was held:

> "I do not think that the use of the phrase 'might have a bearing' is anything more than a recognition by the Legislature that, in order to determine whether a particular object

[108] Above n 32.

> has a bearing on a particular investigation, it may be necessary to examine it, make copies of or take extracts from it or even seize such object."[109]

[148] It should also be remembered that section 29 provides for two mechanisms to inform the searched person about the scope of the authorised search: (i) section 29(9)(a) provides that a copy of the warrant must be provided to the searched person, and (ii) section 29(9)(b) requires the investigator to—

> "supply such person at his or her request with particulars regarding his or her authority to execute such a warrant."

The parties differ on the proper interpretation of this latter provision. Counsel for Thint, Mr Zuma and Mr Hulley submit that it is concerned only with the delegation of authority to search to the particular investigator in question. Counsel for the respondents submit that there was no reason to give the section such an overly restricted meaning. Instead, he argued, the phrase "particulars regarding his or her authority to execute such a warrant" should be understood in accordance with its natural, broad meaning to include particulars of the *scope* of that authority.

[149] It is my view that the latter interpretation is preferable, when the provision is read through the prism of the Bill of Rights. Interpreted in this way, section 29(9)(b) would place a duty on the investigator to answer questions about the scope of the authorised search that a searched person may wish to ask. This would enable searched persons who cannot read or who cannot understand complex legal language to gain

[109] Id at para 12.

some idea of the ambit of the search to which they are subjected. This interpretation, furthermore, is bolstered by the duty imposed on investigators by section 29(2) to execute searches with strict regard to decency, order, dignity, freedom and privacy.

[150] The implication of this approach is that a searched person who wishes to understand more about the scope of the search is not dependent solely on the terms of the warrant alone; he or she may request further particulars from the officials carrying out the search in terms of section 29(9)(b). This, in turn, suggests that warrants need not always be drafted in terms that everyone subjectively understands, nor need they necessarily define the scope of the search in an absolutely exhaustive or perfect way.

The common-law principle of intelligibility

[151] I have already set out the various common law principles that are relevant to determining whether a search warrant is lawful.[110] The most relevant principle is: "A warrant must convey intelligibly to both searcher and searched the ambit of the search it authorises."[111] Thus stated, this intelligibility principle lacks precision. It therefore falls to this Court to give it more concrete content and to determine what it requires, specifically when it is applied to section 29 warrants.[112] As this constitutes a

[110] See above at para 88, where I quote para 59 of *Powell*, above n 22.

[111] Id.

[112] There is no reason to hold that this intelligibility principle should impose exactly the same requirements for all search and seizure warrants, no matter the statutory provision in terms whereof they are issued. In *Rudolph and Another v Commissioner for Inland Revenue and Others* 1997 (4) SA 391 (SCA) at 397, the Supreme Court of Appeal held unanimously that cases on the validity of warrants under different statutory provisions are merely indicative of the general approach of our courts, but "provide no further assistance." It held that it is not useful to know that it has long been established that the courts will refuse to recognise as valid a warrant the terms of which are "too general", because the validity of any particular warrant "can only be determined by reference to the terms of the [empowering] section itself".

The majority in the SCA Zuma judgment adopted this approach, above n 2 at para 75, where it held:

development of the common-law, the content we give it must promote the spirit, purport and objects of the Bill of Rights.[113] The same constitutional principles and values discussed in the context of interpreting section 29 are relevant to this task.

The test to be satisfied

[152] The question arises: How should it be determined whether a document is intelligible? I do not think that *Powell* lays down a subjective test for a warrant's intelligibility, which would mean that the lawfulness of a warrant will depend on the understanding of the person present at the premises when it is executed. This approach would effectively require every warrant to be perfectly tailored so that any person searched would, in the light of his or her own subjective mental capabilities and education, have a complete understanding of the scope of the search. The principle in *Powell* does not establish this requirement either explicitly or by implication. Such a requirement would be practically unworkable and would scupper the fight against serious and organised crime, because it would be practically impossible to prepare every warrant relating to complex offences and circumstances in a way that would make it understandable, in all its detail, to every person who may be searched.

> "The proper starting point, in my view, is not with pre-conceived ideas of what a warrant must contain, whether drawn from other cases or otherwise, but rather with construing the particular authorising statute to see what its criteria are."

I agree, except to emphasise the duty of courts, when interpreting the authorising statute, to promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution.

[113] See section 39(2) of the Constitution, above n 33.

[153] Take this case for example. The warrants before this Court authorise a search and seizure in relation to an investigation into corruption in contravention of the Corruption Act 94 of 1992,[114] fraud, money laundering in contravention of the Prevention of Organised Crime Act 121 of 1998 and/or tax offences in contravention of the Income Tax Act 58 of 1962. The offences which fall into these classes are obviously very complex.[115]

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[114] Which has now been replaced by the Prevention and Combating of Corrupt Activities Act 12 of 2004.

[115] Corruption is defined in section 1(1) of the Corruption Act 94 of 1992 as follows:

> "1(1) Any person—
>
> (a) who corruptly gives or offers or agrees to give any benefit of whatever nature which is not legally due, to any person upon whom—
>
> (i) any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any office or any relationship of agency or any law, or to anyone else, with the intention to influence the person upon whom such power has been conferred or who has been charged with such duty to commit or omit to do any act in relation to such power or duty; or
>
> (ii) any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any office or any relationship of agency or any law and who committed or omitted to do any act constituting any excess of such power or any neglect of such duty, with the intention to reward the person upon whom such power has been conferred or who has been charged with such duty because he so acted; or
>
> (b) upon whom any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any post or any relationship of agency or any law and who corruptly receives or obtains or agrees to receive or attempts to obtain any benefit of whatever nature which is not legally due, from any person, either for himself or for anyone else, with the intention—
>
> (i) that he should commit or omit to do any act in relation to such power or duty, whether the giver or offeror of the benefit has the intention to influence the person upon whom such power has been conferred or who has been charged with such duty, so to act or not; or
>
> (ii) to be rewarded for having committed or omitted to do any act constituting any excess of such power or any neglect of such duty, whether the giver or offeror of the benefit has the intention to reward the person upon whom such power has been conferred or who has been charged with such duty, so to act or not,
>
> shall be guilty of an offence."

Fraud is defined by Burchell in *Principles of Criminal Law* (3ed) (Juta, Cape Town 2005) 833 as follows:

> "Fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another."

Money laundering is defined in section 4 of the Prevention of Organised Crime Act 121 of 1998 as follows:

[154] Accordingly, whether a section 29 warrant is intelligible must be tested objectively. In my view, these warrants must be "reasonably intelligible", in the sense that they are reasonably capable of being understood by the reasonably well-informed person who understands the relevant empowering legislation and the nature of the offences under investigation.

[155] It must be emphasised that where this test is satisfied – that is, where a warrant is reasonably intelligible in the sense described above – that will not necessarily mean that both the searcher and the searched will always agree on whether or not certain items fall within the ambit of the authorised search. There might still be differences of opinion about whether or not a particular item is covered. My view is that the potential for such disagreements does not necessarily indicate that a warrant is unduly vague or overbroad. It would be impossible always to expect unanimity as to precisely which items fall within the terms of a search warrant.

"Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and—

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect—

  (i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or

  (ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere—

    (aa) to avoid prosecution; or

    (bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,

shall be guilty of an offence."

Tax offences have various definitions.

[156] It would also be unrealistic, however adequately represented the searched person might be at the time, to expect differences of opinion to be resolved while the search is taking place. The Act empowers investigators to execute the operation unilaterally, thus investigators are entitled to decide whether to examine or seize any particular item without the consent of the searched person. Differences of opinion may, in the end, have to be resolved by a court. They do not necessarily render the warrant unduly vague or overbroad.

[157] Indeed, the more complex the offence, the more likely it is that there may be reasonable differences of opinion over what is covered by a warrant and what is not. And, just as it is unrealistic to expect all disagreements to be resolved during a search, it is equally unrealistic to expect the terms of a warrant, possibly supplemented by the investigator's explanations in terms of section 29(9)(b), to place a searched lay person in a position to determine with certainty exactly which items on or in the premises may be seized and which may not.

Sources of information external to the warrant

[158] The final question to be answered before I consider the validity of the warrants themselves is whether and for what purpose it is legally permissible to travel outside the terms of a section 29 warrant. It should be recalled that the majority of the Supreme Court of Appeal held that whether the warrants were intelligible could legitimately be ascertained by reference to external sources of information such as Mr

Du Plooy's affidavit, while the minority held that they had to be intelligible on their own terms, without any outside aid.

[159] Here an important distinction must be drawn in relation to the purposes for which one might consider sources of information external to the warrant. An investigator or court or any other person could conceivably consider sources beyond the warrant in order to determine its general ambit. That, in my view, is impermissible. A section 29 warrant should state at least the following, in a manner that is reasonably intelligible without recourse to external sources of information: the statutory provision in terms whereof it is issued; to whom it is addressed; the powers it confers upon the addressee; the suspected offences that are under investigation; the premises to be searched; and the classes of items that are reasonably suspected to be on or in that premises. It may therefore be said that the warrant should itself define the scope of the investigation and authorised search in a reasonably intelligible manner.

[160] It is quite different, however, where the purpose of considering sources of information external to the warrant is to determine whether a particular item is relevant, or possibly relevant, to the investigation in question, and therefore may legitimately be examined, copied or seized under the warrant's authority. This is not a broad question about the scope of the investigation or authorised search considered abstractly, but rather a concrete question of application about whether a particular item in fact might have a bearing on that investigation. My view is that it is permissible to travel outside the warrant for that purpose. Indeed, it seems very likely

that every small item of knowledge attained by an investigator would be relevant to deciding whether an item might have a bearing on the investigation. Whether, for example, a particular letter or financial record is relevant to an investigation may depend on a host of factors beyond the terms of a warrant, including what other relevant letters and financial records state. Therefore, it seems to me that it would in most cases, where complex criminal offences are involved, not be possible to prepare a warrant in such a way that the relevance or irrelevance to the investigation of any particular item found in the searched premises could be determined without doubt by the searched party having regard to the terms of the warrant alone. I do not understand the judgment in *Powell* to have laid down such a restrictive rule.

[161] There are other reasons for this conclusion. First, it seems to me that the only possible reason to impose this restrictive requirement would be strongly to encourage searched persons taking steps themselves to protect their privacy while the search is being carried out. However, it is unnecessary for steps to be taken to protect the privacy of searched persons where the scope of a search is reasonably intelligible at the time the warrant is issued, and a searched person may enforce his or her privacy rights in a court at a later stage. It is also unnecessary given that a searched person is entitled to request particulars of the scope of the authorised search in terms of section 29(9)(b). In addition, it may be dangerous to encourage intervention by searched persons where the state is empowered to act unilaterally and to use force where necessary.

[162] Second, the requirement may frustrate the purpose of the Act, which is to facilitate the investigation and prosecution of serious and complex crime, because it would impose a burden on the state in every such case to incorporate into the warrant a comprehensive and possibly lengthy description of the investigation. An extremely lengthy search warrant will not be of any assistance to a searched person.

Applying the above principles to the warrants

[163] Having set out and explained the relevant legislative provisions and common-law principles, I am in a position to apply these to the warrants now before us. We must ask whether the warrants, considered on their face at the time of their issue, are reasonably capable of being understood by the reasonably well-informed person who knows and appreciates the relevant empowering legislation and the nature of the offences under investigation. For the reasons that follow, my judgement is that, when assessed in their legislative and investigative context, the warrants were indeed reasonably intelligible and thus lawful.

[164] It must be stated at the outset that, when the operative part of each warrant is read with its preamble and annexure A,[116] it is clear that the warrants authorised only searches for and seizures of documents that meet two requirements. The first is that the document must fall within one of the classes of documents and records listed in annexure A. The second is that the document must be one which has a bearing or might have a bearing on the investigation. Only items which meet both these

[116] The texts of the warrants are set out above at paras 16-9.

requirements may be seized under the warrants. I shall consider each condition in turn.

[165] As far as the first requirement is concerned, the limiting effect of annexure A ensures that the warrants draw narrower boundaries than those which would have been permitted by the Act itself. All the paragraphs in annexure A, with the exception of the so-called catch-all paragraphs to which I return below, specify a particular class of document or computer record which the prosecution considered, in view of their intimate knowledge of the case, to have at least a possible bearing on the investigation. Many of these detailed descriptions also identify the persons and entities allegedly involved in the offences, and describe broadly what those parties are accused of having done. The warrants clearly fall within the bounds of the Act, as they limit the scope of the operation to these classes of documents.

[166] Furthermore, all the warrants delineate searches that are narrower in scope than those which the Act would have permitted, in at least one further respect. The Act permits the search for and seizure of any object, whereas the warrants apply only to any document or computer record. This means, for example, that were there to be an expensive painting on the searched premises, which an investigator might suspect was bought using the proceeds of corruption, he or she could not seize it under the warrant's authority.

[167] The second limiting requirement is that it must be established that there is reason to believe that documents or computer records that are the object of the search have "a bearing or might have a bearing" on the investigation. This limitation tracks the language of the Act itself. The investigators were not authorised to search for, examine, copy or seize anything that had no possible connection to the investigation. Clearly, therefore, the manner in which this requirement delineates the scope of the authorised search depends crucially on the ambit of the investigation itself: One needs to know the boundaries of the investigation in order to determine the boundaries of the authorised search and seizure operation.

[168] The preamble to the warrants states that the nature of the criminal investigation appears from the information placed on oath before the judge who issued the warrant. The investigation arises, the warrants state, from the reasonable belief that certain offences have been committed or that attempts have been made to commit them. The suspected offences are listed as corruption in contravention of Act 94 of 1992, fraud, money laundering in contravention of Act 121 of 1998 and tax offences in contravention of Act 58 of 1962.

[169] This broad description of the scope of the investigation was, in my judgement, sufficient to satisfy the objective test of reasonable intelligibility. It would give any reasonably well-informed person, who had knowledge of the Act and the relevant classes of offences, a fair idea of the ambit of the authorised search. A searched person confronted with a warrant would then be able to request further particulars

from the investigators about the scope of their authority in terms of section 29(9)(b), and would be placed in a position to protest effectively against the search for and seizure of items clearly irrelevant to the investigation in question.

[170] Moreover, in the context of the facts of this case, I can see no reason why the prosecution should have been obliged to provide further details as to exactly who was suspected of having committed the offences, as well as where and when they were suspected to have been committed. If the state is always required to provide these details in the warrant itself, that may undermine the success of the investigation where a suspect is in fact guilty and unnecessarily damage the reputation of a suspect who is in fact innocent.[117] Furthermore, in complex cases involving offences such as fraud and corruption, the investigators may not, at the time they apply for the warrants to be issued, have knowledge of all the particulars of the suspected crime and thus may not be in a position to provide all such details in a warrant.

[171] In addition, if there had been any concrete and enduring dispute about whether the examination or seizure of a particular document or computer record was unauthorised, a court would have been able to settle the issue by having regard to the content of any document or record identified as having been improperly seized by the applicants in the light of the search warrant. The applicants were provided with a copy of Mr Du Plooy's affidavit the day after the search and have since had access to all items that were seized. They therefore have been in a position since 2006 to

[117] A point made by Lord Diplock in *Inland Revenue Commissioners and another v Rossminster Ltd*, above n 51 at 92c-d.

complain that any particular seized item fell beyond the objective scope of the search, but they have not done so. That, after all, is the purpose of precision in warrants: to protect against seizure of items irrelevant to the investigation. Nevertheless, there has been no specific suggestion that any improper seizure has taken place. That the applicants have chosen not to point to any concrete harm lends support to my conclusion that the warrants are reasonably intelligible.

[172] I should also note that the warrants now before this Court are distinguishable in two important respects from the warrant that was invalidated in *Powell*.[118] First, in that case, the warrant made no reference to any criminal offences at all, whereas the warrants in this case refer to four classes of offences. For this reason, the warrant in *Powell* purported to confer powers the conferral of which could not be authorised under the Act. Second, the terms of the warrant in *Powell* authorised the seizure of items that were completely unrelated to the investigation in question,[119] whereas the warrants in this case are limited throughout by the requirement that, to be seized, documents and computer records either bear or might bear on the investigation.

[173] In the light of these considerations, I conclude that the warrants in question were neither too vague nor too broad. Instead, considered on their face at the time of their issue, they were reasonably intelligible to both the searcher and searched. They were reasonably capable of being understood by the reasonably well-informed person, who appreciated the legislation and nature of the offences involved. The warrant

[118] Above n 22.

[119] See the discussion in *Powell*, id, at paras 61-2 of that judgment.

authorised the search and seizure of all documentation and computer records that might have had a bearing on the investigation of the four classes of offences stipulated therein, regardless of when they may have been committed. Finally, the applicants have not pointed to any specific seized item that should not have been seized, despite their knowing since 2006 which items were seized.

[174] I now turn to consider three peripheral attacks on the legal validity of the terms of the warrants.

The catch-all paragraphs

[175] The only difference between the so-called catch-all paragraphs and other paragraphs in annexure A of the warrants is that, while the other paragraphs all refer to a particular class of documents, the catch-all paragraphs do not. Instead, they in effect cover any document, of whatever nature or content, that either has or might have a bearing on the investigation.

[176] I do not think that these catch-all paragraphs are overbroad or unduly vague. Taking into account the proper approach to executing section 29 search warrants that I set out above,[120] I do not think that these paragraphs present a significant danger to searched persons by virtue of their breadth. There may well have been documentation which might have had a bearing on the investigation of the offences mentioned that fell into a category of documents not covered by any of the other paragraphs of

[120] See above at paras 138-50.

annexure A and which the investigators had not foreseen. It is unreasonable to expect investigators to specify in advance every possible class of item relevant to the investigation that may be found during a search. On the contrary, if during a search the investigator comes across an unforeseen item that he or she has reason to believe is relevant, he or she may examine, copy or seize it in accordance with the terms of the warrant and the Act. I have already explained in some detail why allowing such seizures will not amount to authorising an unbounded or limitless search.[121]

[177] I consider below[122] the applicants' further arguments that the catch-all paragraph in the context of the search of the offices of Mr Hulley, Mr Zuma's attorney, took on a particularly sinister character, and that it could not be severed from the relevant warrant because the ex post facto severance of defective portions of warrants is now impermissible under the Constitution.

Did the prosecution adopt a "one size fits all" approach?

[178] Thint argues that the prosecution merely adopted a "one size fits all" approach to the text of the various warrants and thereby failed to tailor them sufficiently to the individual circumstances of the applicants. There is no merit in this submission. While the warrants are very similar in some respects, they differ in others. To the extent that the warrants authorise the search for, examination and seizure of the same classes of documents at the premises of different persons, it cannot be said that the

[121] Id.

[122] At paras 208-12.

prosecution acted unreasonably or that the warrants authorised invasions of privacy not connected with the investigation.

Were the warrants aimed at determining Mr Zuma's defences?

[179] Messrs Zuma and Hulley complain further that paragraphs 9, 10 and 11 of annexure A to the warrants are improper because they relate to an investigation of the defences that Mr Zuma might employ if charged. The argument, as I understand it, is that the state was acting with an improper purpose to uncover Mr Zuma's privileged defences. These paragraphs authorised the seizure of any kind of documentation—

> 9. "relating to any allegations of corruption in respect of the arms acquisition process";
> 10. which Mr Zuma and various other people "would have compiled in reaction to reports regarding the contents of the encrypted fax"; and
> 11. which Mr Zuma and various other people "would have compiled in reaction to the prosecution and trial of Shaik and his related companies."

[180] In my view, there is also no merit in this submission. There is no evidence to suggest that the state was acting with an improper purpose. Quite obviously, in the light of the common-law right to privilege and the statutory procedure relating thereto in section 29(11) of the Act, the authorisation to examine and seize these classes of documents could not lawfully have extended to cover privileged documents. The prosecution, moreover, was well aware that it would have been unlawful to seize privileged documents. The terms of paragraphs 9, 10 and 11 of annexure A to the search warrants could never be understood to permit the seizure of privileged material, and any argument to the contrary must be rejected. However, there is nothing

impermissible in the state seizing non-privileged material which fell within the categories mentioned in paragraphs 9, 10 and 11. Indeed, prosecuting authorities must, subject to the protections conferred by privilege, anticipate possible defences of accused persons and prepare their cases accordingly within the bounds of the law. I therefore hold that these paragraphs are lawful.

Conclusion concerning the lawfulness of the terms of the warrants

[181] To sum up, I conclude that our law requires that warrants are reasonably intelligible and clear; the warrants in question were indeed reasonably intelligible; they were not too broad in the light of the broad empowering provisions of the Act; the catch-all paragraphs were not unduly vague or overbroad; and paragraphs 9, 10 and 11 of annexure A of the warrants were lawful.

Were the warrants worded or executed in a way that provided insufficient protection for the applicants' right to legal professional privilege?

[182] The applicants' next set of submissions concerns their right to legal professional privilege. They submit that the warrants were all unlawful for want of an explicit reference to the statutory protection of privilege in terms of section 29(11) of the Act or, alternatively, that the applicants' right to privilege demanded at least that the officials executing the warrant should have drawn section 29(11) to the attention of the persons present at the relevant properties. These arguments were stressed as being of particular weight in the context of a search of the offices of a legal practitioner, as occurred at Mr Hulley's offices. In the applicants' view, such searches

pose a far greater risk that investigators and prosecutors will have sight of privileged material, and for that reason they demand greater protection. Finally, Messrs Hulley and Zuma argue that the prosecution team's refusal to seal and lodge with the registrar the items seized from Mr Hulley's office after Mr Hulley initially requested this, and after his subsequent claim by fax that "a certain privilege" attached to all those documents, amounted to an unlawful disregard of section 29(11).

The right to legal professional privilege

[183] The applicants did not assert that the Constitution itself protects legal professional privilege and I therefore do not need to explore that question now.[123] We are thus primarily concerned with the common-law right to legal professional privilege, and with how that right is protected by section 29(11) of the Act. Again, because it is accepted by all the parties to this case that the legislation and common-law principles in question are consistent with the Constitution, the applicants' arguments must be assessed, in the first instance, in the light of the applicable provisions of section 29 of the Act. Of course, both the common-law right and the statutory provisions must be dealt with in a way that complies with section 39(2) of the Constitution. I turn first to consider the right to privilege and then deal with section 29(11).

[123] See Zeffertt et al *The South African Law of Evidence* (formerly Hoffmann and Zeffertt) (LexisNexis Butterworths, Durban 2003) 557-8 for a discussion of the possibility that the right to legal professional privilege has crystallised into an implicit constitutional right.

[184] The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met.[124] The rationale of this right has changed over time.[125] It is now generally accepted that these communications should be protected in order to facilitate the proper functioning of an adversarial system of justice, because it encourages full and frank disclosure between advisors and clients. This, in turn, promotes fairness in litigation. In the context of criminal proceedings, moreover, the right to have privileged communications with a lawyer protected is necessary to uphold the right to a fair trial in terms of section 35 of the Constitution, and for that reason it is to be taken very seriously indeed.[126]

[185] Accordingly, privileged materials may not be admitted as evidence without consent.[127] Nor may they be seized under a search warrant.[128] They need not be

[124] See Schwikkard et al *Principles of Evidence* (2ed) (Juta, Cape Town 2002) 135-7 where the requirements are set out as follows: The legal advisor must have been acting in a professional capacity at the time; the advisor must have been consulted in confidence; the communication must have been made for the purpose of obtaining legal advice; the advice must not facilitate the commission of a crime or fraud; and the privilege must be claimed.

[125] See the discussion of the history and rationale of the right to privilege in Zeffertt et al, above n 123 at 558-70.

[126] The judgment of Hurt J, above n 3 at 490g-i of the SACR and at 110 of the All SA report, emphasised this point, in my view correctly.

[127] See Schwikkard, above n 124 at 134-5, where reference is made to the common-law rule and section 201 of the Criminal Procedure Act, above n 65, which provides:

> "No legal practitioner qualified to practise in any court, whether within the Republic or elsewhere, shall be competent, without the consent of the person concerned, to give evidence at criminal proceedings against any person by whom he is professionally employed or consulted as to any fact, matter or thing with regard to which such practitioner would not on the thirtieth day of May, 1961, by reason of such employment or consultation, have been competent to give evidence without such consent: Provided that such legal practitioner shall be competent and compellable to give evidence as to any fact, matter or thing which relates to or is connected with the commission of any offence with which the person by whom such legal practitioner is professionally employed or consulted, is charged, if such fact, matter or thing came to the knowledge of such legal practitioner before he was professionally employed or consulted with reference to the defence of the person concerned."

disclosed during the discovery process.[129] The person in whom the right vests may not be obliged to testify about the content of the privileged material.[130] It should, however, be emphasised that the common-law right to legal professional privilege must be claimed by the right-holder or by the right-holder's legal representative.[131] The right is not absolute; it may, depending upon the facts of a specific case, be outweighed by countervailing considerations.[132]

The section 29(11) mechanism for settling claims of privilege

[186] Section 29(11) is the statutory mechanism that the legislature has chosen to deal with the right to legal professional privilege (as well as other claims of privilege) in the context of a search and seizure operation under section 29.[133] It states, in sum, that if privilege is claimed in respect of an item, and if the searching official nevertheless believes that the item is relevant and necessary for the investigation, it must be taken to the office of the registrar of the High Court so that a court can decide whether or not it is indeed privileged. The section, furthermore, appears to apply only "during the execution of a warrant or the conducting of a search in terms of this section".

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[128] *Bogoshi v Van Vuuren NO and Others; Bogoshi v Director, Office for Serious Economic Offences, and Others* 1996 (1) SA 785 (A) at 793D-E and *Sasol III (Edms) Bpk v Minister van Wet & Orde* 1991 (3) SA 766 (T) at 785-6.

[129] *International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd (3)* 1953 (4) SA 251 (W) at 253-4.

[130] *International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd (2)* 1953 (3) SA 879 (W) at 883.

[131] *Bogoshi* above n 128 at 793; *S v Lwane* 1966 (2) SA 433 (A) at 438; *S v Van Vreden* 1969 (2) SA 524 (N) at 529; *R v Kweyi* 1957 (3) SA 663 (EDL) at 664; *Schneider v Leigh* 1955 2 QB 195; 1955 2 All ER 173 (CA).

[132] See, for example, *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (4) SA 174 (T); [1997] 2 All SA 636 (T); 1997 (8) BCLR 1048 (T) and *Van Niekerk v City Council of Pretoria* 1997 (3) SA 839 (T) at 849-50; [1997] 1 All SA 305 (T) at 314-5. But see *Jeeva and Others v Receiver of Revenue, Port Elizabeth, and Others* 1995 (2) SA 433 (SE).

[133] Section 29(11) is reproduced in full above at para 35.

[187] Despite this clear language, the parties disagreed as to whether section 29(11) had application after a search and seizure operation has come to an end. In this regard, the applicants contended that section 29(11) should be interpreted so that the mechanism continued to be available after the search was completed because, in their view, an extended application would provide a greater degree of protection for privileged material. The state submitted, in contrast, that the better interpretation was that the availability of the mechanism ceased as soon as the search was completed, for two reasons. First, such an interpretation is more consistent with the ordinary meaning of the provision, which expressly applies only "during the execution of a warrant or the conducting of a search in terms of this section". But, second, the state submitted that claims of privilege will in fact be equally, if not better, protected if section 29(11) is interpreted to have no application after the search has ended. This second argument seems counter-intuitive but, on reflection, I am of the view that it is correct.

[188] The state's contention is that the primary effect of section 29(11) is to provide a benefit to investigators and prosecuting authorities. That is because, in essence, it enables a court to determine quickly and finally whether an item is in fact privileged in a way that protects the item against the risk of loss, damage or destruction, potentially at the hands of the searched person. The mechanism, moreover, also ensures that claims of privilege made incorrectly or in bad faith will almost always fail, because the state will have no reason not to refer the item to a court whenever it believes the item might be relevant to the investigation.

[189] The situation is quite different, so the argument went, where the section 29(11) mechanism is not available. The main consequence is that the state is denied the benefit of an efficient and objective decision on privilege. Instead, where it is faced with a claim (whether correct and made in good faith or otherwise) that a certain item is privileged in the context of a search and seizure operation in furtherance of a criminal investigation, the state faces the difficult choice whether to seize the item in question or not. Choosing to seize the item runs the risk that it may, in fact, be privileged, in which case the state would have acted unlawfully. The item would have to be returned to the searched person, and any subsequent trial may be infected with a degree of unfairness contrary to section 35 of the Constitution. The contrary choice not to seize the item, however, would vindicate the claim of privilege, whether or not it was correct and made in good faith, but would also deny the state the benefit of the item if it was truly not privileged, while the risk of its loss, damage or destruction would remain. In such circumstances, the state is placed between Scylla and Charybdis, whereas privilege remains strongly protected because either a privileged item will not be seized, or its seizure will be unlawful and may render any subsequent trial unfair. It is conceivable, moreover, that the state, by virtue of the risk of rendering the subsequent trial unfair, will be dissuaded from seizing certain items even if the claim of privilege is incorrect or made in bad faith.

[190] I agree. The state suggests that a wide application of section 29(11) would be primarily of benefit only to the state, because it would ensure that non-privileged

items would almost never slip through the net. It follows that the applicants' proposed justification for departing from the clear language of section 29(11) and extending its application – namely, that such an interpretation would better protect privilege – is flawed and must therefore be rejected. Accordingly, my view is that the application of the section 29(11) mechanism comes to an end with the completion of the search.

A reference to section 29(11) or some other mechanism beyond section 29(11)?

[191] I am now in a position to evaluate the various arguments concerning privilege advanced by the applicants. The first was that either the warrants should have contained a reference to section 29(11) or the officials should have mentioned that provision to persons at the searched premises. The state argued that the debate over privilege was largely academic in that the applicants have so far failed to identify any specific document as privileged. However, we are presently concerned only with the question of whether the Constitution required the warrants, or the investigators executing the warrants, to refer specifically to section 29(11) of the Act. The sufficiency of the applicants' privilege claim has no bearing on this analysis, so I do not address it here.

[192] Both these claims need to be evaluated in the light of the preceding analysis of section 29(11). I have found that the primary purpose of section 29(11) is to provide the state with a mechanism, where privilege is claimed during a search, to have that claim speedily determined by a court, without the state running the risk of attaching documents subsequently declared to be privileged. The effect of section 29(11),

therefore, does not diminish the protection given to privileged documents at common law. Instead, it provides a novel mechanism to determine claims of privilege prior to a criminal trial, in a manner which, if the claim succeeds, will not result in the search being impugned; and if it fails, will not deprive the state of ultimately seizing the document. It can be seen that the advantages of the mechanism are largely for the state, and not for the person claiming privilege, and yet the common-law protections for privilege remain untouched.

[193] A final important consideration to bear in mind is that section 29(11) comes into operation whenever a claim of privilege is made during a search. The person claiming privilege does not need to mention or indeed know of the existence of section 29(11). All he or she needs to do is assert to the investigators: You may not have that item, it is privileged. As soon as such a claim is made, the investigator is bound to follow the section 29(11) procedure (unless he or she decides to desist from seizing the item). If the searched person does not know or appreciate that items are privileged, and therefore fails to claim the privilege during the search, he or she does not lose the right to claim subsequently the common-law protections provided to privileged items. The right to object to the admissibility of privileged items will remain and the matter will only be determined when the state seeks to have the items admitted in evidence.

[194] Given the purpose and effect of section 29(11), I cannot see that there is any benefit to a person being searched in being notified of its provisions. Once a person

claims privilege during a search, section 29(11) will operate and a failure to follow the procedure it provides will be unlawful with all the attendant consequences. If a person does not claim privilege during a search because he or she does not appreciate that the items seized are privileged, then the ordinary common-law protection of privileged documents will persist and privilege may be claimed subsequently.

[195] For all these reasons, I conclude that it is not necessary for a warrant to refer to section 29(11), nor is it necessary for investigators to inform those being searched of the section 29(11) mechanism. Both these arguments of the applicants must fail.

Did the search of Mr Hulley's offices call for special protection?

[196] The search of Mr Hulley's offices must be dealt with separately because, in this instance, we are concerned with the execution of a search and seizure warrant at the offices of an attorney. The applicants assert that there is a greater risk of the discovery of items protected by legal professional privilege at the offices of attorneys and therefore that such searches require special consideration. In this submission, they rely on the Canadian case of *R v Lavallee, Rackel and Heintz*[134] in which the Supreme Court of Canada had to consider the constitutionality of section 488.1 of the Canadian Criminal Code. That section provided a procedure for determining a claim of legal professional privilege in respect of documents seized from an attorney's offices under a search warrant. The applicants argue that greater protection for legal

[134] [2002] 3 SCR 209 (SCC). In this case, attorney-client privilege was claimed by a lawyer familiar with the documents as soon as the police arrived at the firm's offices. The police had, following the procedure set out in section 488.1 of the Canadian Criminal Code, sealed the documents that had summarily been identified to them.

professional privilege was similarly called for in this context, whether in the form of a reference to section 29(11) in the warrant or some mention of section 29(11) on the part of the executing officials. They also assert, for the same reason, that the relevant catch-all paragraph was especially unacceptable.

[197] It is undeniable that, where a search of an attorney's offices is undertaken in circumstances where his or her client is under investigation, such searches may raise a danger that items protected by legal professional privilege will be discovered.[135] Of course, searching the home or office of a person under investigation will also bear the risk of the discovery of privileged items, as it will be likely that any letters or documents prepared for legal advice to that person will also have been sent to the person under investigation. But when attorneys' offices are searched, there is the additional risk that the privileged documents of other clients of an attorney may be found. I agree therefore that there is a greater risk of the invasion of legal professional privilege when the search of attorneys' offices is undertaken.

[198] In *Lavallee*, the Supreme Court of Canada held by a six-three majority that section 488.1[136] was unconstitutional in its entirety.[137] The precise provisions of section 488.1 are not of relevance to our enquiry. What is of relevance, and indeed persuasive, is the reasoning in both judgments in *Lavallee* that emphasises the

[135] See *Bogoshi* above n 128.

[136] As mentioned above, section 488.1 provided a sealing procedure for determining a claim of legal professional privilege in respect of documents seized from an attorney's offices under a search warrant.

[137] However, the court was unanimous that one of the subsections of the provision was unconstitutional in that it permitted the state to have preliminary access to the privileged documents to enable the state to present argument on the question whether the documents were privileged or not.

importance of the protection for legal professional privilege.[138] Arbour J confirms that it is "a principle of fundamental justice" within the meaning of section 7 of the Canadian Charter of Rights and Freedoms.[139] I have no doubt that the importance of legal professional privilege must not be overlooked by a judicial officer issuing a search warrant. Beyond this proposition, however, I am not persuaded that *Lavallee* has any further direct relevance.[140] In fact, *Lavallee* is distinguishable from the instant case in that the attorney in that case had immediately claimed privilege in respect of the identified documents when the police arrived at the firm.

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[138] Above n 134, specifically Arbour J at para 21 and Le Bel J at para 59.

[139] Id. Section 7 of the Canadian Charter provides:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[140] In *Lavallee*, section 488.1 of the Canadian Criminal Code was impugned on six grounds:

1) the absence or inaction of the attorney during the execution of the warrant could cause the client to forfeit his or her legal privilege;
2) the section required an attorney claiming privilege during the execution of a warrant to name the client, yet the name of the client might itself be privileged;
3) the section did not require any notice to the client to allow the client to claim privilege on his or her own behalf subsequent to the search;
4) the section set forth strict time limits after which – in the absence of an objection – any material seized must be turned over to the state, notwithstanding that these limits might prove insufficient in some circumstances to allow affected clients to claim their privilege;
5) post-seizure, the section did not afford a judge overseeing the seized items a sufficient discretion, in the case of default by a privilege-holder to assert privilege in time, to maintain nevertheless the confidentiality of the items; and
6) the section allowed the Attorney-General to view the items in order to present arguments concerning their privileged status, which was itself a violation of privilege.

See above n 134 at paras 26-33. No similar issues were raised by the applicants in respect of the case now before us. Indeed Mr Hulley was present at the time of the search, and the name of the client was known. Although no notice of the search of Mr Hulley's offices was given to Mr Zuma, Mr Hulley was in a position to give that notice immediately and did not complain of absence of notice. Grounds (4)-(6) have no application here because of the different text of section 29(11). In contrast to *Lavallee*, the applicants here did not challenge the constitutionality of the statute directly, nor did they suggest that the common-law rules of privilege require developing. As I have noted above at paras 186-90, section 29(11) primarily serves to accelerate the judicial resolution of any privilege claim made during the execution of a warrant. The only issue in *Lavallee* which has relevance to this judgment is the question relating to the need for the search warrant. The leading Canadian authority on this issue is *Descôteaux et al v Mierswinski and Attorney-General of Quebec et al* above n 96.

[199] The questions to be answered in the current context are the following: whether the state established that, in the circumstances, it was reasonable for the offices of Mr Hulley to be searched; whether there was a need to search Mr Hulley's offices; whether section 29(11) needed to be mentioned expressly in the warrant or by the investigators executing the warrant; and lastly, whether it was appropriate to include the catch-all paragraph in annexure A to the Hulley warrant.

[200] In considering whether the state has shown that it was reasonable to seek a search warrant to search Mr Hulley's offices, it should be noted that it was clear from Mr Du Plooy's affidavit that the state sought only the documents forwarded to Mr Hulley by Mr Parsee. It is clear that the investigators did not intend an unbounded search of Mr Hulley's offices.[141] The purpose of the search was confined narrowly to the search for and seizure of those records, which were previously held by Mr Shaik in his capacity as Mr Zuma's financial advisor. These documents formed the express subject matter of paragraph 1 of annexure A of the relevant warrant. There was, of course, no reason for anyone to think that those financial records would contain privileged information, because the letter from Mr Parsee to the NDPP stated their contents: records held by Mr Shaik as financial advisor to Mr Zuma. Moreover, as has been stated above, Mr Steynberg stated under oath that Mr Van Loggerenberg, who led the team that searched Mr Hulley's offices, was specifically instructed to

[141] In that regard, the search was different to that conducted at Ms Mahomed's offices. See *Mahomed v National Director of Public Prosecutions and Others* 2006 (1) SACR 495 (W) at 508j-510g; [2006] 1 All SA 127 (W) at 138-40. See also *National Director of Public Prosecutions and Another v Mahomed* [2008] 1 All SA 181 (SCA) at paras 3-6.

seize only the documents delivered by Mr Parsee and not to search the office unless this was strictly necessary to locate only those documents.

[201] The narrow scope of the search coupled with the fact that it was unlikely that the documents to be seized were in fact privileged meant that the ordinary anxieties concerning the seizure of privileged materials which arise where attorneys' offices are searched, did not arise here. In my view, it was not unreasonable for the state to have sought a search warrant for this narrow purpose. Were a more invasive search to have been intended, as for example occurred in respect of Ms Mahomed's offices,[142] the situation would have been quite different. I turn now to consider the question whether there was a need, in terms of section 29(5)(c) of the Act, to search Mr Hulley's offices.

The need to search Mr Hulley's offices

[202] It has been suggested that there was no need to search the office of this attorney, and that there was no reason at all to suppose that he would have done anything but expressly comply with a section 28 subpoena. I cannot agree. Mr Hulley received the documents as an agent for Mr Zuma, because they belonged to Mr Zuma. In my view, if Mr Hulley had received a subpoena in terms of section 28, he would have been within his rights to contact Mr Zuma and to say to him that he had received a subpoena in respect of the documents. There is nothing in the Act that prevents Mr Hulley from making this disclosure, nor would it have been improper for

[142] Id.

Mr Hulley to have done so. Had Mr Hulley not informed Mr Zuma about the subpoena, Mr Zuma would in all probability have had a valid complaint of impropriety on the part of his attorney. In my view, there was the real risk that, had Mr Hulley told Mr Zuma that the documents were sought by the prosecution by way of a subpoena, Mr Zuma would have ensured that the documents were placed in his possession. After that, Mr Zuma could have done precisely what he wished with them. The real risk that a few crucial documents would have been removed cannot be excluded.

The protection of privilege during the search of Mr Hulley's offices

[203] The next question is whether the terms of the search warrant needed to include an express reference to section 29(11). In my view, the applicants' arguments relating to the need to mention section 29(11) in the warrant must fail for the same reasons given in paragraphs 186 to 195 above. The purpose of section 29(11) is to provide an accelerated procedure for the determination of claims of privilege. That procedure comes into operation as soon as privilege is claimed. The person claiming privilege need know nothing of its provisions. We can assume that attorneys are those best placed to know which items are the subject of legal professional privilege and that they will therefore be in a position to claim privilege. Once they claim privilege, even if they do not know of the provisions of section 29(11), the procedure in section 29(11) must be followed. I do not agree, therefore, that it is necessary for the warrant to mention section 29(11), as that mechanism will operate as soon as privilege is

claimed, whether or not the person claiming privilege is aware of it. The applicants' argument in this respect must fail.

[204] I now consider the manner in which the warrant was executed.[143] It appears that the state was well aware of the possible presence of privileged materials and included a senior advocate in the investigating team to ensure that, if claims of privilege were made, the procedure under section 29(11) would be followed. This reveals that the state was willing to take extra care in this context and in fact did so. It should also be recalled that, although a search of an attorney's office was envisaged, the key terms of the warrant and the planned search were strictly confined to items that almost certainly were not privileged. It follows that the risk ordinarily attendant on the search of an attorney's office was lessened.

[205] Furthermore, it is common cause that a general search of Mr Hulley's office was in fact unnecessary and did not take place. Instead, the documents in question were located quickly, with the full co-operation of Mr Hulley. No other documents were examined or seized. Therefore, the danger associated with the idea of a general search of an attorney's office simply never arose on the facts.

[206] All of these considerations point in favour of a finding that there was no unlawfulness in the manner in which the search was executed. Nor am I persuaded that the investigators needed to draw Mr Hulley's attention to the provisions of section

[143] See above at paras 24-33.

29(11). Mr Hulley can be assumed to have been aware of the common-law right to legal professional privilege, including the rule that such privilege must be claimed. If he had claimed the privilege during the search, section 29(11) would have come into operation. But Mr Hulley made no claim during the search. Instead, he co-operated fully and gave up the two boxes containing the financial records without hesitation. My view is that the most plausible inference to be drawn in those circumstances is that Mr Hulley had no reason at all to think that the documents contained privileged information.[144] Moreover, the applicants have failed to identify a single seized item as being privileged, despite the fact that Mr Hulley made a copy of the inventory of the documents on the day that they were seized. They have therefore failed to establish any actual prejudice. Instead, the applicants base their claim solely on the hypothetical ground that privileged documents *might* have been seized.

[207] In the circumstances, I conclude that neither the absence of an explicit reference to section 29(11) in the text of the search warrant nor the manner of the subsequent execution of the warrant was unlawful. I turn now to consider the final challenge to the terms of the warrant, which relates to the inclusion of the catch-all paragraph.

The catch-all paragraph in the warrant executed at Mr Hulley's offices

[208] It was submitted that the catch-all paragraph in annexure A of the warrant executed at Mr Hulley's offices was unlawful. Its full and indiscriminate execution in

[144] His conduct may be contrasted with that of Ms Mahomed who did claim privilege during the search of her offices. See the High Court judgment in *Mahomed* above n 141 at 509e-510d of the SACR and 138i-139h of the All SA report.

the offices of the attorney, so the argument went, would have posed a great danger to legal professional privilege, particularly if no one had happened to be present in Mr Hulley's offices that morning.

[209] I agree. It cannot be denied that searches of attorneys' offices pose a heightened risk concerning privileged material, and for that reason all such searches should be carried out with great care and circumspection. The catch-all paragraph, however, purported to authorise a wide-ranging search through Mr Hulley's documents, files and computer records. In my view, it opened the door too widely and provided insufficient direction to the searchers and searched in the specific context of the search of an attorney's office.

[210] The next question that arises is whether this particular catch-all paragraph was severable from the warrant as a whole. It will be recalled that Hurt J held, in the Durban High Court, that ex post facto severance of a defective portion of a warrant was no longer permissible because the authorities relied on by the state in support of severance pre-dated the Constitution[145] and constitutional considerations have since superseded the considerations in favour of severance advanced in those cases.[146] In the Supreme Court of Appeal,[147] however, Farlam JA held in an *obiter dictum* in his minority judgment that counsel for Messrs Zuma and Hulley correctly conceded that

[145] *Cine Films (Pty) Ltd and Others v Commissioner of Police and Others* 1972 (2) SA 254 (A) at 268D-F; *Divisional Commissioner of SA Police, Witwatersrand Area and Others v SA Associated Newspapers Ltd and Another* above n 65 at 513A-B.

[146] See above n 3 at 493b-f of the SACR and 112b-f of the All SA report.

[147] The majority in the SCA Zuma judgment, above n 2, did not consider the question of severance.

Hurt J erred in this respect, in particular because the case relied on by Hurt J did not support his conclusion.[148] Counsel for the applicants did not press the argument against severance before us.

[211] I agree with the observations of Farlam JA. I can think of no reason in principle why the Constitution should be interpreted to prohibit absolutely the ex post facto striking down of a defective portion of a warrant while upholding the remainder of it. This is a technique frequently used in respect of legislation found to be unconstitutional and invalid in part only, which seeks both to give appropriate and effective relief to an aggrieved litigant and to respect the proper role of legislative and executive arms of government.[149] It seems appropriate to sever an overbroad part of a warrant where it is possible to separate that bad part from the rest of the warrant, and where that part was not in fact executed and therefore no concrete harm resulted to the person searched.[150] In such circumstances, severance is the proportionate response; declaring the entire warrant invalid would amount to using a sledgehammer to crack a nut. I refrain from commenting on whether severance is ever appropriate where the impugned part of the warrant is executed to any degree. That is a distinguishable question to be answered on another occasion.

[148] Id at para 51. In the *Ferucci* case, above n 83, which Hurt J purported to follow, the court found that severance was not possible because the difficulties flowing from the defective terms and contents of the warrant permeated the warrant as a whole, and not because of new constitutional considerations which rendered the two Appellate Division cases no longer applicable.

[149] *South African Liquor Traders Association and Others v Chairperson, Gauteng Liquor Board and Others* [2006] 7; 2006 (8) BCLR 901 (CC) at paras 31 and 35.

[150] This was the case in *Divisional Commissioner of SA Police* above n 65 at 509F-G.

[212] Returning to the circumstances of this case, the fact of the matter is that this particular catch-all paragraph was not executed at all during the search of Mr Hulley's offices. Nothing was examined or seized under its apparent authority. Instead, as I have set out above,[151] only those documents sent by Mr Parsee to Mr Hulley, comprising records that Mr Shaik previously held in his capacity as Mr Zuma's financial advisor, were seized. It follows that, despite its inclusion in the warrant, this catch-all paragraph resulted in no concrete harm to the applicants. In the circumstances, and given that the paragraph constitutes a distinct element that is clearly separate from the remainder of annexures A and B and the authorising part of the warrant itself, my view is that the appropriate remedy is to sever it.

Mr Hulley's subsequent claim of privilege

[213] The final issue that falls to be dealt with under the rubric of privilege is the legal import of Mr Hulley's claim, made via fax to Mr Steynberg the day after the search, that "a certain privilege attaches to the entire body of documents seized". This purported claim of privilege referred to the financial records, sent by Mr Parsee to Mr Hulley, and seized by Mr Van Loggerenberg's team during the search of Mr Hulley's offices. In my view, two considerations dispose of this argument.

[214] First, for the reasons advanced above at some length,[152] it is my view that section 29(11) must be interpreted so that it has no application after the completion of the search and seizure operation. It follows that, because Mr Hulley's claim was made

[151] Above at paras 24-33.

[152] See above at paras 186-90.

a day after the relevant search and seizure operation, the state was under no statutory duty to place the financial records with the registrar of the High Court. Instead, it was entitled to face its difficult choice: either to hold on to the documents and risk trial unfairness if they truly are privileged, or to return the documents and risk their permanent loss or destruction. Of course, the state could have attempted to negotiate a compromise solution, perhaps along the lines of the section 29(11) mechanism, but it was not legally obliged to do so.

[215] Second, my view is that the claim of privilege was not a serious attempt made in good faith and, frankly, rings hollow in the context. Mr Hulley has been tendered, and has had access to, copies of the documents taken from his office but has not asserted that any of them were indeed privileged despite having had ample opportunity to do so. To date, he has still not concretised nor further explained his imprecise claim of privilege. He has also not advanced a claim that a specific privileged document was seized. This all suggests powerfully that the financial records were not in fact privileged, and that the state's election not to indulge Mr Hulley's belated and puzzling claim was beyond reproach.

The question of a preservation order

[216] The final question to be considered concerns the state's alternative submission that, should this Court decide that the search and seizure operations were unlawful for any reason, the appropriate remedy would be to grant a preservation order along the

lines suggested by the minority judgment in the Supreme Court of Appeal.[153] Such an order, the state contends, would be "just and equitable" within the meaning of section 172(1)(b) of the Constitution,[154] because it would recognise and balance all the constitutional issues involved. The applicants initially resisted this suggestion, arguing that if this Court were to hold that the warrants were invalid, and thus in violation of their right to privacy in terms of section 14 of the Constitution, this Court should order the immediate return of the documents.

[217] Because I hold that the search and seizure operations were lawful, the question of a preservation order need not, strictly speaking, be resolved in order to decide this appeal. Nevertheless, in view of the fact that this question gave rise to significant disagreement amongst the judges of the Supreme Court of Appeal[155] and the fact that

[153] The minority in the SCA Zuma judgment, above n 2, proposed an order requiring the state to hand over to the registrar of the High Court all the items seized, and requiring the registrar to make and retain copies of all such items, to return the originals to the applicants, and to keep the copies accessible, safe and intact under seal until the state permitted their return, the conclusion of criminal proceedings against the applicants envisaged in Mr Du Plooy's affidavit, or the date the state decided not to institute such proceedings. The proposed order was made subject to any future court order, the lawful execution of any search warrant obtained in the future, and the duty of the applicants or registrar to comply with any lawful subpoena issued in the future. Finally, the proposed order directed the state not to take any steps to obtain access to any of the retained or returned items, unless they gave the applicants reasonable prior notice.

[154] Section 172(1) provides:

> "When deciding a constitutional matter within its power, a court—
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including—
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[155] The Supreme Court of Appeal handed down judgments in three cases that arose from the state's search and seizure operation: the two judgments against which the applicants now apply for leave to appeal, and the judgment in *Mahomed*, above n 141. In the first two judgments, the majority did not address the question of a preservation order. In the *Mahomed* judgment, the court divided four to one in favour of preserving the relevant seized items, but the four judges comprising the majority were unable to agree on the reasoning for their shared conclusion.

it has been argued before this Court, I consider it in the interests of justice to make a few remarks to give guidance to litigants and courts in this regard.

[218] In his minority judgment in *NDPP and Another v Mahomed*,[156] Ponnan JA held that the default remedy for an unlawful search and seizure is the prompt return of all the items seized. As authority for this proposition he cited a case[157] concerned with section 31 of the Criminal Procedure Act,[158] which provides that the state is obliged to return seized items that are not needed for the purposes of trial to the person from whom they were seized as long as it not unlawful for that person to possess the items. It is not at all clear to me that this case is authority for the blanket common-law rule he asserts. Nor is it clear that *Pullen NO and Another v Waja*[159] (also cited by Ponnan JA in *Mahomed*) is authority for that proposition, although it is cited as authority for it in several textbooks.[160] In *Pullen*, the court held that seized books should be returned to the person from whom they had been seized on the basis that the books were illegally seized and that—

> "even at the date of the hearing of this appeal no charge had been preferred against the respondent in regard to which the books might be required by the Crown as evidence."[161]

[156] Above n 141 at para 35.

[157] *Ndabeni v Minister of Law and Order* above n 65.

[158] Above n 65.

[159] 1929 TPD 838.

[160] See for example 5(2) *LAWSA* (2ed) at 192 and Kruger *Hiemstra's Criminal Procedure* Service Issue 1 (LexisNexis, Durban 2008) at chapter 2, 2-11.

[161] Above n 159 at 852.

One case cited by Ponnan JA did result in the unqualified return of seized items.[162] We do not need to decide the question of the default common-law remedy today. The question I wish to consider is what the relief should be when a court concludes that a search warrant issued under section 29 was unlawful.

[219] Here, my view is that a preservation order, such as that proposed by the minority in the Supreme Court of Appeal in the present matter and that handed down on the same day by the majority of the Supreme Court of Appeal in *Mahomed*,[163] will frequently be a just and equitable remedy. To explain why, I shall first address the question whether a preservation order is ever a competent order at all, and then consider why preserving the seized items would be appropriate in this context.

[220] The judges in the Supreme Court of Appeal differed as to whether a preservation order is a competent order at all. Farlam JA thought that it fell under the court's power to grant "just and equitable" remedies in terms of section 172(1)(b) of the Constitution.[164] Nugent JA disagreed. I am of the view that section 172(1)(b) of the Constitution does permit a preservation order to be made. That section explicitly states that a court deciding a constitutional matter may make any order that is just and equitable including an order "suspending the declaration of invalidity for any period

[162] See *Hertzfelder v Attorney-General* 1907 TS 403 at 406, in which unlawfully seized items were returned. The items returned were not property in respect of which an offence had been alleged to have been committed. The court did not consider whether the return of unlawfully seized items was an invariable rule of the common law.

[163] Above n 141.

[164] Above n 154.

and on any conditions, to allow the competent authority to correct the defect." This section thus expressly contemplates an ongoing violation of a right pending rectification by a competent authority. It should also be noted that section 172(1)(a) is not limited to declarations of invalidity in respect of laws but also includes declarations of invalidity in respect of conduct. From the start, this Court has recognised that at times there will be considerations of justice and equity which outweigh the need to give immediate relief for the breach of a constitutional right.[165] A preservation order raises similar questions of balancing the need to protect the right to privacy on the one hand, with other important public considerations on the other.

[221] Nor am I persuaded by Nugent JA's reference to Canadian jurisprudence. First, I note that section 24 of the Canadian Charter[166] is formulated in similar terms to section 35(5) of our Constitution,[167] giving a trial court a discretion to determine the admissibility of unlawfully obtained evidence. On my reading of *Re Commodore Business Machines Ltd and Director of Investigation and Research et al*,[168] a decision

[165] See, for example, *Fraser v Children's Court, Pretoria North, and Others* [1997] ZACC 1; 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) at paras 45-52 and *Tsotetsi v Mutual and Federal Insurance Company Ltd* [1996] ZACC 19; 1997 (1) SA 585 (CC); 1996 (11) BCLR 1439 (CC) at paras 10-3.

[166] Section 24 of the Canadian Charter provides:

> "(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

The leading case on section 24(2) is *R v Collins* [1987] 1 SCR 265 (SCC).

[167] See below at para 222.

[168] (1988) 50 DLR (4th) 559.

relied upon by Nugent JA,[169] the court did not assert that Canadian courts do not have a discretion to preserve copies of documents that had been unlawfully seized. On the contrary, although in that case the authorisation to search was declared invalid, the Crown was held entitled to retain copies of documents seized that were needed for the prosecution. Moreover, section 490 of the Canadian Criminal Code specifically authorises courts to make preservation orders (called "detention orders").[170]

[222] Turning now to consider the appropriateness of preservation orders in the present context, I have stated why preliminary litigation on search warrants is generally undesirable.[171] It has the potential to delay the commencement of trials. This may be particularly damaging in the case of serious and complex economic crime when trials are often lengthy. Furthermore, it is highly desirable that the trial court be the one primarily concerned with ensuring trial fairness in general and with the admissibility of evidence in particular by applying its discretion in terms of section 35(5) of the Constitution, which provides:

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[169] Above n 141 at para 25.

[170] Section 490(1) of the Canadian Criminal Code provides:

> "Subject to this or any other Act of Parliament, where, pursuant to paragraph 489.1(1)(b) or subsection 489.1(2), anything that has been seized is brought before a justice or a report in respect of anything seized is made to a justice, the justice shall,
> (a) where the lawful owner or person who is lawfully entitled to possession of the thing seized is known, order it to be returned to that owner or person, unless the prosecutor, or the peace officer or the person having custody of the thing seized, satisfies the justice that the detention of the thing seized is required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding; or
> (b) where the prosecutor or the peace officer or other person having custody of the thing seized, satisfies the justice that the thing seized should be detained for a reason set out in paragraph (a), detain the thing seized or order that it be detained, taking reasonable care to ensure that it is preserved until the conclusion of any investigation or until it is required to be produced for the purposes of a preliminary inquiry, trial or other proceeding."

[171] Above at para 65.

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

That is the way in which the Constitution strikes the balance amongst the various competing interests that are involved in deciding whether or not to admit unlawfully obtained evidence. It is the trial court that is empowered by section 35(5) of the Constitution to consider these questions in the first instance.[172] This is especially important in cases of serious and complex economic crimes which frequently require close scrutiny of mountains of facts.

[223] It follows accordingly that the ordinary rule should be that when a court finds a section 29 warrant to be unlawful, it will preserve the evidence so that the trial court can apply its section 35(5) discretion to the question of whether the evidence should be admitted or not. It seems to me that it is only if an applicant can identify specific items the seizure of which constitutes a serious breach of privacy that affects the inner core of the personal or intimate sphere,[173] or where there has been particularly egregious conduct in the execution of the warrant, that a preservation order should not be granted.

[224] The above approach to warrants issued under section 29 of the Act is consistent with our jurisprudence on granting constitutional remedies. Although the point of

[172] See for example *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1996] ZACC 27; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 153; *Key v Attorney-General* [1996] ZACC 25; 1996 (4) SA 187 (CC); 1996 (6) BCLR 788 (CC) at paras 13-4; and *S v Maputle* 2003 (2) SACR 15 (SCA) at para 11.

[173] *Bernstein and Others v Bester and Others NNO* above n 44 at para 67.

departure is that a victim of a constitutional violation is entitled to effective relief, a court must also take into account other relevant circumstances, including the interests of others and the public interest,[174] which in turn includes the public interest in the prosecution of serious crime.[175] I emphasise that such an order may not be appropriate if an applicant can point to a particular item the seizure of which constitutes a serious violation of privacy. Absent such an article or evidence of some other egregious conduct in the execution of the warrant, an order of preservation cannot be assumed to give rise to a serious ongoing violation of the constitutional right to privacy. The granting of preservation orders will also facilitate the protection of another important constitutional right, in that it will discourage the proliferation of unnecessary and delaying preliminary litigation thereby assisting in the conclusion of criminal trials without unreasonable delay. This is consistent with the requirements of section 35(3) of the Constitution.

Conclusion

[225] To sum up, therefore, I hold that the catch-all paragraph in the warrant executed at Mr Hulley's offices was unlawful but severable. Other than that, all the applicants' challenges to the search and seizure operation executed at various premises connected to them must fail. It is my judgement that the application for the warrants, the terms of the warrants themselves, and their subsequent execution were lawful, in view of the

[174] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre,* Amici Curiae*); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre,* Amici Curiae*)* 2004 (6) SA 40 (SCA); 2004 (8) BCLR 821 (SCA); [2004] 3 All SA 169 (SCA) at paras 41-2.

[175] *S v Basson* above n 66 at para 33;.*Hyundai* above n 32 at paras 53-4; *Key v Attorney-General, Cape Provincial Division* above n 172 at paras 13-4; *S v Motloutsi* 1996 (1) SA 584 (C) at 590A-592G; 1996 (2) BCLR 220 (C) at 226-8; [1996] 1 All SA 27 (C) at 33-5; 1996 (1) SACR 78 (C) at 84-6.

applicable common-law, statutory and constitutional principles. For that reason, although the applications for leave to appeal are granted, the appeals themselves are refused and the judgments of the Supreme Court of Appeal appealed against are confirmed.

Costs

[226] The applicants have raised important constitutional issues. In line with our ordinary approach, this is a case in which no order as to costs in this Court should be made.

Order

[227] It is ordered that:

(a) The applications for leave to appeal are granted.

(b) Paragraph 2 of annexure A of the warrant executed at the offices of Mr Hulley is declared unlawful and is severed from that warrant.

(c) In all other respects, the appeals are refused and the orders made by the Supreme Court of Appeal are upheld.

(d) There is no order as to costs in this Court.

O'Regan ADCJ, Jafta AJ, Kroon AJ, Madala J, Mokgoro J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Langa CJ.

NGCOBO J:

Introduction

[228] In *Hyundai*[1] we considered the constitutionality of the provisions of subsection 29(5) of the National Prosecuting Authority Act (the NPA Act)[2] in the context of a preparatory investigation. On that occasion, we found that the subsection limits the right to privacy that is guaranteed in section 14 of the Constitution. However, we held that the subsection provides sufficient safeguards against unwarranted invasion of the right to privacy.[3] We therefore upheld the constitutionality of the subsection.[4]

[229] These two cases present different, though equally important questions important questions concerning: first, the circumstances under which the investigating authority can resort to a search and seizure warrant for the purposes of conducting an investigation under the NPA Act and; second, the contents of search and seizure warrants. The importance of these questions lies in the fact that the search and seizure warrant is a drastic measure which constitutes an invasion of a person's right to privacy and right to dignity. The search and seizure warrant can be a useful

[1] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (2) SACR 349 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 1.

[2] Act 32 of 1998.

[3] Above n 1 at para 55.

[4] Id at para 58.

investigative tool to combat organised crime, in particular corruption However, unless it is used only when there is a need for it, it may be abused, and this would result in an unwarranted invasion of privacy and dignity.

[230] These cases require us, in particular, to determine two issues: firstly, whether on the facts and circumstances of these cases there was a need for the state to resort to this drastic procedure. Secondly, a somewhat related but equally important issue concerns the duty of the state to disclose all material facts when it applies for a search and seizure warrant. This duty arises because applications of this nature are invariably made ex parte and without the knowledge of the person who is the subject of the intended search. The person concerned is therefore unable to present the facts showing why a search and seizure warrant should not be issued.

[231] These are difficult questions. They are difficult because they require us to strike a very delicate balance between, on the one hand, the need to fight crime, in particular organised crime, and, on the other hand, the need to protect individuals against the unwarranted invasions of their privacy and dignity. As we held in *Hyundai*, this is "a task that lies at the heart of the inquiry into the limitation of rights."[5] If the balance is struck in favour of the state, constitutional rights, which the people of this country fought so hard to achieve, may be compromised. If it is struck in favour of constitutional rights, then the fight against organised crime, in particular corruption, which is a real threat to our young democracy, may be compromised.

[5] Id at para 54.

Precisely where and how that balance should be struck is the central question presented in these cases.

Issues presented

[232] The main issues for consideration in these applications for leave to appeal include whether:

(a) it is in the interests of justice to grant leave to appeal in these cases;

(b) the state was guilty of non-disclosure of material facts which renders the warrants invalid;

(c) the state established that there was a need for search and seizure warrants in relation to the investigation; and

(d) the warrants were invalid because they were either overbroad or vague.

The difference between the main judgment and this judgment

[233] I have read the main judgment. I remain troubled, as I was during oral argument, by the question whether the requirement of need was satisfied before the search and seizure warrants were issued. Regrettably, my troubles have not been assuaged by the main judgment. I am therefore unable to agree with the test for the need requirement as formulated by it and his conclusion that the state established the need for the search and seizure warrants in these cases.

[234] In addition, the majority finds that the state did not err materially by failing to provide the judge who issued the search and seizure warrants with details on both

earlier investigations and Thint's previous co-operation in the investigation. The majority therefore conclude that Thint's complaint based on material non-disclosure has no merit. I am unable to agree with both the finding and the conclusion of the majority in this regard.

[235] However, I agree with the main judgment that it is in the interests of justice to grant the applicants leave to appeal. In view of the importance of the issues raised by the state in this regard, I consider it necessary to set out my views on why it is in the interests of justice to grant leave to appeal.

[236] The conclusion I reach on the question of the need requirement and the duty of disclosure renders it unnecessary for me to consider the challenge based on the contents of the warrants. This judgment is therefore confined to three of the main issues set out above, namely: first, whether it is in the interests of justice to grant leave to appeal; second, whether the state has established the need for the search and seizure warrants; and third, whether there was non-disclosure of material facts.

[237] In order to put the issues in context, it will be necessary, by way of background, to consider the investigative scheme of the NPA Act and the proper construction of subsection 29(5). Needless to say, the question of the need requirement will be discussed in relation to Mr Zuma, Mr Hulley and Thint. In relation to Mr Zuma and Thint, it will be necessary to address the argument based on general concerns about the likely or possible attitude of persons suspected of crime not to co-operate in a

section 28 summons investigation. This will regrettably result in some unavoidable repetition and in the judgment being longer than it should have been.

Scheme of the judgment

[238] Accordingly, in this judgment, I propose to address the following:

(a) whether it is in the interests of justice to grant leave to appeal in these cases;

(b) the investigative scheme of the NPA Act;

(c) the construction of section 29(5);

(d) the test for the need requirement in subsection 29(5)(c);

(e) the requirement of disclosure of material information;

(f) whether the state satisfied the requirement of material disclosure;

(g) whether the state satisfied the requirement of the need for search and seizure warrants; and

Is it in the interests of justice to grant leave to appeal?

[239] The state contended that it is not in the interests of justice to grant leave to appeal to the applicants. In support of this contention the state submitted that the sole purpose of this litigation is to prevent the state from using the evidence that it had obtained through the disputed search and seizure warrants. The applicants' remedy is to be found in section 35(5) of the Constitution, which empowers the trial court to exclude evidence obtained in a manner that violates the Bill of Rights if its admission would render the trial unfair or otherwise be detrimental to the administration of justice, so the argument went. In effect, therefore, the applicants are seeking to

circumvent the provisions of section 35(5), argued the state. The state submitted that this Court should, as a matter of policy, decline to entertain challenges of this nature as complainants in these challenges have other remedies.

[240] Against this background, the state submitted that the trial court would be better placed than this Court to strike a balance between, on the one hand, the interests of the applicants, and, on the other hand, the public interest. The trial court that will be obliged to apply the provisions of section 35(5) will exercise an overriding discretion in terms of section 35(3) to ensure that the applicants are afforded a fair trial. As a matter of policy, therefore, proceedings of this nature should be discouraged and complaints of this nature should be heard by the criminal court in which the evidence is sought to be introduced, argued the state.

[241] The applicants countered these submissions by contending that they are entitled to vindicate their constitutional rights, regardless of the opportunity to prevent the admission of unlawfully obtained evidence under section 35(5). They submitted that section 35(5) does not give the state the right to retain documents which were unlawfully obtained. The applicants also submitted that they are entitled to the return of their property. In particular, they submitted that once the Supreme Court of Appeal had pronounced on the lawfulness of the warrants, the applicants could not raise the same challenge to the validity of the warrants, and therefore the lawfulness of the search and seizure, in the trial court.

[242] It is true, that as a general matter, individuals who seek to prevent the admission of evidence obtained in violation of the Bill of Rights must do so in the trial court in terms of section 35(5) of the Constitution. The trial court will be obliged in terms of section 35(5) to exclude such evidence if its admission will render the trial unfair or otherwise be detrimental to the administration of justice. Apart from this, the trial court will exercise an overriding discretion in terms of section 35(3) of the Constitution which requires criminal trials to be conducted fairly and therefore ensure that the applicants are afforded a fair trial. And, for all the reasons advanced by the state, the trial court will be in a better position to balance the interests of the applicants, on the one hand, and the public interest in the prosecution of crime, on the other hand. Indeed, where the trial has commenced, it would be highly desirable to follow this route. For this reason, there is something to be said for the view that challenges to search and seizure warrants must be considered by the court in which the evidence obtained through the warrant is sought to be introduced.

[243] Whether courts, including this Court, should therefore, as a matter of policy, decline to consider challenges to search and seizure warrants and refer the litigant to the provisions of section 35(5) of the Constitution, is a different matter. Such a policy may run foul of the provisions of sections 8(1), 34 and 38 of the Constitution. In terms of section 8, courts are bound by the provisions of the Bill of Rights. Section 38 of the Constitution confers a right on anyone who alleges that a right in the Bill of Rights has been infringed to approach a competent court for relief. This right is fortified in section 34 of the Constitution which guarantees the right of access to

courts. A person who alleges that his or her constitutional rights to privacy have been impermissibly violated by an invalid search warrant is therefore entitled under our Constitution to approach any competent court to vindicate his or her constitutional right to privacy. Section 35(5) does not preclude any person from doing so.

[244] How that tension between the provisions of sections 34 and 38, on the one hand, and the policy contended for by the state, on the other hand, should be resolved, is not necessary to consider here. Nor is it necessary to consider whether a court of first instance, where the validity of a warrant is raised, should adopt the policy contended for by the state and refer the challenge to the court in which the evidence obtained through the disputed warrant is to be produced.

[245] What is beyond question, in my view, is that this Court cannot, at this stage of the litigation, adopt the policy contended for by the state. Once the Supreme Court of Appeal had pronounced on the validity of the warrants, it was no longer open to the applicants to challenge the validity of the warrants on the same grounds that were rejected by the Supreme Court of Appeal. To do so would amount to an impermissible collateral challenge to the decision of the Supreme Court of Appeal. Whether the applicants may challenge the validity of the warrants on some other grounds other than those rejected by the Supreme Court of Appeal is not necessary to decide. It is sufficient to say that once the Supreme Court of Appeal had upheld the validity of the warrants, it was no longer open to the applicants to challenge the

admissibility of the evidence obtained through those warrants in the trial court. The applicants therefore had to come to this Court to challenge the validity of the warrants.

[246] In these circumstances, and if all the other requirements for granting leave to appeal are met, this Court is obliged to grant leave to appeal. It cannot refuse leave on the sole basis that a challenge to warrants must, as a matter of policy, be considered by the trial court in which the evidence obtained through a search and seizure warrant is sought to be introduced. It remains to consider whether the other requirements for granting leave to appeal are satisfied.

[247] In these cases there are compelling considerations which favour the granting of leave to appeal. These cases, as I have pointed out earlier, raise important questions concerning the extent to which the state may constitutionally intrude into the privacy of an individual or juristic person in the pursuit of the legitimate objective of combating serious economic offences. A search and seizure is a powerful weapon in the hands of the state to investigate these offences which are hard to detect. When these powers may be used and what are the requirements for a valid search warrant are questions raised by these cases. It is in the interests of the state that these issues be resolved.

[248] The High Courts,[6] which addressed these issues at first instance, reached opposing conclusions. On appeal to the Supreme Court of Appeal, that court was

[6] *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* Case No 268/2006, 4 July 2006, Pretoria High Court, unreported; *Mahomed v National Director of Public Prosecutions and Others* 2006

sharply divided on whether the warrants were invalid for overbreadth and vagueness. While the Supreme Court of Appeal had previously pronounced on the contents of search and seizure warrants in *Powell*,[7] the court was divided on the scope and the applicability of the *Powell* decision. This Court has yet to pronounce on these issues. It now has the benefit of the judgments of the courts below. It is desirable that this Court should now give a ruling on these issues.

[249] The applicants' desire to have a final ruling on the validity of the search and seizure warrants cannot, therefore, be characterised as being hypothetical or academic or seeking justice in theory. It raises real and substantial issues as far as the applicants are concerned and they have an interest in having these issues resolved. The resolution of these issues goes beyond the interests of the applicants, and raises the constitutional limits of the powers of the state under section 29(5).

[250] In all the circumstances, I would grant leave to appeal in both these cases.

The investigative powers in the NPA Act

[251] The questions presented in these cases must be understood and considered within the statutory scheme of the investigative powers of the Directorate of Special Operations (the DSO), and the constitutional safeguards for the exercise of these powers.

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(1) SACR 495 (W); *Zuma and Another v National Director of Public Prosecutions and Others* 2006 (1) SACR 468 (DCLD); [2006] 2 All SA 91 (D).

[7] *Powell NO and Others v Van der Merwe NO and Others* 2005 (5) SA 62 (SCA); [2005] 1 All SA 149 (SCA) (*Powell*).

[252] The powers of the DSO to investigate are set out in Chapter 5 of the NPA Act.[8] If the Investigating Director has reason to suspect that a specified offence has been or is being committed, or an attempt has been or is being made to commit a specified offence, he or she may conduct an investigation.[9] Specified offences are, broadly speaking, offences or criminal or unlawful activities committed in an organised fashion, and they include any other offences which the President may determine as falling within the category of specified offences.[10] It is undisputed that corruption under the Corruption Act 94 of 1992 is one such offence. Similarly, where the National Director of Public Prosecutions (the NDPP) refers a matter concerning an alleged commission of, or attempt to commit, a specified offence to the Investigating Director, the latter is required to conduct either an investigation or a preparatory investigation.[11] The purpose of a preparatory investigation is to determine whether there are reasonable grounds to conduct an investigation.[12]

[253] The Investigating Director is given wide and varied powers to investigate and interrogate people and to obtain documents, books and other objects relating to an investigation.[13] If the Investigating Director believes that you may be able to furnish any information on the subject under investigation, or that you have in your

[8] See for example above n 1 at paras 4-10 and 31-3.

[9] Above n 2 section 28(1).

[10] Id at section 7(1)(a)(aa) and (bb).

[11] Id at section 28(2).

[12] Id at section 28(13).

[13] Id at section 28(6)(a).

possession or under your control any book, document or object relating to the subject under investigation, he or she may summon you to appear before him or her for questioning or require you to produce the book, document or object in question.[14] Once you appear before him or her you may then be questioned under oath or affirmation. The documents, books or objects that you produce may be examined, or retained for further examination, or retained for safe custody.[15] If these documents are retained and you require copies, you must make copies of them at your own expense.[16]

[254] You may not remain silent. You may not claim privilege against self-incrimination. Of course, the answers you provide during the interrogation are not admissible against you in any criminal proceedings.[17] But they are admissible in criminal proceedings arising from your failure to comply with the provisions under which you are being interrogated.[18] If, without sufficient cause, you do not comply with the summons or leave before being excused, you commit an offence.[19] Similarly, if you fail to produce the books or documents that you were summoned to produce, that is also an offence.[20] If you refuse to be sworn in or to make an affirmation, you are guilty of an offence.[21] If, after having been sworn in or having made an affirmation, you fail to answer fully and to the best of your ability any questions put to

[14] Id.

[15] Id.

[16] Id at section 28(6)(b).

[17] Id at section 28(8)(a).

[18] Id at section 28(8)(b).

[19] Id at section 28(10)(a).

[20] Id at section 28(10)(b)(i).

[21] Id at section 28(10)(b)(ii).

you, you are guilty of an offence.[22] You are also guilty of an offence if you give false evidence, knowing that evidence to be false.[23] The same goes if you give false evidence "not knowing or believing it to be true."[24] And if you are guilty of any of these offences you are liable to a fine or to imprisonment for a period not exceeding 15 years or to both the fine and imprisonment.[25]

[255] Apart from the powers to subpoena and interrogate, and to require the production of books and documents, the NPA Act also gives the Investigating Director extensive powers to enter premises, search for, examine and seize documents, books and objects found there.[26] Officials who have been authorised by the Investigating Director to conduct a search or seizure may enter your home with or without prior notice.[27] Once they have entered your premises, they may inspect and search your premises and make enquiries from persons on your premises.[28] They may examine any object found on or in the premises which has a bearing or might have a bearing on the investigation.[29] They may make copies or take extracts from any book or document found on or in the premises and may require you to explain entries in the books or documents if you are suspected of having the necessary information.[30] Anything found on or in the premises which has a bearing or might have a bearing on

[22] Id at section 28(10)(c)(i).

[23] Id at section 28(10)(c)(ii).

[24] Id.

[25] Id at section 41(2).

[26] Id at section 29(1).

[27] Id.

[28] Id at section 29(1)(a).

[29] Id at section 29(1)(b).

[30] Id at section 29(1)(c).

the investigation may be seized and retained for further examination. Whether this is an item of sentimental value to your family, such as your late wife's diary, matters not.[31] If you require copies of the documents seized, you must make copies at your own expense.[32] That these documents happen to be yours, matters not.

[256] Again here, you may not remain silent. If you refuse or fail to give information or an explanation relating to a matter within your knowledge, you are guilty of an offence.[33] So too, if you give any false or misleading information or explanation knowing them to be so.[34] You are also guilty of an offence if you obstruct or hinder the officials performing functions under these provisions.[35] As quid pro quo for your co-operation in the investigation, the NPA Act says that the evidence regarding any questions and answers you give is not admissible in any subsequent criminal proceedings against you.[36] This does not apply where you are charged with unlawful conduct relating to the execution of a search and seizure warrant.

[257] Subject to two exceptions mentioned below, a search and seizure may only occur if sanctioned by a warrant issued by a judicial officer.[37] Two conditions must be met before a search and seizure warrant may be issued. First, there must be information under oath or affirmation stating: (a) the nature of the investigation under

[31] Id at section 29(1)(d).

[32] Id.

[33] Id at section 29(12)(b).

[34] Id.

[35] Id at section 29(12)(a).

[36] Id at section 29(3).

[37] Id at section 29(4).

section 28;[38] (b) that there is a reasonable suspicion that a specified offence has been committed or is being committed or an attempt is being made to commit these offences;[39] and (c) that there is a need for a search and seizure.[40] Second, the judicial officer must be satisfied that there are reasonable grounds for believing that anything connected with the investigation is on or in the premises which are to be searched or is suspected to be on or in these premises.[41]

[258] A warrant is not necessary, however, if you consent to the search and seizure.[42] Nor is it necessary if the Investigating Director, upon reasonable grounds, believes that the warrant would be issued to him or her if he or she were to apply for it and the delay that might be caused by obtaining the warrant would "defeat the object of the entry, search, seizure and removal."[43]

[259] If during the search you claim that any of the items found on the premises contain privileged information, and you refuse the inspection and removal of those items, the items concerned may be seized and removed for safe custody by the registrar of the High Court having jurisdiction pending a ruling on whether the

[38] Id at section 29(5)(a).

[39] Id at section 29(5)(b).

[40] Id at section 29(5)(c).

[41] Id at section 29(5).

[42] Id at section 29(10)(a)(i).

[43] Id at section 29(10)(a)(ii)(bb).

information concerned is privileged.[44] This may be done at the request of the person executing the warrant.[45]

[260] The statutory scheme therefore provides the Investigating Director with three methods of obtaining information for the purposes of an investigation. The first is to request the person who is in possession of the books, documents or objects relating to the investigation to surrender those items voluntarily. This process is provided for in section 29(10)(a)(i). The second is to summon the person who is believed to have the information to appear before him or her for interrogation and to require that person to produce books, documents and objects under his or her control which relate to the subject of the investigation.[46] The person summoned may be questioned under oath or affirmation and documents or books produced by that person may be examined and seized for safe keeping.[47] The third mechanism is to apply for a search and seizure warrant which authorises entry into and search of premises and the seizure of documents relevant to the investigation.[48] To make each of these mechanisms effective, the failure to comply with a summons, or the giving of false information, or the refusal to produce documents, attract criminal sanctions and severe penalties.[49]

[44] Id at section 29(11).

[45] Id.

[46] Id at section 28(6)(a).

[47] Id at section 28(6)(b).

[48] Id at section 29(1), (4) and (5).

[49] Id at section 28(10) and section 29(12) read with section 41(2).

The same goes for hindering or obstructing the execution of a search and seizure warrant.[50]

[261] In the present cases we are concerned with the search and seizure procedure which is provided for in section 29 of the NPA Act. The question which must be determined is whether on the facts, the state was justified in resorting to the drastic mechanism of search and seizure for the purposes of conducting an investigation under section 28. This question in turn raises three interrelated questions namely: first, what is the nature and extent of the investigating director to disclose information to the judicial officer who is considering the issuing of a search and seizure warrant; second, what is the test for determining the need requirement; and, third, on all the facts and circumstances of these cases, was the state justified in resorting to the search and seizure procedure.

[262] But first the construction of section 29(5).

The construction of section 29(5)

[263] To resolve the questions presented in these cases, it is necessary first to construe the relevant provisions of section 29 of the NPA Act. These are subsections (4) and (5) which provide:

> "(4) Subject to subsection (10), the premises referred to in subsection (1) may only be entered, and the acts referred to in subsection (1) may only be

[50] Id at section 29(12)(a).

> performed, by virtue of a warrant issued in chambers by a magistrate, regional magistrate or judge of the area of jurisdiction within which the premises is situated: Provided that such a warrant may be issued by a judge in respect of premises situated in another area of jurisdiction, if he or she deems it justified.
>
> (5) A warrant contemplated in subsection (4) may only be issued if it appears to the magistrate, regional magistrate or judge from information on oath or affirmation, stating—
>
> (a) the nature of the investigation in terms of section 28;
>
> (b) that there exists a reasonable suspicion that an offence, which might be a specified offence, has been or is being committed, or that an attempt was or had been made to commit such an offence; and
>
> (c) the need, in regard to the investigation, for a search and seizure in terms of this section,
>
> that there are reasonable grounds for believing that anything referred to in subsection (1) is on or in such premises or suspected to be on or in such premises."

[264] As pointed out above, this Court has previously considered the provisions of section 29(5). However, this subsection was considered in the context of a contention that the subsection does not require that there should be a reasonable suspicion that a specified offence has been committed before the judicial officer may authorise a search and seizure warrant for the purpose of a preparatory investigation.[51] What we said on that occasion is nevertheless instructive in understanding the meaning and the requirements of the subsection.

[51] Above n 1 at para 11.

[265] Dealing with the information that must be considered by the judicial officer before a warrant for search and seizure may be issued, we said:

> "Section 29(5) prescribes what information must be considered by the judicial officer before a warrant for search and seizure may be issued. It must appear to the judicial officer, from information on oath or affirmation, that there are reasonable grounds for believing that anything connected with the preparatory investigation is, or is suspected to be on such premises. That information must relate to (a) the nature of the preparatory investigation; (b) the suspicion that gave rise to the preparatory investigation; and (c) the need for a warrant in regard to the preparatory investigation. On the face of it, the judicial officer is required, among other things, to be satisfied that there are grounds for a preparatory investigation; in other words, that the Investigating Director is not acting arbitrarily. Further, the judicial officer must evaluate the suspicion that gave rise to the preparatory investigation as well as the need for a search for purposes of a preparatory investigation."[52]

And we added:

> "It is implicit in the section that the judicial officer will apply his or her mind to the question whether the suspicion which led to the preparatory investigation, and the need for the search and seizure to be sanctioned, are sufficient to justify the invasion of privacy that is to take place. On the basis of that information, the judicial officer has to make an independent evaluation and determine whether or not there are reasonable grounds to suspect that an object that might have a bearing on a preparatory investigation is on the targeted premises."[53]

[266] It is clear from these passages, and indeed from the provisions of the subsection, that one of the requirements for the issue of a warrant for search and seizure is a showing that there is a need for a warrant in regard to the investigation.[54]

[52] Id at para 36.

[53] Id at para 37.

[54] Id at para 36.

In other words, the Investigating Director must demonstrate, and the judicial officer must be satisfied, that it is necessary to obtain a warrant in order to conduct the investigation. As the last passage amply demonstrates, the judicial officer must "apply his or her mind to the question whether . . . the need for the search and seizure to be sanctioned, [is] sufficient to justify the invasion of privacy that is to take place."[55]

[267] Neither of the parties contended otherwise. On the contrary, they approached the matter on the footing that the state had to show a need for a warrant. This was indeed the approach of the courts below.[56] They were right in doing so. However, the parties and the courts below differed on the appropriate test for determining the need requirement.

Proper approach in determining need

[268] What must be considered in the first place is the proper approach in determining the meaning of the phrase "the need, in regard to the investigation, for a search and a seizure in terms of [section 29(5)]". It is by now axiomatic that the provisions of section 29(5) must be interpreted in a manner that promotes the spirit, purport and objects of the Bill of Rights.[57] This means that the provisions of section 29(5) must be construed in a manner that does not authorise unwarranted invasion of

[55] Id at para 37.

[56] *Zuma and Another v National Director of Public Prosecutions and Others* above n 6 at 484a-g of the SACR; All SA report at 104a-d and *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* above n 6 at 16.

[57] Section 39(2) of the Constitution. See also above n 1 at paras 21-6.

the rights to privacy and other rights of the person who is the subject of the investigation. This is consistent with the limitation clause of the Constitution which requires that a law of general application, which limits a right in the Bill of Rights, must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into consideration all relevant factors, including any less restrictive means to achieve the purpose of the statute.[58]

[269] In *Hyundai*, we emphasised that the NPA Act exhibits a concern for the constitutional rights of persons subjected to the search and seizure provisions.[59] As evidence of this concern we drew attention to the fact that subsections (4) and (5) require a search and seizure to be authorised by a judicial officer.[60] This concern is also apparent from the provisions of section 29(2) which require the execution of a search warrant to be conducted with strict regard to decency and order, including respect for the right to dignity, to personal freedom and security and to privacy of the person who is the subject of a search warrant. Persons carrying out searches and seizures are therefore obliged by the NPA Act to comply with the requirements of the Constitution. So too are the judicial officers who are required to issue search and seizure warrants. As we said in *Hyundai*, judicial officers who authorise the search warrants must do so with due regard to a person's right to dignity, to personal freedom and security, and to privacy.[61]

[58] Section 36(1) of the Constitution.

[59] Above n 1 at para 38.

[60] Id.

[61] Above n 1 at paras 38 and 40.

[270] When we concluded in *Hyundai* that the limitation of the right to privacy imposed by section 29(5) is reasonable and justifiable under 36(1) of the Constitution, we emphasised that section 29(5) provides sufficient safeguards against unwarranted invasion of the right to privacy.[62] In my judgement, the provisions of section 29(5)(c) must therefore be construed so as to prevent unwarranted invasion of constitutional rights of persons likely to be affected by the search and seizure warrants. In determining the meaning of the word "need" in section 29(5)(c), it must be borne in mind that the NPA Act contemplates that no one should be subjected to unwarranted searches and seizures.[63] It must be construed in a manner that does not permit greater invasion of constitutional rights than is required to achieve the objectives of the NPA Act.

[271] But at the same time the requirement of need must not be construed in such a way as to make the NPA Act unworkable. The importance of the search and seizure provisions cannot be gainsaid. This much appears from what we said in *Hyundai*:

> "It is a notorious fact that the rate of crime in South Africa is unacceptably high. There are frequent reports of violent crime and incessant disclosures of fraudulent activity. This has a seriously adverse effect not only on the security of citizens and the morale of the community but also on the country's economy. This ultimately affects the government's ability to address the pressing social welfare problems in South Africa. The need to fight crime is thus an important objective in our society, and the setting up of special investigating directorates should be seen in that light. The Legislature has sought to prioritise the investigation of certain serious offences detrimentally affecting our communities and has set up a specialised structure, the

[62] Above n 1 at para 55.

[63] Above n 2 at section 29(10).

> investigating directorate, to deal with them. For purposes of conducting its investigatory functions, the investigating directorates have been granted the powers of search and seizure."[64] (Footnote omitted.)

[272] In construing the need requirement we must therefore adopt a construction which, on the one hand, strikes a balance between the need to fight crime, and, on the other hand, the need to protect individuals against state officials who unnecessarily invade premises for purposes of searching and seizing property. As we held in *Hyundai*, we must strike a balance between the interests of the individual and of the state; this is a task that lies at the heart of the enquiry into the limitation of rights.[65]

[273] The starting point therefore is that a search and seizure warrant is often a drastic invasion of privacy of the individual subject to a search. The state must therefore justify its resort to the more drastic intrusion into the privacy of an individual in the light of the availability of the other less intrusive measures provided for in the NPA Act. And consistent with the statute's concern for constitutional rights, the judicial officer must be satisfied that the intrusion is justified in the sense that there are reasonable grounds for believing that there is a need to resort to a search and seizure warrant in order to obtain the information required for the purposes of the investigation. It is within this context that the test for determining need must be considered.

The test for the need requirement

[64] Above n 1 at para 53.

[65] Id at para 54.

[274] The Durban High Court considered the "need" requirement in section 29(5)(c) of the NPA Act and expressed the following view:

> "It is common to all of the reported authorities which I have read in relation to search and seizure operations that the Court has placed emphasis on the drastic nature of the remedy. It should not be sanctioned by judicial authorisation unless the judicial officer is satisfied that the investigating authority's resort to it is reasonable in all the circumstances. And it cannot be reasonable if there are other, less drastic means available to the investigating authority which may succeed. . . . The upshot of these considerations is that the affidavit evidence placed before the judicial officer in terms of s 29(5) must contain a persuasive explanation as to why the provisions of s 29 have to be invoked for the purpose of obtaining the evidence concerned."[66]

[275] The considerations that appear to have influenced Hurt J in formulating the above test include the fact that the search and seizure procedure involves some drastic incursions into the rights in the Bill of Rights, in particular those contained in sections 10, 14, 25, 34 and 35 of the Constitution. In view of the drastic incursions into these rights, he held that "the person requesting a warrant must satisfy the judicial officer that there is no reasonable prospect of obtaining the evidence by less disruptive and incursive means."[67] In the light of this, he reasoned that the judicial officer must be satisfied by evidence under oath that the powers under section 28 would probably not result in the evidence being obtained.[68]

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[66] *Zuma and Another v National Director of Public Prosecutions and Others* above n 6 at 484d-f of the SACR; All SA report at 104a-c.

[67] Id at 484b-c of the SACR; All SA report at 103h-i.

[68] Id at 484c of the SACR; All SA report at 103i-j.

[276] The test postulated by Hurt J requires that the search and seizure procedure be resorted to where it is "reasonable in all the circumstances" to do so. He held that where there were other less drastic means available which may succeed, resort to a search and seizure procedure cannot be said to be reasonable.[69] The test enunciated by Hurt J was largely adopted by Du Plessis J, in the Pretoria High Court, in the *Thint* case.[70] In this regard, the court said:

> "It is axiomatic that a search and seizure warrant seriously invades different important rights of the person or entity whose premises are to be searched in terms thereof. For that reason, as was pointed out in the Zuma and Hulley judgment a judicial officer should only authorise search and seizure if 'resort to it is reasonable in all the circumstances'. To determine whether search and seizure is reasonable in all the circumstances the rights of the person or entity, including those to privacy, freedom and dignity must be weighed against society's need to combat crime. The likelihood that the information sought can be obtained by less invasive means must be taken into account."[71] (Emphasis removed.)

[277] The state accepted the correctness of the test based on "reasonable in all the circumstances." However, it took issue with the view expressed by Hurt J that where there are less disruptive and incursive means which might succeed, resort to the search and seizure procedure cannot be reasonable. It submitted that this pitches the test much higher and would make section 29 unworkable. In support of its contention, the state submitted that it can never prove that there is no reasonable prospect of getting the evidence from a suspect by asking him or her for it or by issuing a subpoena against him or her to produce documents. What it could at most show is that there is a

[69] Id at 484d-e of the SACR; All SA report at 104a-b.

[70] *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* above n 6.

[71] Id at 16.

real risk that the suspect might destroy the evidence or dispose of it if it were to follow any of the lesser intrusive routes, so the argument went. The showing of such a risk, said the state, is sufficient to demonstrate that it is reasonable to follow the search and seizure route rather than risk losing the evidence.

[278] The majority of the Supreme Court of Appeal also criticised the test formulated by the Durban High Court.[72] It was said that the High Court set the bar too high in requiring a showing that the material could not be obtained by invoking the provisions of section 28. The Supreme Court of Appeal expressed the view that it could not "see how an investigator could ever show that other than by first asking for the material to be produced and having the request refused."[73] If this is the requirement, the court said, this would altogether undermine the investigation. The court further took the view that how an investigation is conducted falls within the prerogative of the investigator.

[279] I think there is much to be said for the test postulated by the High Court. Requiring the state to show that its resort to the search and seizure procedure is reasonable in all the circumstances is not to pitch the test too high. Nor is requiring the state to show that the less drastic measures available to it are not likely to succeed, nor is it to require the state to do the impossible. As Hurt J pointed out, what is required of the state is to place evidence before the judicial officer containing a

[72] *National Director of Public Prosecutions v Zuma* [2007] SCA 137 (RSA), 8 November 2007, unreported at para 103.

[73] Id at para 104.

persuasive explanation as to why the search and seizure provisions have been invoked. This is not too much to expect of the state in the light of the existence of a less drastic alternative.

[280] The test formulated by Hurt J permits the balancing of the right to privacy against the need to make the investigative scheme of the NPA Act workable. Thus, if following the section 28 summons procedure would involve the risk of frustrating the investigation, resorting to the search and seizure would be reasonable. On the other hand, if resorting to a section 28 summons procedure does not involve such a risk, resorting to the search and seizure would not be reasonable. If there is no other reasonable alternative to a search and seizure procedure, provided other requirements are met, resorting to a search and seizure procedure would be reasonable in justifying the invasion of privacy involved. In statutory terms, there will be a need for a search and seizure.

[281] The concept of need, to my mind, implies a consideration of other mechanisms for getting information or documents. That this must be so is apparent from the provisions of the NPA Act which provide for alternative mechanisms for obtaining information. In the first place, the state may resort to the informal method of obtaining documents and records by requesting the person who is in possession of the documents voluntarily to surrender these documents or permit the state to make copies of the documents. This informal method is implicit in section 29(10)(a)(i) which

permits the state to search for, seize and remove documents or objects with the consent of the person in charge of the premises.

[282] In the second place, there is the section 28 summons. Under this mechanism, the state has far-reaching powers to subpoena and interrogate persons believed to have information or documents or records on the subject of the investigation. The provisions of section 28 equip the investigating authority with far-reaching powers not only to conduct an investigation but also to obtain documents, records or objects in possession of a person relating to the subject of the investigation. To make these powers effective they are buttressed by criminal sanctions and penalties. Accordingly, a person who fails to produce a document or book or object in his or her possession runs the risk of a fine or imprisonment for up to 15 years. The provisions of section 28(6) are therefore in themselves drastic. The provisions of section 29(5) are even more drastic.

[283] The statement by Hurt J draws its essence both from the provisions of the Constitution and the NPA Act. As I have said before, the NPA Act expresses concern for constitutional rights. It does this out of recognition that South Africa is a constitutional state; a state founded on the respect for human dignity and dedicated to the pursuit of the achievement of human rights and freedom for all. Yet it is a state which recognises that at times there may be a need to limit those rights. But when the limitation does occur, it must occur in accordance with the bounds prescribed by the Constitution. Section 36(1) of the Constitution requires a limitation of constitutional

rights to be reasonable and justifiable in an open and democratic society dedicated to the pursuit of human dignity, equality and freedom.

[284] Consistent with this constitutional standard for determining the boundaries of limitation, we have held that the process of determining the constitutionality of any limitation involves a balancing process.[74] Factors that are relevant to this balancing process include a consideration of the availability of less intrusive means. The Constitution therefore prescribes reasonableness and justification as a standard for determining the constitutionality of a limitation of constitutional rights, and requires the consideration of less intrusive means.

[285] Therefore, a test which postulates reasonableness and justification as requirements before resort to a more drastic and invasive procedure finds support in the Constitution. Resort to the more drastic procedure must be reasonable and, to be reasonable, it must be justified in the light of the existence of other less drastic mechanisms. The requirement of justification obliges the state to justify its conduct, in particular where it invades constitutional rights. Indeed it is fundamental to a constitutional state that state conduct must be justifiable. This is the more so when the state conduct constitutes an invasion of constitutional rights. The requirement that a search and seizure under section 29(5) may only occur if sanctioned by a judicial officer is consistent with the requirement of justification. Were it to be otherwise, the very foundation of our democracy would be undermined.

[74] *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 66.

[286] The test formulated by the High Court also has support in the provisions of the NPA Act. What the legislature contemplated is that, consistent with the concern for the constitutional rights of persons under investigation: (a) the state will ordinarily resort to the informal method of requesting a person to surrender documents or the less drastic procedure contained in section 28(6) unless these methods are unlikely to succeed; and (b) when the state resorts to the more drastic procedure in section 29(5), consistently with the constitutional principles of openness and accountability, the state will justify its conduct by tendering credible evidence under oath as to why, in the specific case, resort to the provisions of section 29(5) is reasonable and justifiable. This approach to the construction of the provisions of sections 28 and 29 is consistent with the constitutional principle of interpretation which enjoins us to construe statutes in a manner that results in less interference with constitutional rights, a principle implicit, if not explicit, in the provisions of sections 36(1) and 39(2) of the Constitution.

[287] There is support for this approach to search and seizure warrants in the New Zealand jurisprudence and I consider it particularly instructive to consider that jurisprudence. The New Zealand case to which our attention was drawn is *Tranz Rail*.[75] That case involved a search warrant under section 98A(2) of the Commerce Act 5 of 1986. That section, like section 29(5) of the NPA Act, authorises specified judicial officers to issue search warrants if they are satisfied that there are reasonable

[75] *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA) (*Tranz Rail*).

grounds to believe that it is necessary to do so for the purposes of ascertaining whether or not a person has engaged in or is engaging in conduct which constitutes or may constitute a contravention of the Commerce Act.[76]

[288] In addition, and like the NPA Act, section 98 of the Commerce Act makes provision for an alternative mechanism for obtaining information and documents relevant to the investigation. That section empowers the Commission, which is the body that investigates contraventions of the Commerce Act, where it considers it necessary or desirable for the purposes of carrying out its functions and powers, to give notice to any person, requiring that person to furnish it with any information that is specified in the notice or to furnish any document that is specified in the notice, or to appear before it to give evidence, either orally or in writing, and to produce "any document or class of document."[77]

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[76] Section 98A(2) states:

> "A District Court Judge, or Justice, or a Court Registrar (not being a constable) who is satisfied on application made on oath by a person who is authorised under subsection (1) of this section that there are reasonable grounds to believe that it is necessary for the purpose of ascertaining whether or not a person has engaged in or is engaging in conduct that constitutes or may constitute a contravention of this Act, not being a contravention of section 99A of this Act, for an employee of the Commission to search any place may, by warrant, authorise that employee to search a place specified in the warrant."

[77] Section 98 of the Commerce Act states:

> "Where the Commission considers it necessary or desirable for the purposes of carrying out its functions and exercising its powers under this Act, the Commission may, by notice in writing served on any person, require that person—
>
> (a) To furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a director or competent servant or agent of the body corporate, within the time and in the manner specified in the notice, any information or class of information specified in the notice; or
>
> (b) To produce to the Commission, or to a person specified in the notice acting on its behalf in accordance with the notice, any document or class of documents specified in the notice; or
>
> (c) To appear before the Commission at a time and place specified in the notice to give evidence, either orally or in writing, and produce any document or class of documents specified in the notice."

[289] And finally, like sections 28(6), 28(10) and 41(2) of the NPA Act, refusal or failure, without reasonable excuse, to comply with the notice under section 98 or furnish or produce a document is an offence.[78] Giving evidence "knowing it to be false or misleading is an offence."[79] Similarly, refusal or failure, without reasonable excuse, to appear before the Commission, is an offence. So too is a refusal to answer any question or produce any book or document that a person is required to produce. These offences carry a penalty of a fine not exceeding NZ$ 10 000 in the case of an individual or NZ$ 30 000 in the case of a corporation.[80]

[290] Instead of using this section, the Commission sought and obtained interviews with the personnel of Tranz Rail on a voluntary basis. Tranz Rail "adopted an entirely cooperative attitude."[81] A number of interviews were conducted on different dates. Then, without notice, officers of the Commission came to the premises of Tranz Rail to execute the search warrant. The warrant was challenged on three grounds, namely, lack of evidence that the warrant was necessary in terms of section 98A(2), material non-disclosure, and the unjustified breadth of the warrant.[82]

[291] The Court of Appeal held that the concept of necessity in section 98A(2) "must imply some consideration of what other investigative tools such as s 98 notice, are

[78] Section 103(1)(a) and (b) of the Commerce Act.

[79] Id.

[80] Id at section 103(4).

[81] Above n 75 at para 6.

[82] Id at para 3.

reasonably available before a warrant is issued."[83] The Court emphasised that in determining the meaning of the word "necessary", the provisions of the Bill of Rights which protect everyone from unreasonable search and seizure must be borne in mind. But at the same time the Court warned that the word "necessary" must not be construed in a manner that renders the legislation unworkable.[84] In the course of developing the appropriate test for determining whether it was necessary to resort to a search warrant, the Court identified "four linked but separately recognisable considerations" that are relevant to the question of whether a warrant is necessary.[85] These are:

> "First, there must be evidence giving rise to at least a reasonable suspicion that a contravention of the Act is taking or has taken place. Secondly, access to the documents or other materials the subject of the proposed search, must be reasonably required for the purpose of the Commission's investigation. In this respect the compass of the warrant . . . must be no greater than is reasonably required. Thirdly, the proposed search warrant must have a realistic prospect of bearing fruit as regards its proposed subject-matter and location. Fourthly, and this will often be the most problematic factor, there must be no other reasonable way of gaining access to the subject-matter of the search."[86]

[292] Against this background, the Court formulated the test as follows:

> "That brings us to the fourth question. It is here that the parties primarily joined issue, albeit they did not define the elements of necessity as we have done. The question is whether the Commission established, on all the material facts, that there was no other reasonable way of gaining access to the subject-matter of the proposed

[83] Id at para 27. Section 98 of the Commerce Act.

[84] Id at para 28.

[85] Id at para 29.

[86] Id.

> search. That question in this case really comes down, as Judge Thompson indicated, to whether it was reasonable for the Commission to have used the s 98 procedure first. Was a search warrant necessary when these other investigating methods had not been used?"[87]

[293] The test postulated in *Tranz Rail* therefore is whether, having regard to all the material facts, it was reasonable for the Commission to have used the search warrants first when other less invasive methods had not been used. It is plain from the judgment that this test was informed by the considerations of the right of privacy contained in section 21 of the New Zealand Bill of Rights and the need to recognise Bill of Rights considerations in construing and applying legislation.[88] The Court pointed out that "[i]f there is a reasonable alternative to a search warrant, a search by warrant can be seen as an unreasonable search, and thus an inappropriate invasion of the privacy expectations which s 21 engenders."[89] And the court held that if there is no other reasonable alternative to a search warrant, the search "will be a reasonable one justifying the invasion of privacy involved."[90] Such a search will then be necessary within the meaning of the statute.[91]

[294] In my judgement, given the more drastic nature of the provisions of section 29(5), the statement by Hurt J that it cannot be reasonable to resort to the provisions of section 29(5) if there are other less drastic means available to the investigating

[87] Id at para 32.

[88] Id at paras 28 and 30.

[89] Id at para 30.

[90] Id.

[91] Id.

authority which may succeed cannot be faulted. I consider this to be the correct statement of the law. What must be stressed here, which is implicit, if not explicit, in the statement, is that the emphasis is on the existence of less drastic means "which may succeed". There should therefore be evidence under oath to satisfy the judicial officer that the powers under section 28 would probably not result in the evidence being obtained. This serves to protect persons who are the subject of investigation from unwarranted drastic invasion of their right to privacy.

[295] To sum up therefore, the judicial officer must be satisfied that the drastic intrusion into the right to privacy of the individual subject to a search is justified in the sense that resort to the search and seizure procedure is reasonable in all the circumstances. The question therefore is whether, having regard to all the material facts, the state established that it was reasonable for it to resort to the search and seizure procedure. Since the judicial officer only has the information presented by the state to decide whether it is reasonable to resort to a search and seizure warrant, the state must place all the facts relevant to this task before the judicial officer. This brings me to the duty of disclosure which is relevant to a consideration of the need for a search warrant.

The duty of disclosure

[296] It is by now axiomatic that in an ex parte application, the applicant is required to observe the *uberrima fides* (utmost good faith) rule. This rule requires that all

material facts which might influence a court in coming to a decision must be disclosed. This rule is stated in the following terms by Herbstein and Van Winsen:

> "Although, on the one hand, the petitioner is entitled to embody in his petition only sufficient allegations to establish his right, he must, on the other, make full disclosure of all material facts which might affect the granting or otherwise of an ex parte order. The utmost good faith must be observed by litigants making ex parte applications in placing material facts before the court; so much so that if an order has been made upon an ex parte application and it appears that material facts have been kept back, whether wilfully and mala fide or negligently, which might have influenced the decision of the court whether to make an order or not, the court has a discretion to set the order aside with costs on the ground of non-disclosure. It should, however, be noticed that the court has a discretion and is not compelled, even if the non-disclosure was material, to dismiss the application or to set aside the proceedings."[92] (Footnote omitted.)

[297] In view of the ex parte nature of an application for a search and seizure warrant, the state has a duty to disclose all the material facts, not only those in favour of the issuing of the warrant but also those that are against the issuing of a warrant. The duty of utmost good faith must be observed.[93] All facts which may reasonably be regarded as relevant to the task of the issuing by the judicial officer must be disclosed.[94] The duty of full disclosure goes to the need for a search warrant. Withholding of information that is relevant to the need requirement, whether deliberately or otherwise, may result in the issuing of a warrant in circumstances where it should not

[92] Van Winsen & Thomas *The Civil Practice of the Superior Courts in South Africa* (2ed) (Juta, Johannesburg 1973) at 94. See also *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348F-H; *MV Rizcun Trader(4) MV Rizcun Trader v Manley Appledore Shipping Ltd* 2000 (3) SA 776 at 794D-E; *Reilly v Benigno* 1982 (4) SA 365 (CPD) at 370D-E; *Rosenberg v Mbanga (Azaminle Liquor (Pty) Ltd Intervening)* 1992 (4) SA 331 (E) at 336H-J; *Cometal-Mometal v Corlana Enterprises* 1981 (2) SA 412 (W) at 414C-D; *Godlonton NO v Ryan Scholtz & Co (Pty)* Ltd 1978 (4) SA 84 (E) at 87A-E; *Tranz Rail* above n 75 at paras 27-31.

[93] *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA); [2002] 2 All SA 247 (SCA) at para 21 and *Tranz Rail* above n 75 at para 22.

[94] *A Firm of Solicitors v District Court at Auckland* 1 NZLR [2006] 586 CA at paras 41-6.

have been issued. For example, the fact that the person under investigation had volunteered to hand over documents relating to the investigation is a relevant and material fact.[95]

[298] Our courts have extended the application of the disclosure rule to applications for restraint orders under the provisions of the Prevention of Organised Crime Act 121 of 1998 (POCA) and to search and seizure warrants under the NPA Act. Thus in *National Director of Public Prosecutions v Basson*, the Supreme Court of Appeal applied this rule in the context of an application for a restraint order under the provisions of section 26(1) read with section 25(1) of POCA. In that case, the court had to consider whether a punitive costs order should have been made by the trial court. In determining this question, the court held:

> "Where an order is sought ex parte it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or mala fide".[96]

[299] A similar view was expressed in *Powell*[97] in the context of search and seizure under the NPA Act under section 29(5). In this case, the Supreme Court of Appeal had to consider, among other thing, a challenge to the validity of a search and seizure

[95] Above n 93 at para 21.

[96] Id at para 21.

[97] Above n 7.

warrant based on a failure to disclose material facts.[98] In the course of dealing with this challenge, the court held:

> "In invoking a procedure without notice to the party sought to be subjected to it, Ferreira engaged the processes of justice in an inevitably one-sided process. She was consequently under a duty to be ultra-scrupulous in disclosing any material facts that might influence the Court in coming to its decision."[99]

[300] Courts in other jurisdictions, notably New Zealand, have adopted a similar approach to search warrants. Thus in *Tranz Rail*, the Court of Appeal said:

> "An application for a search warrant in whatever context is almost always made on an ex parte basis – that is, without notice to the party whose premises are to be the subject of the proposed search. For this reason the judicial officer to whom the application is made is entitled to expect that the applicant will make full and candid disclosure of all facts and circumstances relevant to the question whether the warrant should be issued. A failure to make such disclosure runs the risk that any warrant obtained will be held to be invalid."[100]

And in *R v McColl*,[101] the duty of disclosure was described as follows:

> "It follows in our view that the applicant should lay before the judicial officer all facts which could reasonably be regarded as relevant to the judicial officer's task. An applicant should not present the judicial officer with a selective or edited version of the facts. There is an obligation on the applicant to be candid and to present the full picture to the judicial officer, not just the conclusion which the judicial officer is asked to draw, supported by so much of the factual background as the applicant chooses to disclose. It is for the judicial officer, on an assessment of all the relevant

[98] Above n 7 at paras 32 and 41.

[99] Id at para 42.

[100] Above n 75 at para 21 and above n 94 at paras 41-6.

[101] *R v McColl* (1999) 17 CRNZ 136 (CA).

> facts fairly presented, to decide whether the necessary conclusions can be drawn, and thus whether a warrant should issue."[102]

[301] There is no reason in principle why the views expressed in these cases should not be adopted. What these cases emphasise is the need for an applicant for an ex parte order to set out fully the facts known to him or her which might influence the court in coming to its decision. This includes facts tat are against the issuing of the search and seizure warrant. It is clear from the *Tranz Rail* decision that an applicant for a warrant is obliged to set out all facts known to him or her that might be relied upon by the target of the warrant if that person had the opportunity to oppose the application for a warrant.[103]

[302] Thus, where the target of a warrant had previously been subjected to questioning, it is necessary to set out the details of the interrogation, so as to indicate whether there was any co-operation from the person.[104] Merely recording that the individual denied the allegations is likely to give the impression that there was a bare denial of the allegations.[105] If there were documents or records that were handed in during the questioning, these must be specified, as well as the circumstances under which they were handed in. Similarly, if an offer of further assistance has been made, it should be mentioned. So too the fact that the individual had volunteered documents that relate to the investigation. All this is necessary to enable the judicial officer

[102] Id at para 20.

[103] Above n 75 at para 22.

[104] Id at para 23.

[105] Id.

properly to perform his or her function under the NPA Act. What must be disclosed are material facts that might influence the judicial officer in coming to a decision whether to issue a warrant.

[303] The significance of disclosure of all material facts cannot be gainsaid. The judicial officer must be satisfied that there is a need for the state to resort to the search and seizure procedure as opposed to other less drastic mechanisms for obtaining information and other documentation that the state requires in relation to the investigation. The disclosure of evidence of prior co-operation in the investigation is a relevant and material consideration. The suppression of this evidence, whether wilfully or otherwise, may mislead the judicial officer into believing that the person under investigation is not likely to co-operate if the state were to resort to a section 28 summons. This may result in the issuing of a search and seizure warrant which, if all the material facts had been disclosed, would not have been issued. And this would result in an unwarranted drastic invasion of the privacy of the person under investigation. It is for this reason that the suppression or withholding of material and relevant facts, by itself, entitles a court to set aside a search and seizure warrant.[106]

[304] With these legal principles in mind, I now turn to consider the applicants' challenges to the validity of the search and seizure warrants based on non-disclosure and the need requirement.

[106] Above n 93 at para 21.

Was there non-disclosure in respect of Thint?

[305] Thint contended that Mr Du Plooy was guilty of material non-disclosure in that he failed to disclose fully to the authorising judge the extent of its previous co-operation in regard to the investigation. In essence, Thint's complaint with regard to non-disclosure relates to failure by Mr Du Plooy to disclose to the judge: first, that a number of documents had been obtained from Thint prior to June 2001 by way of a section 28 summons and through voluntary co-operation of Thint through its attorneys; second, the full extent of Thint's previous co-operation in relation to the section 28 investigation, which included it making available to the DSO during 2001 its computer information and computer materials; and third, that Mr Thétard had relocated to Mauritius and had been succeeded by Mr Moynot who had been more willing to co-operate during the investigation than Mr Thétard, according to the state's version.

[306] The majority dismisses as without merit the non-disclosure complaint by Thint. In dismissing the first two complaints, the majority hold that they are "not persuaded that Mr Du Plooy erred materially by failing to provide more detail on these earlier investigations and Thint's previous co-operation."[107] And in dismissing the third complaint, the majority holds that it seems unlikely that more details on Mr Thétard's relocation would have affected Ngoepe JP's decision to issue the warrants. I do not understand the majority to hold that the matters that form the subject of the non-disclosure complaint by Thint were disclosed by Mr Du Plooy. The majority hold the

[107] Above at para 104.

view that these matters are not material to the task of deciding whether to issue a warrant. I am unable to agree with that view. It is necessary to consider, in detail, what Mr Du Plooy disclosed and what he did not disclose in relation to Thint's previous co-operation in the investigation.

[307] All that Mr Du Plooy disclosed concerning Thint was that, during October 2001, a search and seizure operation was conducted at various premises in France and Mauritius relating to the Thomson/Thales Group and its offices, and that "documentation was obtained from the Thomson corporate premises in Midrand before the searches in 2001 by summons and with the co-operation of Thomson through its attorneys." The question is whether the two sentences in the affidavit of Mr Du Plooy, in which he mentions search and seizure operations at the premises of Thint and states that documentation was obtained from Thomson through the summons and with the co-operation of Thomson through its attorneys, satisfy the requirement of full and candid disclosure as required by the law.

[308] In opposing the High Court application, Mr Du Plooy did not dispute the details of Thint's previous co-operation in relation to the section 28 summons, but contended that he was not obliged to give these details in applying for a search and seizure warrant. The factual averments by Mr Moynot and other deponents on behalf of Thint are not denied by Mr McCarthy, who deposed to an affidavit dealing with these matters. The question is whether, in the light of all the facts that have now come to light, did Mr Du Plooy, to borrow the phrase used by the Supreme Court of Appeal in

Powell, comply with the "duty to be scrupulous in disclosing any material facts that might influence the court in coming to its decision."[108] What must be borne in mind in answering this question is that the state's case is that it resorted to the search and seizure warrant because the section 28 summons and any other less intrusive mechanism of obtaining information would have been ineffective against Thint. Thint's previous co-operation in relation to the section 28 summons is therefore highly relevant.

[309] The significance of full disclosure of the extent of prior co-operation is material to the assessment of the efficacy of the section 28 summons and thus the determination of the need for a search and seizure warrant cannot be gainsaid. A section 28 summons provides the state with the opportunity to call upon the person under investigation to produce specific records, books and documents. The fact that a person under investigation was requested to produce specific documents, records or books under a section 28 summons, and that the person in fact produced the documents required, is a relevant consideration. This tends to refute the suggestion that a section 28 summons is likely to warn the person under investigation and thus lead to the destruction or concealment of documents, records or books. It is therefore necessary to consider in some detail the facts that are relevant to Thint's previous co-operation which were not disclosed in the application for the search warrant.

[108] Above n 7 at para 42.

[310] It is apparent from the affidavit of Mr Driman, Thint's attorney at the time, that the section 28 summons called upon Thint to produce books, documents and objects which were specified in the summons. He says the following in this regard:

> "At the initial stages of my instructions, a summons in terms of Section [28] of the National Prosecuting Authority Act was served on ADS calling upon it to produce books, documents or objects mentioned in the summons to the Investigating Director. I was instructed by the Second Applicant to make arrangements with the DSO to offer its full co-operation and expedite the orderly surrender of all the books, documents and objects mentioned in the summons. To this end, I made arrangements with Dawes to meet at the ADS premises in Midrand at an appointed time on Wednesday, 23 May 2001, to expedite the delivery of all that had been required in terms of the summons. Although the books, documents and objects mentioned in the summons covered a very extensive range and were extremely broad, my instructions were to tender everything which the investigators considered was covered by the summons subject to sufficient safeguards being implemented to preserve the confidentiality relating to the business affairs and transactions of ADS which by its very nature were highly secretive and private.
>
> . . . .
>
> I discussed with Dawes the question of persons whom the investigators wished to interview but he informed me that the investigators would first review the documents which they required by way of summons before a decision was made as to who should be interviewed. We discussed arrangements that would be made should persons be required for interviews. As agreed, arrangements were made for persons who were later interviewed pursuant to summons being served on them in terms of Section 28 of the NPA Act. Amongst the persons interviewed were the Second Applicant, Mr Alain Thetard and Mr Christiaan Louis Pelser who had been employed as administrator by the First Applicant.
>
> During the discussions, I informed Dawes that the time permitted for the production of the documents was not sufficient because of their extensive nature.

> On 23 May 2001, Dawes and other investigators perused the documents stored at the offices of ADS and removed whatever files, books, documents or objects which they considered to have been covered by the summons. No restrictions whatsoever were placed on the investigators who searched the premises and removed the material. Other documents that had been requested by the investigators and which were not located at ADS in Midrand were kept at its operations premises at Mount Edgecombe in KwaZulu-Natal."

[311] Mr Driman describes the extent of the co-operation in general. As is apparent from the affidavit of Mr Driman, some of the documents that the investigators required were not in Midrand but were in Mount Edgecombe. The investigators were therefore allowed to conduct a search at the offices in Mount Edgecombe. The extent of the co-operation at the Mount Edgecombe premises is described by Ms Fryer, the TNA Contract Manager for African Defence Systems (Pty) Ltd (ADS) in Mount Edgecombe. The investigators were granted absolute access to the premises and were allowed to peruse all the documents and files and copy whatever they chose. The investigators searched and seized files, books and a number of items. It took the entire week to seize and copy the documents, which were later removed from the premises by a trailer. These allegations are not denied either.

[312] The extent of co-operation by Thint in the prior section 28 summons proceedings is also apparent from the affidavit of Mr Moynot. He says the investigating authority was given untrammelled access to all records and documents it wished to see. A large amount of documentation and computer information was obtained from Thint by way of a section 28 summons and Thint's co-operation through its attorneys. This included some 30 lever arch files, computer disks, hard

drives, computers and a laptop that were surrendered to the investigating authority. Mirror images were made of the contents of the computers by officers of the investigating authority with the co-operation of the employees of Thint, most notably the co-operation of Mr Thétard. What is significant is that all this information was made available voluntarily, pursuant to the section 28 summons. Furthermore, Mr Sooklal, Thint's attorney, had offered further co-operation in any future investigation on behalf of Thint.

[313] There is no suggestion on the part of the state that the books, documents and objects which were mentioned in the summons served upon Thint were not made available to them. Indeed, if this had been the case, one would have expected the state to have said so in order to demonstrate the inefficacy of a section 28 summons. It must therefore be accepted that Thint, as Mr Driman states in his affidavit, tendered "everything which the investigators considered was covered by the summons". This conduct on the part of Thint, viewed against the absence of any suggestion that documents mentioned in the summons were not made available to the state, refutes any suggestion that a section 28 summons would have been ineffective against Thint. Or for that matter that any other less intrusive mechanism would not have worked.

[314] What must be stressed is the point already made: the state has an obligation to be candid and to present the full picture to the judicial officer who is considering the issuing of the warrant. In an application for a search warrant the judicial officer should not be presented with a selective or edited version of the facts. Nor should the

state present just the conclusion that the judicial officer is asked to draw supported only by the factual background that the state chooses to disclose. The state should be "ultra-scrupulous" in disclosing any material fact that might influence the judicial officer in coming to a decision whether to issue a search and seizure warrant.[109] It is for the judicial officer, on an assessment of all the relevant facts fairly presented, to decide whether the other less drastic measures might be ineffective and thus whether it is reasonable for the state to resort to a search and seizure warrant.[110]

[315] The picture that the information that was presented to the judge in the application for the search warrant painted was that Thint and its officials would not co-operate and were likely to hide or destroy documents and that the section 28 summons would be ineffective against Thint. This impression of Thint is strengthened by the terse reference to prior co-operation by Thint and the documentation that was obtained through the section 28 summons. This picture no doubt influenced the judge in his decision to issue the search warrant. Yet, when one has regard to the true facts, a different picture emerges. The picture which emerges is that Thint and its officials fully co-operated in the investigation to such an extent that the state remarked that "Mr Moynot has at all times offered the investigating teams his characteristically kind and affable cooperation."

[316] The investigators were granted absolute access to the files, books, documents, computers and other objects which they considered to have been covered by the

[109] Id.

[110] Above n 101 at para 20.

section 28 summons. The investigators were offered assistance by Thint's attorney and were offered co-operation in any further investigation. In no way was the judge made aware that there had been no refusal to supply any documentary material or computer material which was mentioned in the section 28 summons. This picture refutes the suggestion by Mr Du Plooy that the section 28 summons would have been ineffective in relation to Thint. Indeed, the judge was not aware that a large volume of items that were mentioned were made available to the investigators and they were allowed to remove these items over a period of five days, including the diaries for 1997, 1998 and 1999. In *National Director of Public Prosecutions v Basson*,[111] the Supreme Court of Appeal held that the fact that a person against whom a restraint order is sought had volunteered to place all affected property under the control of the state is clearly material. So too is the fact that the target of a search warrant had previously co-operated fully with the investigators.

[317] What is more, it is apparent from the affidavit of Mr Driman that certain officials of Thint, notably, Mr Moynot and Mr Thétard, were interrogated pursuant to the section 28 summons. Yet the judge was not told what questions were asked and what answers were given during the interrogation. Nor was the judge told of the information obtained through interrogation. The fact that these officials were interviewed does not appear in the affidavit of Mr Du Plooy in support of the application for warrants. Where the target of a search warrant has previously been summoned under section 28, it is necessary to set out fully the extent of previous co-

[111] Above n 93 at para 21.

operation, documents, records or other objects surrendered, as well as the circumstances under which the items were handed in. To my mind, so too is the fact that the individual had volunteered documents and had offered assistance in the future if needed.

[318] In the circumstances of this case, prior co-operation by Thint was highly relevant to the question whether the section 28 summons would have been ineffective against Thint as alleged by the state and ultimately whether it was therefore reasonable for the state to resort to the search and seizure warrant. The state was accordingly obliged by the principle of full disclosure to disclose the details of Thint's prior co-operation. Its failure to do so constituted a material error.

[319] So too did its failure to disclose the fact that Mr Thétard relocated to Mauritius during the second quarter of 2000 and that Mr Thétard had left Thint by the end of January 2002. Mr Moynot also complained about the failure to disclose the fact that Mr Thétard relocated to Mauritius during the second quarter of 2000. As appears from the affidavit of Ms Ferreira, this fact was known to the state. Ms Ferreira was the previous lead investigator of the DSO in respect of the relevant investigation and she also interrogated Mr Thétard. Although Ms Ferreira did not depose to an affidavit in these proceedings, during September 2001 she deposed to an affidavit in the application for a *commission rogatoire* and a search and seizure in Mauritius. This was some two months after the search at the offices of Thint pursuant to a section 28 summons and through the co-operation of Thint. Mr Moynot refers to an excerpt from

this affidavit in which Ms Ferreira stated, amongst other things, that "[i]n the second quarter of 2000, Thetard relocated to the Thales Africa office in Port Louis, Mauritius, although he retained his Thomson Holding and Thomson (Pty) Limited positions in South Africa." This excerpt is attached to the affidavit of Mr Moynot and he offered to make available the full affidavit of Ms Ferreira in court. The state did not take issue with the contents of this affidavit.

[320] Ms Ferreira, as the lead investigator in this matter at the relevant time and who was preparing for an application for search and seizure in Mauritius, would have known the whereabouts of Mr Thétard. In addition, in the excerpt attached, Ms Ferreira described in some detail the corporate structure of Thomson companies and referred to the senior executives of the companies. In particular, she focused on Mr Thétard, describing the position he held at the time, the places where he reported to and then stated that he relocated to Mauritius "in the second quarter of 2000". It is therefore inconceivable that she could have made a mistake about the relocation of Mr Thétard to Mauritius. No one disputed this allegation either. On the contrary, it also appears from the statement made by Mr Jugoo, the Detective Chief Inspector in Mauritius who conducted the search and seizure that Mr Thétard was already in his Mauritius office by 9 October 2001.

[321] It must therefore be accepted that Mr Thétard had in fact relocated to Mauritius by the time the section 28 summons was served on him. It is therefore probable that when he left for Mauritius, during the second quarter of 2000, he took with him his

diary for 2000 and left the diaries for the years 1997, 1998 and 1999 in his South African office. This is so because although Mr Thétard had relocated to Mauritius, he nevertheless "retained his Thomson Holding and Thomson (Pty) Limited positions in South Africa" and this explains why he retained his Midrand office where the other diaries were found. That explains why the diaries for the years 1997, 1998 and 1999 were "removed from the safe of the office of Alain Thetard", as annexure CLP1 of the affidavit of Mr Pelser indicates. What must be emphasised is that, prior to October 2001, no one specifically asked Mr Thétard to hand over to or produce his diary for 2000. The undisputed fact is that, when Mr Jugoo, who conducted the search and seizure in Mauritius three months later, asked Mr Thétard for his diary for 2000, Mr Thétard "without hesitation . . . removed [the diary] from the second drawer of his office table and handed it over to [Mr Jugoo]."

[322] Mr Downer describes how the search at Mr Thétard's office in Mauritius was conducted. Mr Jugoo and his team conducted the search while Mr Downer and the other members of his team waited outside. Periodically Mr Jugoo would come outside and hand documents to Mr Downer in order to ascertain if the document was relevant to the investigation. Apparently, Mr Jugoo did not know which documents were relevant to the investigation and that is why he had to ask Mr Downer about each document. During this process, Mr Downer asked Mr Jugoo if he had found Mr Thétard's diary for 2000 and he asked Mr Jugoo to specifically ask Mr Thétard for the diary. Mr Jugoo therefore returned to the office and asked Mr Thétard for his diary

for 2000 and Mr Thétard, without hesitation, retrieved the diary from the drawer of his desk and handed it over to Mr Jugoo.

[323] It seems inconceivable that Mr Thétard would have kept his diary for 2000 in his Mauritius office about three months after the search in his office in South Africa if he had intended to conceal or destroy it. If he intended to conceal it, he had ample time to do so. This conduct on the part of Mr Thétard is inconsistent with a person who intended to conceal or destroy the diary. The conclusion that Mr Thétard concealed his diary for 2000 and did not co-operate with the investigation is therefore not supported by the true facts. Regrettably, this picture of Mr Thétard did not emerge before the judge because the full facts were not presented.

[324] It is not without significance that the allegations relating to the diary for 2000, which Mr Du Plooy made in his opposing affidavit in the High Court, evoked a specific and direct response from Mr Moynot. In his response, Mr Moynot claims that Mr Thétard was interrogated by Ms Ferreira pursuant to the section 28 summons. He states under oath that he had gone through the record of the proceedings of the interrogation and that "[n]owhere in the record of proceedings is it ever indicated that Mr Thetard was asked for or expressed unwillingness to provide his diary for 2000." Mr Moynot offered the record of the proceedings and further stated that the state is in possession of this record. In effect, Mr Moynot's allegations called into question the statement made by Mr Du Plooy that Mr Thétard was unwilling to produce his diary for 2000 pursuant to the section 28 summons.

[325] In these circumstances, and in particular given the heavy reliance by Mr Du Plooy on the alleged concealment of the diary for 2000, it was incumbent upon Mr Du Plooy to respond specifically to the allegations made by Mr Moynot in reply. It is true that these allegations by Mr Moynot are contained in his replying affidavit and, in the normal course of events, could not be denied by Mr Du Plooy. However, if these allegations were untrue, or if there was an adequate explanation for the allegation by Mr Du Plooy in relation to the diary for 2000, leave of the High Court could have been sought to answer these allegations and would probably have been granted.[112] Mr Moynot's replying affidavit did not evoke any request from the state to be given an opportunity to deal with the allegations made by Mr Moynot; instead the case was argued on all the affidavits including the replying affidavit by Mr Moynot without demur by the state.

[326] In all the circumstances, the fact that Mr Thétard had relocated to Mauritius in the second quarter of 2000; the circumstances under which the other diaries were found by the investigators; the fact that prior to October 2001 Mr Thétard had never been specifically asked for his diary for 2000; the fact that when Mr Thétard was specifically asked for his diary for 2000, he handed it over without hesitation; and that Mr Thétard had left Thint by January 2002, were all matters that were relevant to the question of the likelihood of the co-operation of Thint with a further section 28

[112] *Marshall v Marshall (Pty) Ltd and Others* 1954 (3) SA 571 (N) at 576B-D; *Sigaba v Minister of Defence and Police and Another* 1980 (3) SA 535 (TSC) at 550F-G; *Bangtoo Bros and Others v National Transport Commission and Others* 1973 (4) SA 667 (N) at 680A-B.

summons. The disclosure of these matters would have provided a different picture to that of concealment suggested by the state.

[327] It is important here to bear in mind that the judicial officer is the only line of pre-emptive defence against unwarranted invasions of privacy and dignity of the person who is the subject of a proposed search. The NPA Act, as I have pointed out earlier, clearly exhibits a concern for the constitutional rights of persons subject to the search and seizure provisions.[113] This is why subsections 29(4) and (5) state that a search and seizure may only be carried out if sanctioned by a warrant issued by a judicial officer.[114] That is why the NPA Act made provision for obtaining information by means of mechanisms of varying degrees of intrusion. Thus, when a judicial officer considers an application for a search and seizure warrant, he or she is performing an important judicial process which is designed to strike the right balance between the interests of the state and those of the person who is the subject of the search warrant. That balance can only be struck if the judicial officer has all the facts and circumstances relevant to the question whether the warrant should be issued. This includes facts which are known to the state which might be relied on by the subject of the search if that person had the opportunity to oppose the application.[115] A failure to disclose facts that are material to the issuing of a search and seizure warrant entitles a court to declare the warrant invalid.[116]

[113] See above n 1 at para 38.

[114] Id.

[115] Above n 75 at para 22.

[116] Above n 93 at para 21.

[328] I am therefore unable to agree with the views expressed in the main judgment that the failure by Mr Du Plooy to disclose the matters set out above was not a material error. A failure to observe the duty to make full and candid disclosure should not be excused too readily on the basis of immateriality. To do so may well undermine the duty to put the judicial officer in possession of all the potentially relevant facts, so that it is the judicial officer who decides what is relevant rather than the investigating authority. No doubt there will be cases when it can be said that although relevant information has not been disclosed, the non-disclosure is immaterial. This is not such a case. The information which Mr Du Plooy did not disclose was clearly relevant to the efficacy of a section 28 summons and ultimately to the question whether, in all the circumstances, it was reasonable for the state to resort to the more drastic measure of a warrant instead of other less drastic measures.

[329] For all these reasons, I conclude that, in respect of Thint, there was a material non-disclosure and this non-disclosure is relevant to the question whether the need for a search and seizure warrant was established in relation to Thint. It is to that question that I now turn. In this regard, the question is whether, in all the circumstances relating to Thint, including the information that was not placed before the judge, it was reasonable for the state to resort to the search and seizure procedure.

Thint and the need for the search and seizure

[330] In dealing with the need for search and seizures in relation to Thint, Mr Du Plooy advanced both specific and general concerns regarding people who are under

investigation. The specific concerns raised by Mr Du Plooy relate to Mr Thétard. I deal later with the general concerns. The specific concerns relate to the conduct of Mr Thétard and they concern Mr Thétard's diary for 2000 and the so-called encrypted fax.

[331] Mr Du Plooy refers to the fact that Mr Thétard was unwilling to produce his diary for 2000 while he was willing to make available the diaries for other years. This statement is no more than a conclusion that Mr Du Plooy drew from the facts. And this conclusion created the impression that Mr Thétard concealed his diary for 2000 during the section 28 summons investigation and that the discovery of the diary was only as a result of search and seizure in Mauritius. This impression supports the fact that a further section 28 summons would not have been effective in these circumstances. Mr Du Plooy did not present to the judge the facts upon which his conclusion was based. However, a review of the true facts casts doubt on the conclusion reached by Mr Du Plooy.

[332] What is important to note in this regard is that the investigators were given the power to go into the offices of Thint and search for and seize any documents or objects which they considered relevant to the investigation. In the course of a search the investigators found and removed from the safe in Mr Thétard's office his diaries for 1997, 1998 and 1999. This is apparent from annexure CLP1 to the affidavit of Mr Pelser which indicated that these diaries were "removed from the safe in the office of Alain Thetard, room 1G6". Mr Thétard did not hand over these diaries to the investigators. These diaries were kept in the safe because they were no longer in use.

The diary for 2000 was not in the safe because when Mr Thétard relocated to Mauritius in the second quarter of 2000 he would have taken it with him, as Mr Moynot alleges. After 2000, he would have kept the diary in his Mauritius office. This would have explained why that diary was later found in Mauritius as the statement by Mr Jugoo indicates.

[333] What is important, however, is that at no stage was Mr Thétard specifically asked to produce his diary for 2000 save during the search and seizure in Mauritius in October 2001, which was some three to four months after the alleged concealment of the diary. And what is more telling is the undeniable fact that when Mr Thétard was specifically asked for his diary for 2000 in October 2001, he "without hesitation" produced the diary from the drawer of his desk. Mr Thétard must have known that the investigation was continuing and that he was the main focus of the investigation. His Midrand office had been searched a mere three months earlier. In these circumstances, it is highly unlikely that if Mr Thétard had intended to conceal the diary he would have retained the diary and kept it in his Mauritius office.

[334] In all the circumstances, it was incumbent upon Mr Du Plooy to give the full circumstances under which the diaries were found, including Mr Thétard's response when he was specifically asked for his diary for 2000. This information was highly relevant to the question whether Mr Thétard sought to conceal his diary for 2000 from the investigators. The disclosure of these facts would have shown that there was an explanation for the fact that the diary for 2000 was not found in South Africa during

July 2001 but was only handed over to the investigators about three months later in Mauritius. And this would have cast doubt on the suggestion that Mr Thétard sought to conceal the diary.

[335] In these circumstances, the state's reliance on the diary issue is misplaced because there is no credible evidence that Mr Thétard was ever asked for his diary for the year 2000 and refused to make it available. On the contrary, on the state's version, when Mr Thétard was asked for this diary, he, as Detective Chief Inspector Jugoo stated, "without hesitation removed [the diary] from the second drawer of his office table and handed it over to [Mr Jugoo]." If Mr Thétard had been previously asked for his diary and had concealed it, it seems highly unlikely that he would have kept this incriminating evidence at his office and in the drawer of his desk for that matter. This conduct on the part of Mr Thétard is inconsistent with the behaviour of a person who wanted to conceal or destroy the diary for 2000. In addition, the fact that the encrypted fax was not discovered during the section 28 summons search does not mean that it had been concealed. It may have been in Mauritius at the time, as Mr Thétard had relocated there.

[336] That said, what must be stressed however is that the specific concerns Mr Du Plooy raised pertained exclusively to Mr Thétard, who was an employee of Thint. They do not relate to Thint as an institution, or any other Thint representative. What is more, Mr Thétard had resigned as a director of Thint by 30 January 2002. He thereafter had no ties with Thint. Mr Moynot was the person who was then in charge.

He had an impeccable record of co-operation in the investigation as testified to by the letter from the state confirming the fact that "Mr Moynot has at all times offered the investigating team his characteristically kind and affable cooperation." The conduct of Thint, and Mr Moynot in particular, was not impeached. On the contrary, on the state's version, Mr Moynot always co-operated with the investigation.

[337] What is further significant is that Thint through its attorneys offered co-operation in any further investigation. During April 2004 and at the request of the state, Thint co-operated with the state in securing an affidavit from Mr Thétard confirming that he was the author of the encrypted fax. While it is true that this co-operation was linked to the withdrawal of the charges against Thint in relation to the trial of Mr Shaik, it was made clear to Thint that the withdrawal of charges against it did not mean indemnity from prosecution. These allegations, which are contained in the founding affidavit of Mr Moynot, were not disputed by the state.

[338] In these circumstances, it is therefore difficult to fathom why Thint should not be judged by the conduct of Mr Moynot. Or for that matter why Thint should not be judged by its own conduct of full prior co-operation. And as I have set out above, Thint had co-operated fully during the section 28 summons proceedings. In all the circumstances there was simply no basis for any belief that Thint would not co-operate in any further investigation. There is no suggestion in the papers either that Thint knew of the encrypted fax or of the diary of 2000, or that it concealed either item.

[339] On the basis of the information provided by Mr Du Plooy in support of the search and seizure warrant, and the impression given by that information, the judge who issued the warrant could well have inferred that Thint and its officials were less than co-operative in furnishing the documents and computer records pursuant to the section 28 summons. Indeed, he would have been left with the impression that Thint and its officials had concealed certain documents during the section 28 investigation and that they were therefore prone to continue to do so were the section 28 summons procedure to be resorted to again. Had that been the true position, the judge could have concluded that it was unreasonable to expect the investigating authority to use the section 28 procedure or indeed to take any other steps before obtaining the search warrant. But when the issue is viewed against the true facts, the position is by no means the same.

[340] As set out above, the justification for a search and seizure warrant is not immediately apparent. The section 28 summons procedure had been used successfully against Thint as evidenced by the extensive co-operation by Thint and its officials during the investigation at its two premises, one in Midrand and the other in Mount Edgecombe, and the documentation and other evidence surrendered pursuant to the section 28 summons. The investigators were given unlimited access to any document or object that they considered was relevant having regard to the items that were mentioned in the section 28 summons. In all the circumstances, in particular having regard to Thint's prior co-operation with the section 28 summons, the state has not

shown that it was reasonable for the investigating authority to resort to a search and seizure warrant.

Was there a need for a search and seizure in relation to Mr Zuma?

[341] There is no suggestion in the affidavit of Mr Du Plooy that Mr Zuma was summoned in terms of section 28 as the other individuals were. During the entire investigation spanning almost four years, Mr Du Plooy only mentions one incident relating to the questioning of Mr Zuma. All he says is that during the investigation, Mr Zuma agreed to provide written answers to written questions concerning the allegations of corruption against him in Parliament. In this regard, Mr Du Plooy says:

> "Questions concerning Zuma's involvement in the present matter were directed to him in Parliament on 14 February 2003. In his reply on 12 March 2003, he denied any wrongdoing. He denied attending a meeting with Thetard and Shaik in Durban on 11 March 2000. His reply makes no mention of any meeting with Thetard and Shaik in Durban on 10 March 2000, in accordance with Shaik's version, or on any date at all to discuss the request for a donation to the Jacob Zuma Education Trust."

[342] Mr Du Plooy goes on to record "the gravamen" of Mr Zuma's response to the facts on which the two charges of corruption are brought:

> "**Count 1**
> Zuma denied that he received any payments (as opposed to loans) from Shaik or the Nkobi companies over the period 1995 to 2002. He [conceded] that he is a party to a loan agreement with Schabir Shaik, under which he receives loans for personal expenses. His version in this regard, is thus a bare denial of any wrongdoing.
>
> **Count 3**

> Zuma contends that he did not meet Thetard and Shaik on 11 March 2000 as alleged in the fax. He denies that the contents of the fax are true. Zuma makes no mention of a meeting between himself, Shaik and Thetard the previous day during which a request for a donation to the Jacob Zuma Education Trust was discussed, in accordance with Shaik's testimony at his trial. Zuma concedes that he might have met representatives of the Thomson/Thales group in Paris and/or in South Africa during the period 1997 to date, but contends that only general matters relating to his official portfolios would have been discussed. It is obvious that the request for a donation to the JZET is not a matter relating to Zuma's official portfolios. Zuma thus in effect denies that he met Shaik and Thetard and discussed a donation to the JZET. This contradicts Shaik's testimony and serves to detract from the strength and reasonableness of Zuma's denial."

[343] It is not clear from this affidavit why the discrepancy between what Mr Shaik said in evidence in his trial and Mr Zuma's response should "detract from the strength and reasonableness of Zuma's denial" as Mr Du Plooy suggests in his affidavit. What is more, this answer was given by Mr Zuma during March 2003 and before the trial of Mr Shaik commenced. There is nothing in the affidavit to indicate that Mr Zuma was called upon to explain this discrepancy. Nor is it clear why Mr Du Plooy should prefer Mr Shaik's evidence on this aspect to that of Mr Zuma without giving Mr Zuma the opportunity to explain the discrepancy.

[344] In relation to other individuals who were investigated, such as Mr Reddy, Mr Kögl of Cay Nominees (Pty) Ltd and Ms Fakude-Nkuna of Bohlabela Wheels (Pty) Ltd, Mr Du Plooy records: the fact that they were summoned in terms of section 28 and questioned under that section; the information that was obtained from them; and why the information obtained from these individuals was either "not . . . calculated to facilitate any investigation into the source of funds" (in the case of Mr Kögl) or raised

"doubt as to the completeness and veracity of the information supplied" (in the case of Ms Fakude-Nkuna). In the case of Mr Reddy, while his attorney invited the state to address requests for further information to him, the explanation for not accepting this offer was that "there can be no guarantee of the completeness or veracity of information in documents provided pursuant to a section 28 summons." Why this is so is not apparent from the affidavit. These of course are conclusions drawn by Mr Du Plooy; there is no factual basis for these conclusions.

[345] Now, in the case of Mr Zuma, the judge was not told what the specific concerns were which justified a jump from an informal question and answer procedure to the more drastic measure of a search and seizure warrant. We know from the affidavit of Mr Du Plooy that Mr Zuma was questioned in Parliament in 2003. We are not given the details of the questions asked and the answers given. We are left with the impression that, in response to Count One of corruption, "[h]is version [was] a bare denial of any wrongdoing." In relation to Count Three, we are told that he denied certain things, admitted others and explained some. We are not told whether Mr Zuma was ever asked to produce any documents or records or, if that was the case, what his attitude was to this request.

[346] Where a person who has been questioned in the past is the subject of a search and seizure warrant, it is incumbent upon the state to provide a full background relating to the questions asked and the answers given to those questions.[117] The state

[117] Above n 75 at para 23.

should not give the judicial officer considering the warrant an edited version.[118] Such information is vital to demonstrate the extent of the co-operation during a prior encounter. And this in turn is relevant to the question whether there is a need to resort to the more drastic search and seizure warrant. As pointed out earlier, in an application for a search and seizure warrant, the state should be candid and present the full picture and present all the relevant facts fairly. This is necessary to enable the judicial officer to assess whether on all the material facts it is reasonable for the state to resort to a search and seizure warrant. The judicial officer must be able to assess the efficacy of other processes of securing the documents sought.

[347] Mr Du Plooy does not indicate that Mr Zuma refused to answer any of the questions directed to him. Indeed, he does not tell us that Mr Zuma refused to co-operate. In the light of this background, the justification for a search and seizure warrant as against a section 28 summons is not obvious. The investigating authority moved straight from co-operation to the most intrusive step available to it without giving any satisfactory explanation why the intermediate step of a section 28 summons would not be sufficient. During 2003, when questions were directed to Mr Zuma, he was already a suspect. At that point, the investigating authority presumably had no significant concerns about concealment or destruction. On that occasion, the investigating authority was content to receive information from Mr Zuma on an informal basis as an appropriate means of ascertaining whether there had been a commission of a specified offence. The need for a search warrant, as opposed to a

[118] Id.

summons under section 28, after what appears to have been a fairly informal approach to the investigation, is not self-evident, nor, as I have said, was it adequately explained.

[348] In the case of Mr Zuma and Mr Hulley, the High Court questioned the need for an investigation in terms of section 28(1). The court's concern arose from the fact that, according to Mr Du Plooy, the state had "credible evidence" on the charges of corruption against both Mr Zuma and Thint. If this is true, then there would have been no need for any further investigation. However, Mr Du Plooy advanced further reasons for continuing the investigation in terms of section 28(1). He stated that the continuation of an investigation during a criminal trial is a common feature of criminal proceedings in complex commercial matters. He went on to state that certain aspects may emerge from the accused's defence which may require investigation. Of course, this did not arise in this particular case because the trial had not started, so that there was nothing which had emerged which required any investigation.

[349] Mr Du Plooy of course alluded to the difficulty which the state encounters in relation to equipping itself to deal with defences which the accused may raise during the course of the trial. But, as the High Court correctly observed, that problem exists in every prosecution. I agree with the High Court that "[i]t is inconceivable that the prosecuting authority could justifiably invoke the search and seizure provisions against an accused for the avowed purpose of finding out what defences he will raise

during his trial."[119] This is not, in my view, the purpose of the provisions of section 28. Nor can this be the purpose of section 29(5). Were it to be otherwise, this would indeed have serious consequences for an accused person's right to a fair trial.

[350] I agree with the High Court that if the state has a prima facie case to establish that benefits were received in relation to fraudulent non-disclosure of benefits and income, there can surely be no difficulty in establishing the absence of any declaration to Parliament or to the Receiver of Revenue of those benefits. Indeed, it is difficult to conceive of how a fraudulent non-disclosure of benefits or of income, as the High Court observed, "in such a narrow compass",[120] could be described as complicated offences in the sense contemplated in the proclamation defining specified offences which may be the subject of investigation in terms of section 28 and 29.

Was there a need for a search and seizure in relation to Mr Hulley?

[351] The information relating to Mr Hulley, on the basis of which Mr Du Plooy sought to establish that the resort to a search and seizure warrant in relation to Mr Hulley was reasonable, is contained in one paragraph of the affidavit of Mr Du Plooy. All that is said is this:

> "The attorneys for Shaik, Messrs Reeves Parsee, directed a letter to the prosecution dated 19 July 2005, informing that Shaik had resigned his position as financial adviser to Zuma as of 11 July 2005 and that all Zuma's documentation has been forwarded to Zuma's attorney, namely Mr M Hulley. It is known to me that Mr

[119] *Zuma and Another v National Director of Public Prosecutions and Others* above n 6 at 486c-d of the SACR; All SA report at 105h-i.

[120] Id at 486a-b of the SACR; All SA report at 105f-g.

> Hulley practices in Durban under the style of M Hulley and Associates. In the result, it is also necessary to obtain the relevant information concerning Zuma from Hulley and Associates."

[352] The question is whether based on this information only it was reasonable for the state to resort to the more drastic measure of a search warrant instead of other less drastic mechanisms for obtaining the information from Mr Hulley, the attorney for Mr Zuma. In my view it was manifestly not. This information is wholly inadequate to establish that it was reasonable for the state to resort to the search warrant in the case of Mr Hulley, an attorney and an officer of the court. And as it turned out, all that the state required from him were two boxes containing documents that had been sent to him. The state could have requested Mr Hulley to consent to them perusing or removing or making copies of the documents in terms of section 29(10)(a)(i) of the NPA Act. At the same time they could have drawn his attention to the fact that if he refused to consent the state would either invoke the summons process or the search warrant procedure. In addition, they could have drawn his attention to the offences and penalties for concealing or destroying the documents prescribed by the NPA Act. All this could have been explored rather than a resort to the drastic measure of a search and seizure warrant.

[353] But there are further considerations which militate against the reasonableness of resorting to a search and seizure warrant in the case of Mr Hulley.

[354] The undisputed fact in relation to Mr Hulley is that what prompted the search and seizure at his offices was a letter from Mr Shaik's attorney informing the state that Mr Shaik had resigned as Mr Zuma's financial advisor and that they had forwarded all documentation belonging to Mr Zuma to his attorney, Mr Hulley. This letter was not attached to the affidavit in support of the application for a warrant against Mr Hulley. Nor was the issuing judge told when the letter was received by the investigating authority. All that the judge was told was that the letter was sent on 19 July 2005, leaving everyone to speculate on how the letter was sent and when it would have reached the state. This may well leave one with the impression that the letter was sent by post and probably reached the state sometime after 19 July 2005.

[355] The letter and the details that are missing from the affidavit of Mr Du Plooy appear, however, in the affidavit of Mr Steynberg, a Deputy Director of Public Prosecutions stationed in KwaZulu-Natal. This affidavit was filed in the Durban High Court in the proceedings in which Mr Zuma and Mr Hulley challenged the lawfulness of the warrants at issue in these cases. It emerges from both the letter itself and the affidavit of Mr Steynberg that the letter was in fact sent to Messrs Downer and Steynberg by telefax transmission on 19 July 2005. The letter was, in all probability therefore, received by the state on the same day; that is, on 19 July 2005. The letter informed the state that documentation had been forwarded to Mr Hulley. The letter did not indicate when this documentation had been sent.

[356] Mr Du Plooy only applied for a search and seizure warrant against Mr Hulley on 11 August 2005, some three and a half weeks after the state had received information that documentation relating to Mr Zuma had been sent to Mr Hulley's office. Mr Du Plooy did not explain this delay in applying for a search and seizure warrant. An applicant for a search and seizure must explain any delay in applying for such a warrant.[121] If the state had been concerned about the disappearance of the documents, one would have expected the state to act promptly to obtain the documents. The state did not do so. Nor does the state explain why it did not do so. Of course, the state does not say it feared that Mr Hulley would otherwise destroy the documentation.

[357] What is even more telling is that Mr Du Plooy does not set out which steps, if any, that were taken by the state to establish whether Mr Hulley had the documentation and whether he was prepared to produce the documentation. Significantly, there is no explanation as to why any method of securing the documentation from Mr Hulley other than through a warrant would not have been successful. The absence of this explanation must be viewed against the prior conduct of the state in dealing with the other individuals such as Messrs Zuma, Reddy, Thétard and Kögl, Ms Fakude-Nkuna, and Thint. Except for Mr Zuma, to whom questions were directed in Parliament, the others were issued with section 28 summonses. And in relation to Mr Reddy, Mr Kögl, Ms Fakude-Nkuna and Thint, Mr Du Plooy put forward some explanation, albeit an unsatisfactory explanation, as to why he was not

[121] *R v Williams and Others* [2007] NZCA 52 (CA) at para 223(d) and *R v McColl* above n 101 at para 30.

confident that further section 28 summonses would yield results. But he provides no explanation, nothing at all, in respect of Mr Hulley for recourse to the search and seizure warrants. In fact, in relation to Mr Hulley, Mr Du Plooy disclosed no specific concerns which led him to resort to the search and seizure procedure without considering any other mechanisms for obtaining the documentation sought by the state.

[358] There was no suggestion that Mr Hulley, who is an officer of the court, would not have co-operated if the state had asked him to hand over the documentation sought. Indeed, Mr Du Plooy could hardly have made such a suggestion as he had never had any dealings with Mr Hulley prior to the search and seizure procedure. Had there been an intention to conceal or destroy the documentation sent to Mr Hulley, more than enough time had lapsed for this to be done. I am not suggesting here that Mr Hulley would do any such thing. On the contrary, when the search and seizure team requested him to produce the documentation, he immediately directed them to two sealed boxes which contained the documentation. This conduct on the part of Mr Hulley is utterly inconsistent with the picture that Mr Du Plooy paints in the affidavit. In fact, in relation to Mr Hulley, Mr Du Plooy does not even suggest that he feared that he might conceal or destroy the documentation in question. All he says is that "it is also necessary to obtain the relevant information concerning Zuma from Hulley and Associates."

[359] The absence of any information as to whether other less intrusive mechanisms were considered at all, and if they were, why they were unlikely to succeed, must of course be viewed in the light of the fact that all that the state was looking for was the documentation that Mr Hulley had received from Mr Shaik's attorney. There was no question that Mr Hulley had received the documentation. A simple enquiry addressed to him to establish whether he had the documentation would have confirmed this. If he was no longer in possession of it, he would have had to explain what had happened to the documentation. In fact, in relation to Mr Hulley, the state could have sought his consent as contemplated in section 29(10)(a)(i) or utilised a section 28 summons.

[360] But we need not speculate on these matters, as Mr Hulley's conduct during the search belies any suggestion that he would have concealed the documentation if he had been summoned under section 28 to produce it. It is indeed unthinkable on the information presented to the judge that Mr Hulley, an officer of the court, would have risked going to jail for 15 years rather than produce the documentation as he subsequently did when he was asked to. There is simply no credible evidence that Mr Hulley would not have produced the documentation under a summons in terms of section 28 or if he had been asked for the documentation.

[361] Against this background the justification for resort to the search and seizure warrant is not immediately apparent. If the investigating authority feared that the documents would be destroyed or concealed, then there are difficulties confronting the investigating authority in this regard. First, Mr Du Plooy does not make this

allegation in relation to Mr Hulley. Second, on the information contained in the affidavit of Mr Du Plooy there is no basis whatsoever for such a fear. Indeed, Mr Du Plooy does not suggest that he had any such fear in relation to Mr Hulley. There are no specific concerns that relate to Mr Hulley in this regard that are advanced by Mr Du Plooy. Third, in relation to Mr Hulley, the investigating authority went straight for the most intrusive step available without first exploring the less intrusive means.

[362] There is no explanation. Nothing at all, to show why Mr Hulley was not requested to hand over the documentation or, for that matter, why the section 28 summons was not invoked. Nor is there any suggestion that any other method ran the risk of frustrating the object of the search. Indeed, the need for a search and seizure warrant, as opposed to a section 28 summons or some other less intrusive mechanism, after what appears to have been a fairly informal approach to the investigation in relation to Mr Zuma, and resort to the section 28 summons in relation to others, is not self-evident. Nor, as I have said, was it explained at all. In fact, it does not even appear that Mr Du Plooy applied his mind to the efficacy of a section 28 summons or any other less intrusive process in relation to Mr Hulley.

[363] It is indeed a source of grave concern if attorneys who are officers of the court, who are not suspects, can be subjected to such drastic measures without first being given the opportunity to produce the documentation required. We should even be more concerned if attorneys' offices are subjected to such measures without any justification as to why such drastic measures are required. Such conduct runs counter

to the principles of openness, accountability and responsiveness on which our constitutional democracy is founded. Unlike the previous legal order, our constitutional democracy is deeply rooted in the culture of justification. The state must justify its conduct, in particular, when its conduct constitutes an intrusion into the right to privacy. This is necessary in order to prevent arbitrary conduct and abuse of power. Unless drastic measures of the kind used in this case are only resorted to when it is reasonable to do so, this may have a chilling effect on the right to legal representation, a right that we hold so dear. It is even more disturbing where the state simply resorts to the search and seizure provisions without any attempt to explain why resort to such a measure is justified. The general concerns expressed by Mr Du Plooy relate to persons who are suspects. Mr Hulley is not a suspect. He is an attorney, who represents Mr Zuma who is a suspect.

[364] In all these circumstances I consider that the resort to the search and seizure warrant in respect of Mr Hulley was not reasonable. Even if one were to apply the test postulated by the majority, namely, whether there was a real risk that the documentation sought would not be obtained, I would still reach the same conclusion. There is simply no information to sustain that risk.

[365] Before concluding this judgement, it is necessary to deal with statements of general concern about the unlikelihood of persons under investigation to co-operate with a section 28 summons.

Statements of general concern

[366] In attempting to justify the need for search and seizure warrants, Mr Du Plooy expresses some general concerns about the efficacy of a summons in terms of section 28. He says that it requires a notice and thus provides "the opportunity to hide or destroy incriminating evidence prior to complying with the summons." He concludes, therefore, that a summons in terms of section 28 has limited efficacy in discovering incriminating material, particularly in the case of corruption where there is no aggrieved victim who would wish to come forward. It is necessary to consider the relevance of statements of general concerns in relation to the need for a search and seizure warrant.

[367] General statements by an investigator that persons under investigation are not likely to co-operate and that a section 28 summons will warn the person ahead of time to conceal the documents are not entirely irrelevant. However, standing alone they cannot be decisive. Were it to be otherwise, it would mean that the state would be at liberty always to invoke the provisions of section 29(5) on the mere say so of the investigator stating that people under investigation are likely to conceal information. This attitude can never be sanctioned under our constitutional democracy which is founded on human dignity, the achievement of equality, and the advancement of human rights and freedom for all. It can never be assumed that all persons who are the subject of an investigation are prone to conceal information. Were this to be the case, it would mean that the investigators would always resort to section 29(5) whenever they were conducting an investigation under section 28. This would render

the requirement of a need for a search under section 29(5) unnecessary. Indeed, the provisions of section 28(6) would also be rendered redundant.

[368] What must be stressed here is the point already made: the NPA Act expresses a concern for the constitutional rights of persons under investigation. This concern is demonstrated, among other things, by providing the state with less drastic measures in section 28(6) and more drastic measures in section 29 to conduct investigations. By doing so, the legislature seeks to safeguard against unwarranted invasion of the right to privacy, and that if there is a need for invasion of privacy, such invasion be kept at a minimum. To my mind, it is inconceivable that the legislature contemplated that the state will always resort to the provisions of section 29(5) on the assumption that a person under investigation is unlikely to co-operate in an investigation. To hold otherwise would be to sacrifice constitutional rights at the altar of the fight against crime.

[369] The need to fight organised crime and, in particular corruption, cannot be gainsaid. That fight, however, should not be fought at the expense of the unwarranted limitation of constitutional rights. A nation that considers itself under siege can be a danger unto itself. Constitutional rights are invariably the first casualty in a nation which considers itself to be under siege, whether the siege comes from the prevalence of crime or some other source. It is precisely at such times that courts ought to be vigilant and act as a bulwark against unwarranted invasion of constitutional rights. They must insist on the minimum invasion of constitutional rights. They should not

allow greater invasion than is required by the specific facts and circumstances of the case.

[370] It is clear from the provisions of section 29(5)(c) that one of the requirements for the issuing of a search and seizure warrant is the need for a warrant in regard to the investigation. The judicial officer must therefore evaluate the need for a search for the purposes of the investigation. It is implicit, if not explicit, in this requirement that the investigator must place before the judicial officer evidence under oath demonstrating the need for the search in relation to the investigation. What the person requesting the warrant must establish therefore is that it is necessary to invoke the provisions of section 29(5) in order to obtain the evidence to fulfil the purposes of the investigation. It is this evidence which the judicial officer must evaluate in order to satisfy himself or herself that there is a need for a search and seizure warrant in regard to the investigation. The mere fact that a person is subject to an investigation under section 28 does not in itself establish the need to invoke the provisions of section 29(5)(c). This is so because section 28(6) itself gives the investigator far-reaching powers of subpoena, interrogation and to obtain evidence.

[371] The efficacy of the section 28(6) summons procedure is a relevant consideration. The general concerns, such as those expressed by Mr Du Plooy about the likely or possible attitude of individuals suspected of committing offences, are of some general relevance. However, the investigating authority in its evidence in support of the application for a search and seizure warrant should set forth evidence of

specific concerns about the likelihood of concealment or destruction in a particular case. The absence of this specific evidence will not necessarily be fatal to the application, as there may nevertheless be sufficient other evidence to establish that, in all the circumstances of the particular case, it was reasonable to resort to the search and seizure procedure.

[372] In this Court, the state submitted that people who are suspects are far more likely to withhold, conceal, remove and destroy incriminating evidence in their possession and give false, misleading or incomplete answers to questions put to them.

[373] The majority endorses this proposition and go further in drawing attention to the fact that these individuals are charged with an offence involving dishonesty. In the main judgment, the majority states that:

> "Furthermore, the crimes of which Mr Shaik has been convicted, and in which Mr Zuma and Thint have been implicated, involve pre-meditation and dishonesty. These factors must be taken into consideration. They do not engender confidence that those involved would respond honestly to a subpoena. Accordingly, the state could not assume with confidence that the applicants would be fully truthful and honest in response to a section 28 summons. There was at the very least an appreciable risk that they might not be, and that was sufficient to establish the 'need' for a section 29 search and seizure."[122]

[374] I am unable to agree with the views expressed by the majority and the state. They seem to proceed on the premise that suspects, in particular those who are accused of crimes involving dishonesty, cannot be trusted to co-operate in response to

[122] Above at para 130.

a section 28 summons. These views are inconsistent with our constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms for all. They are indeed inconsistent with the right to be presumed innocent until proven guilty. This is an elementary principle of our law. That is why suspects must be charged, and thereafter tried before an impartial tribunal, before they can be pronounced guilty. This applies to all suspects regardless of the offence with which they are charged.

[375] I am unable to find anything in our Constitution which warrants the suggestion that persons accused of crimes involving dishonesty are less likely to co-operate. What must be stressed here is that our Constitution embodies an objective, normative value system; it embodies "fundamental constitutional value[s] for all areas of the law [which should act] as a guiding principle and stimulus for the Legislature, Executive and Judiciary."[123] These fundamental constitutional principles are explicitly set out in the founding provisions of our Constitution and are explicitly given effect to in the Bill of Rights. Such values are human dignity and the achievement of equality. The equal protection provision of our Constitution declares that every one of us is entitled to equal protection of the law.

[376] A legal proposition which suggests that persons who are suspects in offences involving dishonesty are less likely to co-operate in investigations or are likely to act dishonestly in an investigation is inimical to these values. Indeed, it is inimical to the

[123] *Carmichele v Minister of Safety and Security* (*Centre for Applied Legal Studies Intervening*) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 54.

principles long recognised by our common law and now embodied in our constitutional law that all those accused of crimes are innocent until they are proven guilty. A construction of the provisions of section 29(5) which permits the state to treat suspects accused of crimes involving dishonesty differently from other suspects is, in my view, inconsistent with the constitutional injunction to construe statutes so as to promote, respect and protect the rights in the Bill of Rights including the right to equal protection under the law. Indeed, it is inconsistent with the spirit and the letter of the NPA Act which manifest a concern for constitutional rights which include the right to equal protection of the law. I am therefore unable to subscribe to a proposition that suggests that individuals that are suspected of offences involving dishonesty must be treated differently.

[377] Such a construction of the provisions of section 29(5) does not take sufficient account of the provisions of sections 28 and 29 of the NPA Act. The NPA Act provides at least three different mechanisms for obtaining information and documents relevant to an investigation: consent under section 29(10)(a)(i), a section 28 summons and a section 29(5) search and seizure warrant. These mechanisms are not there for the state to pick and choose between any one of them. They are there to be used when it is necessary for them to be used. The search and seizure warrant is the most drastic of them all. It could never have been the intention of the legislature to permit the state always to resort to the most drastic process, the search and seizure warrant, whenever it investigates persons suspected of offences involving dishonesty. If this had been the case, it would have been an easy matter to have said so expressly.

[378] The legislature contemplated that the state would use the less drastic measure consistently with the legislature's concern for the right to privacy and other constitutional rights. It contemplated that when the state resorts to the more drastic mechanism in section 29(5), the state will provide an explanation or justification as to why the more drastic measure is used when there are less drastic measures available. It could not have been the intention of the legislature that such an explanation would always be that a certain class of suspects do not co-operate. This would be inimical to the equality provision of the Constitution. If that were to be so, the provisions of section 28(6) would not have been enacted because the state will always express a general concern about persons under investigation not co-operating and therefore this would be enough to establish a need for a search and seizure warrant. The section 28 summons procedure would then be completely superfluous.

[379] While general concerns are not entirely irrelevant, as I have pointed out above, there must be information specific to the individual or entity under investigation which would justify resort to a search and seizure warrant. That is what is lacking in this case. On the contrary, on the information that is now available but which was not available to the judge who issued the warrant, Thint and its officials co-operated during the section 28 summons investigation. There was no suggestion that they had withheld any information or documents. Far from this, the state complimented Mr Moynot and remarked that "Mr Moynot has at all times offered the investigating team his characteristically kind and affable cooperation." In the case of Messrs Zuma and

Hulley, there was no specific information which justified resort to the search and seizure provisions.

Conclusion

[380] I am mindful of the difficulties faced by the state with regard to the inherent tension which exists in respect of the different ways in which it may choose to investigate a specified offence. If it goes straight for a section 29(5) warrant, it will be asked to justify that course against the less intrusive step of voluntary co-operation or a section 28 summons. If it seeks voluntary co-operation in relation to others who are being investigated and then moves, as here, straight to seeking a warrant in respect of other individuals, it will be asked to justify that change of approach. Judicial scrutiny is involved when a search and seizure warrant is sought because the legislature seeks to have a judicial officer control the balance between privacy considerations and the public interest in having the Investigating Director properly investigate serious offences.

[381] The inherent tension to which I have referred must ultimately be resolved by the courts. The judicial officer who is asked to issue a warrant must balance the competing interests in accordance with the circumstances of each particular case. To do this, the judicial officer relies heavily on information contained in the application for a search and seizure warrant. Candid and full disclosure will enable the court to understand the concerns of the investigating authority and its reasons for seeking a search and seizure warrant, either immediately or after earlier investigating steps have

been undertaken. In these cases, and for the reasons I have given, I have found that the search and seizure warrants were not shown to have been needed as required by section 29(5)(c) of the NPA Act.

[382] For all these reasons, I conclude that the state has not established that it was reasonable in all the circumstances to resort to the search and seizure warrants. The state has therefore failed to establish that there was a need within the meaning of the NPA Act to resort to the search and seizure warrants in the case of all the applicants.

[383] In the light of this conclusion it is not necessary for me to express any opinion on the attack on the warrants based on their broad and general terms. And, in addition, this being a minority judgment, it is not necessary for me to consider whether I would have granted a preservation order.

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For the Applicants in CCT 91/07:	Advocate KJ Kemp SC, Advocate MDC Smithers and Advocate TS Khuzwayo instructed by Lourens, De Lange & Minnie.
For the Respondents in CCT 89/07 and 91/07:	Advocate W Trengove SC, Advocate RJ Salmon SC and Advocate AM Breitenbach instructed by the State Attorney.