THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases 89 and 91/07

In the matters between:

THINT (PTY) LIMITED	Applicant
JACOB ZUMA AND MICHAEL HULLEY	Applicants

and

THE NDPP AND OTHERS	Respondents

RESPONDENTS' SUBMISSIONS

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INTRODUCTION

The context

1. In June 2005 the High Court convicted Mr Shaik and his companies of crimes involving corrupt payments made to and for the benefit of Mr Zuma. It held that Thint had been complicit in some of those crimes. Shortly after Mr Shaik's conviction, the NDPP announced his intention to prosecute Mr Zuma and Thint.

2. In August 2005 the Senior Special Investigator Mr Du Plooy, applied for more than 20 search warrants in terms of s 29 of the National Prosecuting Act 32 of 1998, for the further investigation of the crimes of which Mr Zuma and Thint were suspected. Judge President Ngoepe of the Transvaal Provincial Division of the High Court issued the warrants. Most of them were executed on 18 August 2005. Some 250 members of the Directorate of Special Operations participated in the operation. They seized approximately 93 000 documents.

3. Some of the people whose premises were searched subsequently launched proceedings to have the searches overturned. This application is made in two of those cases, the one by Thint and the other by Mr Zuma and his attorney Mr Hulley.

The Thint case

4. Searches were undertaken at the offices of Thint in Pretoria and at the home of one of its directors Mr Moynot. Thint, Mr Moynot and his wife launched an application in the Transvaal Provincial Division of the High Court to have the searches overturned. The NDPP conceded from the outset that the search of the Moynot home had been technically flawed and the state returned all the materials seized in that search. It rendered that aspect of the case moot. The application has continued since then only in relation to the search of the Thint offices.

5. Du Plessis J dismissed Thint's application and upheld the validity of the warrant and the lawfulness of the search in a judgment handed down on 4 July 2006.[1]

The Zuma-Hulley case

6. The searches were undertaken at some seven premises of or associated with Mr Zuma. Mr Hulley's office was one of them. Mr Zuma and Mr Hulley applied to the Durban and Coast Local Division of the High Court for the searches to be overturned.

7. In a judgment handed down on 15 February 2006, Hurt J declared five of the search warrants invalid and the searches pursuant to them unlawful and ordered the state to return all the evidence seized under them to Mr Zuma and Mr Hulley.[2] The five searches he declared unlawful were at the following premises:

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[1] Thint High Court judgment Thint 10:846 to 870

[2] Zuma and Another v NDPP 2006 (1) SACR 468 (D)

- Mr Zuma's flat in Killarney, Johannesburg.[3] Mr Zuma is the beneficial owner of the flat and previously lived there but he moved to another house and the flat was occupied at the time by two of his sons, his daughter and the wife of one of his sons.[4]
- Mr Zuma's residence complex at the Nkandla Traditional Village in the district of Nkandla in KwaZulu-Natal.[5]
- Mr Zuma's former office at the Union Buildings in Pretoria.[6]
- The offices of the KwaZulu-Natal Department of Economic Development and Tourism in Durban.[7] Mr Zuma had been the KZN MEC for Economic Development and Tourism.
- Mr Hulley's offices in Durban.[8]

8. Mr Zuma also attacked two further warrants but the attacks on them became moot and the High Court accordingly did not make any orders in relation to them:

8.1. The one was a warrant to search Mr Zuma's home in Forest Town, Johannesburg.[9] The respondents conceded that there had been a technical defect in the execution of this warrant.[10] The bulk of the

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3 Killarney warrant JZ2 Zuma-Hulley 1:95

4 Du Plooy warrant application Zuma-Hulley supp. vol. 3:260:3; Mxolisi Zuma 2:187:1; Duduzani Zuma 2:194:1

5 Nkandla warrant JZ3 Zuma-Hulley 2:101

6 Union Buildings warrant JZ4 Zuma-Hulley 2:107

7 Department of Economic Development warrant JZ5 Zuma-Hulley 2:113

8 Hulley warrant JZ7 Zuma-Hulley 2:125

9 Forest Town warrant JZ1 Zuma-Hulley 1:89

10 McCarthy Zuma-Hulley 4:323:29; Authorisation LM11 4:362; Mngwengwe 5:380:3 to 6

warrants were issued on 12 August 2005. The Forest Town warrant was only issued on 15 August 2005. All the warrants, including this one, authorised the Investigating Director of the DSO "*or any person authorised by him/her in writing"* to undertake the search. The Acting Investigating Director executed a single letter of authority in terms of which he authorised a list of people to execute the warrants. He intended to grant the authority under all the warrants but mistakenly referred only to the warrants issued on 12 August 2005. His letter of authority accordingly did not include the Forest Town warrant because it was only issued on 15 August 2005. When the respondents discovered this mistake, they conceded that the search had been technically defective and returned all the evidence seized under it to Mr Zuma.[11]

8.2. The other warrant was for a search of Mr Zuma's former offices at Tuynhuys in Cape Town.[12] There was nothing seized at these offices.[13]

The SCA judgments

9. In both cases, the party who lost in the High Court appealed to the SCA. It handed down its judgments in both matters on 8 November 2007.[14] Justice

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[11] McCarthy Zuma-Hulley 4:323:29

[12] Tuynhuys warrant JZ6 Zuma-Hulley 2:119

[13] Zuma Zuma-Hulley 1:81:88; Du Plooy 3:227:3(b)

[14] Thint v NDPP [2008] 1 All SA 229 (SCA); NDPP v Zuma [2008] 1 All SA 197 (SCA)

Nugent with whom Justice Ponnan and Justice Mlambo agreed, held that all the warrants were valid and the searches under them lawful. Justice Farlam and Justice Cloete dissented. In their view the warrants were not sufficiently specific in their description of the materials that would be seized under them. They would have declared the warrants invalid and the searches unlawful. They would however have issued an order for the preservation of the materials gathered in the searches for the determination of their fate by the trial court in the criminal prosecution.

10. It is against these orders of the SCA that Thint, Mr Zuma and Mr Hulley now seek leave to appeal to this court.

The scheme of our submissions

11. We commence with a chapter on the interests of justice. We submit that, irrespective of the applicants' prospects of success or lack of it, this court should not grant them leave to appeal because the only remaining interests worthy of protection in this case, will be adequately protected by the trial court in the criminal prosecution of Thint and Mr Zuma. It will be best placed to balance those interests against the public interest.

12. We deal in a brief chapter with the constitutional principles at play in this case.

13. We devote a series of chapters to the applicants' attacks. We have attempted to group these sensibly together:

13.1. We submit that the NDPP was entitled to apply for the search warrants without notice to the applicants.

13.2. We submit that the application for the warrants made full and proper disclosure of all the material facts.

13.3. We submit that the application for the warrants fully and amply demonstrated the need for the search warrants.

13.4. We submit that the search warrants defined the ambit of the searches with more than sufficient particularity to pass muster under s 29 of the NPA Act.

13.5. We address the applicants' contentions that the search warrants were formally defective in a number of miscellaneous respects.

13.6. We deal specifically with the search of Mr Hulley's offices and the suggestion that it did not provide sufficient protection against the risk of intrusion upon privileged material.

14. We finally submit in the alternative that, even if this court were to hold that the search warrants were invalid or that the searches were unlawful for some other reason, then it should not order the return of the evidence gathered under the search warrants. It should instead make an order for the preservation of the evidence subject to the ultimate direction of the trial court in the criminal prosecution of Thint and Mr Zuma.

THE INTERESTS OF JUSTICE

Introduction

15. We will in the remainder of these submissions submit that the applicants' prospects of success are poor. We submit with respect however that it is in any event not in the interests of justice to grant them leave to appeal to this court even if their prospects of success were good. That is so for two inter-related reasons. The first is that the evidence gathered under the warrants in dispute, is important and should in the public interest be preserved to allow the trial court in the pending criminal prosecution of Mr Zuma and Thint, to determine whether it may be used or not. The second is that the only remaining interests at stake in this application, are confined to the question whether the state should be allowed to use the evidence in its prosecution of Mr Zuma and Thint. The trial court will be fully equipped to cater for and protect those interests. It will moreover be best placed to weigh up the private and public interests at stake and strike a balance between them. There is accordingly no reason for this court to assume jurisdiction in the matter and every reason for it to decline to do so.

The importance of the evidence

16. Mr Shaik and the Nkobi companies were convicted of making corrupt payments to Mr Zuma up to September 2002 in the amount of R1 249 224.91. The new documents have revealed that the corrupt payments continued at least until June 2005 and amounted to R4 072 499.85 in total for the period from 1995 to June

2005. The payments based on the old and the new evidence are therefore more than three times greater than those based on the old evidence alone.[15]

17. The 229 payments discovered for the period 1995 to 30 September 2002 and presented in evidence in the Shaik trial totalled R1 249 224.91. The new documents reveal 354 payments for the same period in the aggregate of R2 081 676.66. In other words, further substantial payments totalling more than R800 000 had not been discovered on the basis of the old documents.[16]

18. Mr Zuma failed to disclose any of these payments to SARS and to Parliament and the Secretary of the Cabinet. The evidence currently available to the state suggests that Mr Zuma failed to declare taxable income of some R2 779 514.20 and evaded tax of some R1 167 971 over the period 1995 to February 2004. This aspect of the investigation is continuing.[17]

19. The new documents also provide further confirmation of the existence of some of the old payments; put some of the old documents in context; show why some of the old documents are more relevant than was previously thought; confirm certain meetings; provide evidence about the outcome of certain meetings and projects identified in the old documents; and provide further evidence about the effect of the payments on the financial position of the Nkobi group.[18]

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[15] Du Plooy Zuma-Hulley 13:1144 to 1145:81.1

[16] Du Plooy Zuma-Hulley 13:1145:81.2

[17] Du Plooy Zuma-Hulley 13:1145 to 1146:81.3

[18] Du Plooy Zuma-Hulley 13:1146:81.4

20. The analysis of the new documents together with the old has cast new light on the events concerning Nkobi's and Thint's acquisition of an interest in ADS, which gave them an entrée into the arms deal and its resulting profits.[19]

21. The new documents identify new sources of income for the Nkobi group about which investigations were necessary to determine if and the extent to which Mr Shaik relied on his "*political connectivity*" and in particular his relationship with Mr Zuma. Those investigations and the analysis of the new documents together with the old, have revealed Mr Zuma's involvement, or Mr Shaik's use of his name, in a significantly greater number of instances than originally discovered and proved at the Shaik trial. The trial court dealt with some four such instances which tended to show that Mr Zuma corruptly provided assistance to Mr Shaik, the Nkobi group and (in one instance) Thint. There are now some 28 instances which tend to show such assistance.[20]

22. The further analysis of the new documents, together with the old, reinforces and expands upon the state's understanding of the essential nature of the Nkobi group's business. Mr Shaik viewed and relied upon political connectivity as the key attribute of his business. The price was corruption. In any future prosecution it will consequently be alleged that the Nkobi group was an enterprise whose business was carried on through a pattern of racketeering activity as defined in and proscribed by the POCA. It will further be alleged that its employees or

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[19] Du Plooy Zuma-Hulley 13:1146:81.5

[20] Du Plooy Zuma-Hulley 13:1146 to 1147:81.6

associates, amongst them Mr Zuma and Thint, participated in the conduct of the business through a pattern of racketeering activity.[21]

23. In addition, the further analysis of the new documents, together with the old, allowed the forensic accountants to investigate more completely the following:

23.1. The period leading to the establishment of the Nkobi group, including its early association with Thomas Nkobi and the ANC, its later exclusion as an ANC equity partner and the introduction of Mr Zuma as its political patron and financial beneficiary.[22]

23.2. The financial position of Mr Zuma, including his reliance on third-party financial assistance to maintain his lifestyle.[23]

23.3. Nkobi's and Mr Shaik's links to other political office bearers as part of the conduct of the business of Nkobi.[24]

23.4. The financial position of Mr Shaik, the financial position and performance of the Nkobi group and the effect on the Nkobi group of the payments to Mr Zuma.[25]

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21 Du Plooy Zuma-Hulley 13:1147:81.7

22 Du Plooy Zuma-Hulley 13:1148:82.1

23 Du Plooy Zuma-Hulley 13:1148:82.2

24 Du Plooy Zuma-Hulley 13:1148:82.3

25 Du Plooy Zuma-Hulley 13:1148:82.4

24. The new forensic report handed to Mr Zuma's and Thint's legal representatives on 5 September 2006, contains extensive references to the new documents in support of the matters mentioned above. There are 147 references to the new documents in the narrative of the report. There are about 1 100 references in the report to the new documents that show the new payments to Mr Zuma (increasing the aggregate from R1.2 million to R4 million, as mentioned above) and that corroborate some of the old payments.[26]

The purpose of these proceedings

25. The applicants' only actual purpose with these proceedings, is to recover the evidence gathered under the disputed warrants in an attempt to deprive the state of the evidence in its prosecution of Mr Zuma and Thint. They do not in fact pursue these proceedings for any other legitimate purpose.

26. We do not contend that it is illegitimate for the applicants to attempt to deprive the state and ultimately their trial court of the evidence which is so incriminating of them. They are entitled to employ every lawful mechanism in their attempt to prevent the truth about their conduct from being revealed. It does not follow however that this court should permit and accommodate their efforts to do so. It will of course always be vigilant in its protection of the applicants' constitutional rights if they have been violated. But the trial court will be fully equipped and in a better position to do so.

[26] Du Plooy Zuma-Hulley 13:1148:83

27. The trial court will firstly be obliged in terms of s 35(5) of the Constitution to exclude any evidence obtained in violation of the Bill of Rights if the admission of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice. It will moreover exercise an overriding discretion in terms of s 35(3) to ensure that the applicants are afforded a fair trial. It follows that the trial court will be able to ensure that the applicants' only real interests in this application are fully and properly protected.

28. The trial court will moreover be better placed than this court to strike a balance between the interests of the applicants on the one hand and the public interest in their prosecution on the other. It will see and hear all the witnesses and have the benefit of having their evidence tested under cross-examination. It will moreover have the benefit of full evidence and submissions on the balance to be struck in the exercise of its discretion on the admissibility of the evidence.

29. We accordingly submit that this court should dismiss the applications for leave to appeal irrespective of their prospects of success or lack of it.

THE CONSTITUTIONAL PRINCIPLES

30. The applicants do not challenge the constitutional validity of s 29 of the NPA Act. This case consequently concerns the proper interpretation and application of the section and not its constitutional validity. The constitutional setting of s 29 remains important however because it guides the interpretation and application of the section in terms of s 39(2) of the Constitution.

31. This court has had occasion to consider aspects of s 29 in the Hyundai case.[27] It made the point that the section strikes a balance between the privacy interests of individuals on the one hand and the public interest in the fight against 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*

[27] 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 2001 (1) SA 545 (CC)

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 …".[28]

32. Both these values are important and neither can be sacrificed to the other. This court described the importance of the state's powers under s 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 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 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."*[29]

33. 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 their person

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[28] 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 2001 (1) SA 545 (CC) para 54

[29] Para 53

or home searched, their property searched, their possessions seized or the privacy of their communications infringed. The courts jealously guard these rights by scrutinising search warrants "*with rigour and exactitude*".[30]

34. It must however be borne in mind that in Thint's case we are concerned with a search of the offices of a company. It is a corporate entity which is a person only by the operation of a legal fiction. It is "*an artificial person with no body to kick and no soul to damn*".[31] It is not the bearer of human dignity and its rights of privacy are much attenuated and not in any way comparable with those of human beings. This court made this clear in Hyundai and more recently again in Magajane.[32] It said for instance in Hyundai that,

> "*privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core. This understanding of the right flows, as was said in Bernstein, from the value placed on human dignity by the Constitution. Juristic persons are not the bearers of human dignity. Their privacy rights, therefore, can never be as intense as those of human beings. However, this does not mean that juristic persons are not protected by the rights to privacy.*"[33]

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30 Powell NO and Others v Van der Merwe NO and Others 2005 (5) SA 62 (SCA) para 50

31 Commissioner for Inland Revenue v Richmond Estates (Pty) Ltd 1956 (1) SA 602 (A) 606G

32 Magajane v Chairperson, North West Gambling Board and Others 2006 (5) SA 250 (CC) paras 42 and 43

33 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 2001 (1) SA 545 (CC) para 18

35. This court went on to hold that, because corporate entities only enjoy attenuated privacy rights, the invasion of their privacy can more readily be justified than the invasion of the privacy of human beings:

> "*Juristic persons therefore do enjoy the right to privacy, although not to the same extent as natural persons. The level of justification for any particular limitation of the right will have to be judged in the light of the circumstances of each case. Relevant circumstances would include whether the subject of the limitation is a natural person or a juristic person as well as the nature and effect of the invasion of privacy.*"[34]

[34] 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 2001 (1) SA 545 (CC) para 18

NO NOTICE WAS NECESSARY

36. Thint now contends that the warrant for the search of its premises should be set aside because Mr Du Plooy "*did not make out, or even attempt to make out, a case for dispensing with notice to [Thint], and for this reason alone the search warrant falls to be set aside*".[35]

37. This is a new point. Thint never raised it in its papers. The NDPP has consequently never had an opportunity to respond to it. Thint should not be allowed to raise it now.

38. In terms of s 29(1) of the NPA Act, the Investigating Director or anybody acting under his or her written authority, may enter and search premises "*without prior notice or with such notice as he or she may deem appropriate"*. In terms of s 29(4) it may only be done under a search warrant "*issued in chambers"* by a magistrate or judge. These provisions imply that the ordinary procedure for the application of a search warrant, is one without notice to the affected parties. They recognise that there is ordinarily a risk that, if the suspects and their associates get wind of an impending search, they may remove or destroy the evidence.

39. We accept that the judicial officer to whom an application for a warrant is made, may decline to authorise it where the affected parties have not been given notice in circumstances where the inherent risk of such notice is absent. This is

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[35] Thint heads 22:65; see also 39:112 (in relation to the computer evidence sought) and 59 to 60:183 to 184 (in relation to the absence in the warrant of safeguards against the violation of the right to claim privilege)

however not such a case. The application for the search warrants explained that it was desirable 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.[36]

40. We accordingly submit that in this case the Judge President properly exercised his discretion to authorise the warrants without notice to affected parties. There is in any event no basis upon which this court should interfere with the exercise of his discretion.

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36 Du Plooy warrant application Thint 7:586:37.3.16.4; 7:587:37.3.17 to 18 and 7:593:41.3 read with 42. See Cooper NO v First National Bank of SA 2001 (3) SA 705 (SCA) paras 26 and 28; Shelton v Commissioner, South African Revenue Service 2002 (2) SA 9 (SCA) para 13

THE APPLICATION MADE PROPER DISCLOSURE

Introduction

41. Thint, Mr Zuma and Mr Hulley all seek to impugn the search warrants on the basis that the *ex parte* application for the search warrants that came before the Judge President failed to disclose material facts which ought to have been disclosed. We will address each of the facts which they say should have been disclosed. We will submit that their complaints are unfounded and based on a misconception of the duty of disclosure in a case such as this one. We will accordingly first deal generally with the duty to make full disclosure in *ex parte* applications and the operation of that duty in a case such as this one before we deal with their complaints one by one.

The duty to disclose material facts

42. The duty to make disclosure of all material facts in an *ex parte* application is settled and well known.[37] The SCA held in Powell that an applicant for a search warrant was "*under a duty to be ultra-scrupulous in disclosing any material facts that might influence the court in coming to its decision*".[38]

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[37] Schlesinger v Schlesinger 1979 (4) SA 342 (W) 348E to 349B; NDPP v Basson 2002 (1) SA 419 (SCA) para 21

[38] Powell NO and Others v Van der Merwe NO and Others 2005 (5) SA 62 (SCA) para 42

43. The basis of the duty of disclosure is a duty of utmost good faith owed to the court when a litigant comes before it without notice to its opponent.[39] It is important to bear in mind that it is utmost good faith that the law requires, no more and no less. The law requires scrupulous candour and anything less is not good enough. At the same time however it does not demand more. It does not require any greater vigilance than utmost good faith. In other words, the duty to display utmost good faith requires disclosure of all the material facts within the applicant's knowledge. A litigant who made full disclosure in utmost good faith cannot be faulted simply because there was a material fact of which he or she was unaware. The duty is limited to the disclosure of facts known to the applicant.

44. The duty is also limited to the disclosure of material facts. A fact is material if it is one "*which might influence a court in coming to its decision*".[40] It is not limited to facts that will alter the court's decision. It includes all facts which might do so. By the same token, the duty does not extend to all the facts that are relevant to the application for the warrant as the applicants seem to suggest. It is only those facts that might influence a court in its decision that need be disclosed. This requires that a value judgment be made because there is no bright line between the facts which might influence a court in its decision on the one hand, and those that are relevant but not sufficiently significant to make a difference on the other.

45. Where an applicant fails to disclose material facts, the failure is not necessarily fatal to the application. The court retains a discretion to dismiss the application

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[39] Schlesinger v Schlesinger 1979 (4) SA 342 (W) 348G to H; NDPP v Basson 2002 (1) SA 419 (SCA) para 21

[40] NDPP v Basson 2002 (1) SA 419 (SCA) para 21

for want of disclosure or to condone it if there are "*very cogent practical reasons"* to do so.[41]

The duty in this case

46. This is not a run of the mill case. It is vast. As explained above, the investigation started in November 2000. It had been going for almost five years when the warrants were sought and obtained in August 2005. By then it had already spawned the highly publicised and long criminal trial in the Durban High Court in which Mr Shaik was convicted and sent to jail and his companies were convicted and fined. Mr Shaik's trial alone generated many thousands of pages of evidence and exhibits. The investigation continued beyond Mr Shaik's trial. The NPA decided in June 2005 to prosecute Mr Zuma. When the search warrants were sought, obtained and executed, the NPA had not yet decided whether to charge Thint as well but it subsequently decided to do so.

47. The search and seizure operation was in itself to be an extensive operation. Mr Du Plooy applied for 21 search warrants.[42] The search of all the premises was co-ordinated to take place on the same day countrywide. It was done on 18 August 2005.[43] Some 250 members of the DSO participated under the authority of Mr Mngwengwe the Acting Investigating Director of the DSO.[44]

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41 Schlesinger v Schlesinger 1979 (4) SA 342 (W) 350B; The Reclamation Group (Pty) Ltd v Smit & Others 2004 (1) SA 215 (SECLD) at 223D to E; Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Ed at 367 to 368

42 Du Plooy warrant application Thint 7:594 to 597

43 Moynot founding affidavit Thint 1:27:9.10. Cf. Du Plooy opposing affidavit 4:349:17, who points out that one search was done on 8 September 2005

44 Mngwengwe Thint 5:395:2; annexures PM14 to PM20 2:162 to 168

93 000 documents and computer information comprising "*terabytes of information*" were seized in the operation.[45]

48. We submit that in these circumstances the application for the warrants which was made in August 2005 required Mr Du Plooy to exercise a value judgment as to what to put into the application and what to leave out. It was not an everyday case where an applicant for a warrant can simply err on the side of caution by putting in all the information that might conceivably be of some relevance. It would not only have been logistically impossible for Mr Du Plooy to garner, record and disclose all the relevant information but the sheer mass of it would have submerged the Judge President who would have needed months to read, absorb and digest it. It would have defeated the purpose of the exercise which was merely to determine whether the DSO should be permitted to search the premises concerned. It was an important decision because it involved rights of privacy but it was at the same time not a judgment which finally determined the rights and obligations of the parties involved.

49. We accept that there will always be room for debate about the things that Mr Du Plooy could have added to or left out of his affidavit in support of the application for the search warrants, but submit that Mr Du Plooy's affidavit in the warrant application was clearly a carefully considered, balanced and fair piece of work. We highlight the following features:

49.1. The background to the application for the warrants involving the arms deal and Mr Shaik's role in it was an affair which had received a great

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[45] Moynot founding affidavit Thint 1:27:9.11; annexure PM5 2:105:2(vi) and (vii); Du Plooy opposing affidavit 4:349:18

deal of publicity over a considerable period of time. Mr Du Plooy accordingly assumed that the judge before whom the application served, would already have taken some judicial notice of the broad outlines of the story.

49.2. His affidavit set out the basic facts in a lucid, clear and careful manner. He told the background story in broad brushstrokes for instance in his description of the prosecution of Mr Shaik[46] and the ongoing investigation before then[47] and since then,[48] but gave considerably more detail when he dealt with the evidence against Mr Zuma and the Thint companies[49] and the basis upon which there was reason to believe that further matters required investigation.[50]

49.3. It is also clear from his affidavit that Mr Du Plooy went out of his way to give the court a balanced picture and not only the prosecution's perspective of the case. He disclosed for instance that although the investigation had included search and seizure operations on 9 October 2001 at various premises of Mr Shaik and his companies in Durban and at various premises in France and Mauritius related to the Thint grouping and its officers,[51] documentation was obtained from the Thint

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46 Du Plooy warrant application Thint 6:535 to 539:10 to 18

47 Du Plooy warrant application Thint 6:530 to 534: 3 to 9

48 Du Plooy warrant application Thint 6:539 to 540:19 to 23

49 Du Plooy warrant application Thint 6:540 to 557:24 to 35

50 Du Plooy warrant application Thint 6:557 to 573:36 to 37.3.12.4 and 7:574 to 590:37.3.13 to 37.3.19

51 Du Plooy warrant application Thint 6:563:37.3.1

corporate premises in Midrand before the searches in 2001 by summons and with the co-operation of Thint through its attorneys.[52] He disclosed that Thint had previously been charged together with Mr Shaik and his companies but that the charges against Thint had been withdrawn at the commencement of the trial in terms of an agreement between the NDPP and Thint's legal representatives.[53] He disclosed that Mr Shaik had obtained leave to appeal against aspects of his conviction and sentence[54] and intended to seek further leave from the President of the SCA to appeal against the remaining aspects.[55] He dealt not only with the incriminating evidence against the suspects, but also with the exculpatory evidence which tended to point the other way.[56]

50. We consequently submit that a reading of Mr Du Plooy's affidavit in support of the application for the search warrants reveals that Mr Du Plooy made frank disclosures, where necessary, and that Mr Du Plooy did not withhold any material facts.

51. Mr Du Plooy says in his affidavit in answer to Thint's challenge in this matter that,

"*in an application of this nature that concerns an investigation stretching over at least five years and that covers a plethora of facts of varying degrees of relevance and weight, the respondents could not have been*

52 Du Plooy warrant application Thint 6:563:37.3.2

53 Du Plooy warrant application Thint 6:535 to 536:12

54 Du Plooy warrant application Thint 6:537 to 538:16

55 Du Plooy warrant application Thint 6:538:17

56 Du Plooy warrant application Thint 6:553 to 557:30 to 35

expected to place before the learned Judge President all possible details that might arguably become relevant. A reading of my affidavit in support of the application for the search warrants reveals that I made frank disclosures, where necessary, and that I did not withhold any material facts.”[57]

We submit this evaluation is correct.

Thint's previous co-operation

52. Thint argues, firstly, that Mr Du Plooy failed to inform “*Ngoepe JP of the fact that documentation had been obtained from [Thint] prior to 2001 by way of a summons in terms of section 28 of the Act, and with the co-operation of [Thint] through its attorneys”*.[58] In its heads of argument Thint also argues that Mr Du Plooy “*failed to disclose fully to the Judge President the extent of [Thint's] previous co-operation in relation to the section 28 investigation*”,[59] which included its making available to the DSO during 2001 its computer information and computer materials.[60] Thint goes on to argue that, had Mr Du Plooy made this disclosure, the Judge President “*would certainly have questioned the need for the authorisation of a search warrant, particularly one issued ex parte, and in the terms issued*”.[61]

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[57] Du Plooy opposing affidavit Thint 4:354:30(c)

[58] Moynot Thint 10:923:67

[59] Thint heads 26:74

[60] Thint heads 29:85

[61] Thint heads 30:87

53. We submit that this complaint is unjustified. Mr Du Plooy did in fact disclose Thint's previous co-operation. He described the questioning of Mr Thétard at an early stage of the investigation,[62] the search and seizure operations undertaken in 2001 at the premises of the Thint group of companies in France and in Mauritius,[63] and the fact that documentation had been obtained from Thint's erstwhile premises in Midrand both by way of subpoena and with the co-operation of Thint acting through its attorneys.[64] Mr Du Plooy accordingly denies with justification that there was any duty on him to make more detailed disclosure of these earlier investigations.[65]

54. The conclusion that Thint draws is in any event sheer speculation. In the light of its experience with Thétard the DSO was suspicious of Thint and unwilling to rely on its co-operation alone. Moreover, by August 2005 Thint was one of the prime suspects in the ongoing investigation, a fact made clear in Mr Du Plooy's affidavit in the warrant application.

55. We respectfully submit that Du Plessis J was thus correct when he found as follows:

> "*The question is, … whether ... [Mr Du Plooy] erred materially by not giving more detail about [Thint's] co-operation. I do not think so for the following reasons. [Thint] is presumed to be innocent. There is a reasonable possibility however that it might not be. Common sense*

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62 Du Plooy warrant application Thint 6:556 to 557:34

63 Du Plooy warrant application Thint 6:563:37.3.1

64 Du Plooy warrant application Thint 6:563:37.3.2 and 6:568:37.3.11.3

65 Du Plooy opposing affidavit Thint 4:363 to 365:39 to 40; 4:370 to 371:52 to 54 and 4:372:55

dictates that the persons investigating [Thint's] possible guilt must bear in mind the possibility that it might not be willing to furnish to the investigators all the relevant evidence. In this context the search was necessary. Even if every instance of co-operation had been mentioned in full, this common sense possibility would have remained."[66]

Mr Thétard's relocation to Mauritius

56. Thint now accepts that Mr Du Plooy was correct when he said in his application for the warrants that Mr Thétard had not produced his diary for 2000 pursuant to a subpoena under s 28 of the NPA Act and that the diary was later found and seized during a search of Thint's office in Mauritius in October 2001. It however complains that Mr Du Plooy failed to inform the Judge President that Mr Thétard had relocated to Mauritius in the second quarter of 2000.[67] Thint now also adds that Mr Du Plooy failed to say that Mr Moynot had succeeded Mr Thétard and had at all times co-operated with the prosecution.[68]

57. We submit that these complaints are typical of the illegitimate kind. They are armchair complaints made after the event by picking out some aspect which was disclosed, and by arguing that it should have been described in greater detail. There will always be matters of that kind and if such complaints were allowed, then no application for a search warrant in a substantial case would ever be upheld.

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66 Thint High Court judgment Thint 10:860 line 16 to 861 line 6

67 Moynot Thint 10:924:70 This complaint was first raised in reply. Cf. Moynot reply Thint 6:511:32(d)

68 Thint heads 26:76 to 77

Privileged material

58. Mr Zuma and Mr Hulley argue 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*".[69] We submit for the reasons that follow that this complaint of non-disclosure is without substance.

59. Mr Hulley is a lawyer who gives advice to his clients, including Mr Zuma, which is privileged and is likely to be in documents kept at his offices. It is not a rare possibility which calls for special disclosure. The fact that Mr Hulley is a lawyer and that Mr Zuma was legally represented (by Mr Hulley) renders it probable that they will seek legal advice when the warrant comes to their knowledge. A lawyer who is consulted about a warrant issued in terms of section 29 of the Act will probably immediately read at least that section of the Act and will be alerted to the provisions of s 29(11). In the circumstances, we submit that it was not necessary to mention in the application that Mr Hulley probably had legally privileged documents at his offices. There is no reason to think that the Judge President would then have ensured greater protection than that which Parliament deemed adequate when it enacted s 29(11). In other words, Mr Du Plooy was entitled to assume that the Judge President would approach the matter on the basis that such privileged material as might be on the premises to be searched,

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[69] Hulley Zuma-Hulley 11:983:87

would be protected under s 29(11). There was accordingly no need for Mr Du Plooy to make any further disclosure.

The court's discretion

60. We submit that even if this court should hold that Mr Du Plooy ought to have disclosed all or some of the matters about which the applicants complain, it would not follow that it should set aside the relevant warrants. It has a discretion whether to do so or not.

61. We submit that there are compelling reasons to exercise its discretion in favour of the state:

61.1. The first is that Mr Du Plooy acted in good faith all along. If Mr Du Plooy was guilty of any non-disclosure, then it was inadvertent.

61.2. The second is that Mr Du Plooy prepared the application for the warrants with great care. If Mr Du Plooy was guilty of non-disclosure, then it was an error of judgment and not due to any negligence on his part.

61.3. The third is that it is in any event unlikely that it would have made any difference to the outcome of the application even if Mr Du Plooy had made the disclosures for which the applicants (especially Thint) contend.

61.4. The fourth is that, what is in issue in this case, is not merely the private interests of the parties, but also the public interest. Mr Zuma and Thint were being investigated for the commission of very serious crimes. They have been charged again. It is in the public interest that the truth be found so that they can be convicted if found guilty and acquitted if found innocent. The evidence gathered under the warrants will contribute to that cause. There is accordingly compelling reason not to set aside the warrants. The applicants have not offered any cogent reason why the court should do so.

THE "*NEED*" FOR THE SEARCHES

The main attack

62. Mr Zuma and Mr Hulley seek to impugn the search warrants on the ground that Mr Du Plooy's application for the search warrants "*failed to establish the necessary jurisdictional pre-requisite under Section 29(5)(c) of the NPA Act, which requires that the need, in regard to the investigation, for a search and seizure in terms of Section 29 of the NPA Act must be established to the judicial officer issuing the warrant*".[70] They contend that Mr Du Plooy had to justify the need "*to conduct the search and seizure operation under Section 29, rather than under the less invasive powers of the Criminal Procedure Act*"[71] or under section 28 of the NPA Act.[72]

"*Reasonable grounds for believing*"

63. In terms of s 29(5) read with s 29(1) of the NPA Act, a judicial officer may only issue a warrant if there are reasonable grounds for believing that there is or is suspected to be relevant evidence in or on the premises concerned. In Hyundai this court held that the section requires that the judicial officer "*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*

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70 Hulley Zuma-Hulley 11:945 to 946:51 (his emphasis); see also 11:1003 to 1010:107 to 113 and Zuma-Hulley heads 34 to 35:54(c) read with 55

71 Hulley Zuma-Hulley 11:1005:111

72 Hulley Zuma-Hulley 11:1006 to 1010:113, quoting extensively from Hurt J in Zuma and Another v NDPP and Others 2006 (1) SACR 468 (D) 483H to 486E

investigation is on the targeted premises".[73] In considering this question, the judicial officer must in terms of s 29(5)(c) have regard to "*the need … for a search and seizure in terms of this section"*.

64. In the Durban High Court Hurt J held that a search warrant was justified only if its use was "*reasonable in all the circumstances"*.[74] We submit with respect that this is the correct test. In coming to this conclusion however, Hurt J also accepted submissions which pitched the test much higher. He accepted the submissions of counsel for Mr Zuma and Mr Hulley that an applicant for a search warrant must satisfy the judicial officer "*that there is no reasonable prospect of obtaining the evidence by less disruptive and incursive means"*[75] and "*that the powers under s 28 would probably not result in the evidence being obtained"*.[76]

65. The latter test makes s 29 of the NPA Act unworkable. The DSO can never prove that there is no reasonable prospect of getting the evidence from the suspect by asking him for it or by issuing a subpoena against him to produce it. At most it will be able to show that there is a real risk that, if it were to follow any of these lesser routes, the suspect might destroy the evidence or dispose of it. If there is such a risk, then it is reasonable to follow the search and seizure route rather than risk losing the evidence altogether. This approach is consistent with the test set out in Hyundai:

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[73] 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 2001 (1) SA 545 (CC) para 37 (our emphasis); see also paras 49 and 52

[74] Zuma and Another v NDPP and Others 2006 (1) SACR 468 (D) 484D

[75] 484B

[76] 484C

> "*It is implicit in this 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.*"[77]

66. Search warrants such as the ones in issue in these applications, are a tool the legislature has put at the disposal of the DSO. It must be used with caution and subject to scrupulous judicial supervision. But the standard for its use must also not be set at a level so strict and so high that the tool becomes impossible to employ in a case such as this one. For this reason, the majority in the SCA found that "*the court below set the bar far too high in requiring that the material could not be obtained by invoking the provisions of section 28*".[78]

67. This is an important point of principle because, although this case is much bigger than the run of the mill criminal case, it is precisely for purposes of cases of this kind that the legislature has designed the tool of search and seizure under s 29 of the NPA Act. This court made the point in Hyundai that it is a tool that the legislature put at the disposal of the DSO for "*the investigation of certain serious*

[77] 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 2001 (1) SA 545 (CC) para 37

[78] Zuma-Hulley SCA judgment para 104

offences detrimentally affecting our communities".[79] It is designed to combat serious crime. It is meant to be used in bigger cases. It is important not to set the requirements for a warrant under s 29 at a level which is so strict that the tool is placed beyond the reach of the state in the combat of serious crime as the legislature intended.

68. We submit that it is legitimate for the prosecution to gather evidence to bolster their case even when they have enough to secure a conviction. It is indeed their duty to do a proper and thorough investigation and to take all reasonable steps to gather all the material evidence. The test is not whether they can make do with what they have.

The searches were necessary

69. In his application for the warrants, Mr Du Plooy went to some lengths to explain why further investigation was necessary and why it was necessary to do so by search warrant.

70. The investigators realised from the outset that the evidence available to the state for the prosecution of Mr Zuma and Thint was different from the evidence upon which Mr Shaik's indictment was based for the following main reasons:

70.1. The state's investigation of the payments made by Mr Shaik and his companies to Mr Zuma, only extended to payments made up to

[79] 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 2001 (1) SA 545 (CC) para 53

30 September 2002. The decision to prosecute Mr Zuma and the Thint companies was taken during the latter half of 2005, some two and a half years later.[80]

70.2. Mr Shaik testified at his trial that the payments to Mr Zuma had continued and were still continuing at the time of the trial. Mr Shaik however refused to provide any details or documentation relating to those further payments.[81]

70.3. Mr Zuma and certain other relevant parties had never been searched during the investigation prior to the Shaik trial. It was therefore also envisaged that other relevant evidence that had not previously been available to the state would be found during the 2005 searches.[82]

70.4. The evidence led during the Shaik trial cast a new light on the relationships between the various role-players. Furthermore, evidence emerged relating to certain declarations made by Mr Zuma to Parliament and Cabinet which appeared to be in conflict with the proven facts.[83]

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[80] Du Plooy warrant application Zuma-Hulley supp. vol. 1:34 to 35:37.3.4; Du Plooy 13:1132:60.1

[81] Du Plooy warrant application Zuma-Hulley supp. vol. 1:35:37.3.4; Du Plooy 13:1132:60.2

[82] Du Plooy Zuma-Hulley 13:1132:60.3

[83] Du Plooy Zuma-Hulley 13: 1133:60.4; cf. Du Plooy warrant application Zuma-Hulley supp. vol. 1:33:37.2.d

70.5. A number of aspects relating to the possible charges against Mr Zuma and Thint required further investigation, which would inevitably result in the need for a new forensic report, which would differ substantially from the old one and mean a substantially different set of charges.[84]

70.6. With hindsight, it became apparent that the conduct of Mr Shaik and his Nkobi group in relation to Mr Zuma, the Thint group and others amounted to institutionalized corruption on an ongoing basis constituting the crime of racketeering. Since Mr Zuma and the Thint companies were all *prima facie* associates with Shaik and his enterprise, this provided further reason to contemplate additional charges.[85]

71. Mr Du Plooy also identified a number of new lines of inquiry that had to be followed up:

71.1. He described at some length the evidence which indicated that Mr Jurgen Kögl and his company Cay Nominees (Pty) Limited made substantial payments to or for the benefit of Mr Zuma, that they may have done so as intermediaries and that the funds may have emanated from Thint.[86] Mr Du Plooy identified a number of questions arising from this evidence which had to be investigated.[87]

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[84] Du Plooy Zuma-Hulley 13:1133:60.5

[85] Du Plooy Zuma-Hulley 13:1133 to 1134:60.6

[86] Du Plooy warrant application Zuma-Hulley supp. vol. 1:37 to 41:37.3.11.1 to 37.3.11.6

[87] Du Plooy warrant application Zuma-Hulley supp. vol. 1:41:37.3.11.7

71.2. Mr Du Plooy also said that Ms Nora Fakude-Nkuna and her company Bohlabela Wheels (Pty) Limited had made four payments to Mr Zuma's builder for his account. She was unable to provide any satisfactory explanation or documentary justification for these payments.[88]

71.3. Mr Du Plooy also said that Mr Vivian Reddy and his corporate vehicles had made substantial payments to or for the benefit of Mr Zuma.[89] Mr Du Plooy identified a number of questions arising from this evidence which called for further investigation.[90]

71.4. Mr Du Plooy also said that Mr Shaik had acted as Mr Zuma's financial adviser for years. After his conviction in the criminal trial however, he resigned as Mr Zuma's financial adviser in July 2005. Pursuant to his resignation, his attorney sent all the documents Mr Shaik had held as Mr Zuma's financial adviser to Mr Zuma's new attorney, Mr Hulley. These documents had a direct bearing on the financial affairs of Mr Zuma and were an obvious source of valuable evidence of payments made to him or for his benefit, not only by Mr Shaik but also by others.[91]

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88 Du Plooy warrant application Zuma-Hulley supp. vol. 1:43 to 45:37.3.12.1 to 37.3.12.4

89 Du Plooy warrant application Zuma-Hulley supp. vol. 1:45 to 49:37.3.13 to 37.3.13.5

90 Du Plooy warrant application Zuma-Hulley supp. vol. 1:49:37.3.13.6

91 Du Plooy warrant application Zuma-Hulley supp. vol. 1:62:39

72. Mr Du Plooy concluded that it was necessary to gather further evidence about these matters and summarised the evidence concerned in some detail.[92] We submit with respect that Mr Du Plooy's explanation cannot be faulted.

Why not s 20 of the CPA or s 28 of the NPA Act?

73. Mr Zuma and Mr Hulley contend that the powers under Chapter 5 of the NPA Act are significantly more invasive than the powers of questioning and search and seizure powers under the CPA because the former do not "*recognise a right to silence, or a right against self-incrimination, the threshold of relevance is differently worded and the penalties are more severe than the penalties under the Criminal Procedure Act*".[93]

74. They do however not explain why a search and seizure in terms of s 29 of the NPA Act violates the accused's rights to remain silent and not to be compelled to give incriminating evidence while a search and seizure in terms of s 20 of the Criminal Procedure Act does not.

75. It is correct that s 29 of the NPA Act includes ancillary powers which s 20 of the Criminal Procedure Act does not. Sections 29(1)(a), (b) and (c) entitle anybody who executes a search warrant on any premises to "*make such inquiries as he or she may deem necessary"* and to question people on the premises about the documents and other objects found there. Section 29(12)(b) obliges anybody who is asked for information or an explanation in terms of s 29(1) to give a

[92] Du Plooy warrant application Zuma-Hulley supp. vol. 1:53 to 55:37.3.15.1 to 37.3.15.5

[93] Hulley Zuma-Hulley 11:1005:110

truthful answer. Section 29(3) provides that such an answer may not be used in any subsequent criminal proceedings against the person who gave it.

76. We accept that this court's obiter finding in Shaik (1)[94] that an accused person may not be questioned in terms of s 28 of the NPA Act on the offences with which he has been charged, may mean that these ancillary powers may not be used to question an accused on the crimes with which he has been charged. But they are not in issue in this case. They were not used to question Mr Zuma in the execution of the search warrants under attack. Their fate is irrelevant to the outcome of this case which concerns the validity of search warrants and their execution under s 29 and not the ambit of the ancillary powers under s 29(1).

77. We have already submitted that in holding that the warrants were invalid because Mr Du Plooy's evidence and contentions in the warrant application "*do not make out a case that the additional evidence … cannot be obtained by invoking the provisions of s 28"*, Hurt J set the threshold too high. The question was whether it was reasonable for the DSO to employ search warrants to gather the additional evidence and not whether it might have been possible for them to obtain the evidence by other means. The suspects in a criminal investigation and their associates who may have been complicit in their crimes may of course respond honestly, frankly and fully to a summons under s 28 of the NPA Act by disclosing the incriminating evidence in their possession and by honestly answering all the incriminating questions put to them. It will almost never be possible for an investigator to exclude this possibility. But it is naïve to think that this is the likely response of suspects and their associates. It is far more likely that they will tend

94 Shaik v Minister of Justice and Constitutional Development 2004 (3) SA 599 (CC) paras 17 to 19

to withhold, conceal, remove and destroy the incriminating evidence in their possession and give false, misleading or incomplete answers to the questions put to them. It is accordingly wrong to say that a search warrant may not be issued unless the applicant demonstrates that the evidence cannot be obtained by other means.

78. Mr Du Plooy sought to demonstrate why he believed that it was unlikely that the additional evidence could be gathered by summons under s 28 and that it would in any event be counter-productive to attempt to do so because it would alert the suspects and their associates to the fact that the DSO was gathering further evidence and would identify the further evidence sought.[95] In addition, we refer to the following:

78.1. In Mr Du Plooy's affidavit in the warrant application he quoted at some length from the High Court judgment in the Shaik trial to demonstrate that it had made damning findings of the complicity of Mr Zuma and Thint in the crimes committed by Mr Shaik and his companies.[96] The encrypted fax in itself seemed to demonstrate the complicity of both of them.[97]

78.2. Mr Du Plooy dealt with Mr Zuma's version in his written answers to the written questions put to him by the DSO concerning the allegations of

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[95] Du Plooy warrant application Zuma-Hulley supp. vol. 1:55:37.3.16 to 61:37.3.19

[96] Du Plooy warrant application Zuma-Hulley supp. vol. 1:12 to 19:26.1.1 to 26.2.6

[97] Du Plooy warrant application Zuma-Hulley supp. vol. 1:19:27; encrypted fax JDP1 supp. vol. 1:70

corruption against him.[98] He also dealt with Thint's denial of any complicity in Mr Shaik's crimes[99] and with the investigators' earlier attempts to obtain evidence from Thint by way of summons.[100]

78.3. Mr Du Plooy also dealt with Mr Kögl's resistance to the investigators' attempts to obtain evidence from him under s 28 of the NPA Act. After protracted correspondence, Mr Kögl eventually provided the DSO with an affidavit and later with another one but neither of them provided satisfactory explanations for his transactions involving Mr Zuma and Thint.[101] There is every reason to believe that Mr Kögl's explanations are false.[102]

78.4. Mr Du Plooy explained that Ms Fakude-Nkuna was also questioned in terms of s 28 of the NPA Act.[103] She failed however to give any satisfactory explanation for her payments to or for the benefit of Mr Zuma and could not provide any documentary evidence of them.[104] The DSO concluded that this raised doubts about the completeness and veracity of the information she provided them and that a search

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[98] Du Plooy warrant application Zuma-Hulley supp. vol. 1:26 to 27:32 to 33

[99] Du Plooy warrant application Zuma-Hulley supp. vol. 1:27:34

[100] Du Plooy warrant application Zuma-Hulley supp. vol. 1:58:37.3.17

[101] Du Plooy warrant application Zuma-Hulley supp. vol. 1:37 to 39:37.3.11.1 to 37.3.11.2

[102] Du Plooy warrant application Zuma-Hulley supp. vol. 1:39 to 43:37.3.11.3 to 37.3.11.7

[103] Du Plooy warrant application Zuma-Hulley supp. vol. 1:43:37.3.12.1

[104] Du Plooy warrant application Zuma-Hulley supp. vol. 1:44:37.3.12.3

was necessary to establish the truth about her payments to or for the benefit of Mr Zuma.[105]

78.5. Mr Du Plooy explained that Mr Reddy was also questioned under s 28 of the NPA Act but he too gave unsatisfactory explanations for his transactions involving Mr Zuma.[106] His version that the funds he provided to Mr Zuma were loans seems to be controverted by the evidence of those transactions.[107] Mr Du Plooy concluded that a search of Mr Reddy's premises was necessary because "*there can be no guarantee of the completeness or veracity of information in documents provided pursuant to a section 28 summons*".[108]

78.6. Mr Du Plooy also explained that the High Court had held in the Shaik trial that the "*revolving loan agreement*" which Ms Mahomed said she had prepared was a sham in that it was "*not reflective of a genuine obligation to borrow or repay these amounts*".[109] There was accordingly every reason to suspect that she may have been complicit, if not in the crimes of Mr Shaik and Mr Zuma, then in an attempt to produce false evidence to conceal it. It would accordingly be naïve to think that she would be honest and frank in response to a s 28 summons.

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[105] Du Plooy warrant application Zuma-Hulley supp. vol. 1:44:37.3.12.4

[106] Du Plooy warrant application Zuma-Hulley supp. vol. 1:45:37.3.13

[107] Du Plooy warrant application Zuma-Hulley supp. vol. 1:45 to 49:37.3.13.1 to 37.3.13.5

[108] Du Plooy warrant application Zuma-Hulley supp. vol. 1:50:37.3.13.7

[109] Du Plooy warrant application Zuma-Hulley supp. vol. 1:52:37.3.14.3

79. This history was not unusual. The people in whose possession the evidence was sought were the suspects themselves and their associates who seemed to have assisted them in the commission of their offences. The DSO could not with any confidence expect that these people would be frank, open and honest in their response to a summons under s 28.

80. Mr Du Plooy also made the point that the evidence the DSO sought comprised documents and electronic computer records. It is evidence which can very easily be concealed, removed, destroyed or altered. It was accordingly important to get to the evidence and seize it without forewarning the suspects and their associates.[110]

81. We submit in the circumstances that the prosecution did more than enough to demonstrate that it was reasonable to seek search warrants in an attempt to gather the outstanding evidence rather than to attempt to get it by summons. At the very least, they demonstrated that "*the material [could not] be expected in the ordinary course to be produced voluntarily*", to adopt the wording of Justice Nugent.[111]

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[110] Du Plooy warrant application Zuma-Hulley supp. vol. 1:57:37.3.16.4 to 58:37.3.17

[111] Zuma-Hulley SCA judgment para 104

THE AMBIT OF THE WARRANTS

Introduction

82. The applicants contend that the warrants were unduly vague in that they did not sufficiently circumscribe the searches they authorised.[112]

83. The SCA dismissed the applicants' contention by a majority. Justice Nugent with whom Justices Ponnan and Mlambo agreed, held that the warrants sufficiently circumscribed the searches.[113] Justice Farlam with whom Justice Cloete agreed, however came to the opposite conclusion.[114]

84. Both judgments accepted as their starting point, the SCA's earlier statement in Powell that a warrant "*must convey intelligibly to both searcher and searched the ambit of the search it authorises"*.[115]

85. The majority held that the warrants complied with this requirement while the minority held that they did not. The main difference between them was that the majority held that it was permissible for a warrant to circumscribe the search by reference to an investigation which it identifies but does not describe. As long as the ambit of the investigation is capable of objective determination, it effectively

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[112] Zuma-Hulley heads 32:54(a) and 41:68 to 86; Thint heads 41:116 to 149

[113] Zuma-Hulley SCA judgment paras 74 to 102

[114] Zuma-Hulley SCA judgment paras 33 to 50

[115] Powell NO v Van der Merwe NO 2005 (5) SA 62 (SCA) para 59(d)

circumscribes the parameters of the warrant albeit that its boundaries are not apparent from the warrant alone.

86. The minority judgment on the other hand held that the warrant must on its own and without reference to any extraneous facts, define its own boundaries. Both the searcher and the searched must "*there and then"* be able to determine the parameters of the search from the warrant alone. It is not good enough if the warrant merely enables them to do so in due course.

87. We submit in the first place that it does not matter whether the majority or minority of the SCA was correct because the warrants were sufficiently specific to meet even the high threshold set by the minority. We go on to submit however that, if and to the extent that it might be necessary to choose between the two, the majority was correct and the minority not. The purpose of a warrant is to delineate objectively what the boundaries are of the search it authorises. It does so for the protection of both the searcher and the searched. Its purpose is achieved if the boundaries of its authority are capable of objective determination. It need not be possible to do so from the warrant on its own without regard to the extraneous matters which it incorporates by reference. The only possible purpose of the "*there and then"* requirement set by the SCA minority, would be to facilitate self-help by someone subject to a search who concludes that the searcher is exceeding the parameters of the warrant. But the purpose of the warrant is not to facilitate or encourage self-help.

Analysis of section 29

88. The requirements of a warrant under s 29 of the NPA Act depend on the proper interpretation of the section. Justice Nugent made this point in his judgment in the SCA:

> "*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. And where the legislature, in a constitutionally valid law, has authorised the performance of an act if certain conditions are met, others cannot simply be added."*[116]

89. The SCA had previously forcefully made this point in Rudolph's case.[117] It held 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 went on to say for example 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"*.[118]

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116 Zuma-Hulley SCA judgment para 75

117 Rudolph v CIR 1997 (4) SA 391 (SCA) 397

118 397D to H

90. This point is vividly illustrated by the old Transvaal case of Pullen[119] from which Justice Farlam quoted in para 36 of his judgment. He quoted a statement by Tindall J in Pullen that,

> "*It is desirable that the person whose premises are being invaded should know the reason why: the arguments in favour of the desirability of such a practice are obvious.*"[120]

Tindall J however went on to qualify this statement in the next sentence of his judgment by adding that, "*in my opinion there is nothing in sec.49 which justifies the court in laying down such a rule.*" He also made the point in other words, that the requirements of a warrant depend entirely on the express and implied provisions of the empowering statute under which it is issued.

91. The House of Lords also adopted this approach in its leading judgment on the issue in Rossminster.[121] The issue in the case was whether the warrants before the court defined the parameters of the searches with sufficient particularity. All five law lords delivered separate speeches and all of them made it clear that the issue depended entirely on the proper interpretation of the underlying empowering provision. Lord Diplock for instance said explicitly that,

> "*What has to be disclosed on the face of the search warrant depends on the true construction of the statute.*"[122]

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[119] Pullen NO v Waja 1929 TPD 838

[120] Pullen NO v Waja 1929 TPD 838 at 849 quoted in Zuma-Hulley SCA judgment para 36

[121] IRC v Rossminster [1980] 1 All ER 80 (HL)

[122] 90(e) to (f)

92. The requirements in this case, must accordingly be determined by a proper interpretation of s 29 of the NPA Act. We will not attempt an exhaustive interpretation but merely point to a number of its features which bear on the question before the court.

93. Sections 26(1) and 29(1) make it clear that the powers of search and seizure under s 29, may only be exercised by an Investigating Director or someone acting under his written authority. As appears from the definition of an "*Investigating Director*" in s 1, this office is held only by the head of the Directorate of Special Operations and the head of an Investigating Directorate established by the President in terms of s 7(1A). The powers are accordingly confined to one or at most three of the most senior officers in the NPA.

94. Section 29(1) makes it clear that the search and seizure powers may only be used for purposes of an "*investigation*" in terms of s 28(1), that is, an investigation into a "*specified offence*".[123] The definition of a "*specified offence*" in s 1 read with s 7(1) and (1A) makes it clear that the search and seizure powers under s 29 may only be used for the investigation of organised crime and such other offences or categories of offences as may be determined by the President.

95. The search and seizure powers under s 29 are in other words special powers entrusted to senior officials for the investigation of serious crimes. The section must be interpreted in a way which renders it effective for the purposes it has been designed to serve.

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[123] In terms of s 28(1)(c) an investigation into a specified offence may be extended to connected offences which are not in themselves specified offences. In terms of s 28(13) and (14) the search and seizure powers may also be invoked for purposes of a preparatory investigation.

96. In terms of s 29(5) a warrant may only be issued by a judicial officer. He or she may only issue a warrant if the following four things appear from information on oath or affirmation placed before them:

    96.1. The first is the nature of the investigation for purposes of which the search is to be undertaken. This is an important requirement. We will later return to it. Its implication is that the nature of the investigation is always apparent from the application for the warrant.

    96.2. The second is a reasonable suspicion that an offence has been or is being committed or that an attempt to commit one has been or is being made.

    96.3. The third is a need for the search and seizure for purposes of the investigation.

    96.4. The fourth is reasonable grounds for believing that "*anything*" referred to in s 29(1) is on or in the premises to be searched or is suspected to be on or in those premises. We emphasize the word "*anything*". It means that the judicial officer need merely be satisfied that one or more things of the kind mentioned in s 29(1) are or are suspected to be on the premises.

97. Once these requirements are met, the judicial officer issues the search warrant. The section is silent on what it must say. It is clear however that it may and

should confer on the investigator, the search and seizure powers in s 29(1). They are the following powers:

97.1. To inspect and search the premises.

97.2. To examine any object found on or in the premises which has a bearing or might have a bearing on the investigation.

97.3. To make copies or to 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.

97.4. To seize anything on or in the premises,

- which has a bearing or might have a bearing on the investigation or
- which he wishes to retain for further examination or
- which he wishes to retain for safe custody.

97.5. To question people on the premises,

- by making such enquiries as he may deem necessary;
- by asking for information about any object found on or in the premises which has a bearing or might have a bearing on the investigation and
- by requesting an explanation for any entry in any book or document found on or in the premises which has a bearing or might have a bearing on the investigation.

The people from whom this information is sought are obliged to give it in terms of s 29(12)(b) but in terms of s 29(3) it may not be used in any criminal proceedings against them.

98. The section lays down a number of further rules which regulate the exercise of these powers:

98.1. Section 29(2) requires the search and seizure powers to be exercised with strict regard to decency and order and the constitutional rights of all concerned.

98.2. Section 29(9) provides that, if the person in control of the premises is present, the person executing the warrant must,

- identify himself to the person in control of the premises;
- hand that person a copy of the warrant, and
- supply that person on the request with particulars regarding his authority to execute the warrant.

We emphasize the latter requirement laid down by s 29(9)(b). It makes it clear that the person whose premises are to be searched, is not confined to the warrant itself to determine the scope of the authority it confers on those acting under it. He is entitled to ask particulars of its nature and scope and the investigator is obliged to furnish those particulars.

98.3. Section 29(11) creates a special mechanism which is triggered whenever anybody claims that any item found on or in the premises contains privileged information.

98.4. Section 29(7) authorises any person who acts under a warrant, to use such force as may be reasonably necessary to overcome any resistance against its proper execution.

98.5. Anybody who obstructs or hinders the execution of a warrant is guilty of an offence in terms of s 29(12)(a).

99. We emphasize the following two features of s 29:

99.1. In terms of s 29(5) the judicial officer may issue a warrant once he is satisfied that some things of the kind described in s 29(1), are on the premises or are suspected to be on it. Once the warrant is issued, s 29(1) determines what things the investigator may search for and seize. They are not confined to the things of which information was placed before the judicial officer. The section explicitly authorises the investigator to search for and seize anything "*which has a bearing or might have a bearing on the investigation*". In other words, the ambit of the search is not defined by the judicial officer in the warrant. The warrant merely licences the investigator to undertake the search. Under that licence, the investigator is then entitled in terms of s 29(1), to search for and seize anything "*which has a bearing or might have a bearing on the investigation*".

99.2. The second feature is related to the first. It is that the investigation for purposes of which a warrant is sought and issued, plays a crucial and defining role in determining whether a search may take place at all

and, if so, what its permissible scope is. In terms of s 29(5)(a) the applicant for a warrant must satisfy the judicial officer of the nature and scope of the investigation. The investigation then serves as the touchstone by which the scope of the search is determined under s 29(1). The scope of the investigation may not be apparent from the terms of the warrant but, if the person in control of the premises being searched wishes to know more about it, then he is entitled to particulars of it in terms of s 29(9)(b).

The terms of the warrants in this case

100. The warrants other than the one for Mr Hulley's offices,[124] identify the documents which may be sought and seized as follows:

100.1. The operative part of the warrant authorises the Investigating Director or anybody acting under his written authority, to search for and seize any item on or in the premises "*which has a bearing or might have a bearing on the investigation in question"*. This investigation refers back to the investigation described in the preamble.

100.2. The preamble starts off by telling the reader that the nature of the investigation appears from the information on oath placed before the judge who issued the warrant.

[124] Killarney warrant JZ2 Zuma-Hulley 1:95; Nkandla warrant JZ3 2:101; Union Buildings warrant JZ4 2:107; Department of Economic Development warrant JZ5 2:113 Thint warrant PM2 Thint 2:92

100.3. The preamble then summarises the investigation as one into certain offences about which there is a reasonable suspicion that they have been committed or that attempts have been made to commit them. The offences are :

- 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.

100.4. The preamble goes on to say that the items which have a bearing or might have a bearing on the investigation into these offences, are those described in annexure A. It in turn describes categories of documents in detailed terms. Although the descriptions are generic and not specific (in the sense that they describe classes of documents and not individual documents) they are detailed descriptions nonetheless. Many of the descriptions describe who the persons and entities are who were allegedly involved in the offences. They describe broadly what those parties are accused of having done.

100.5. In other words, when the operative part of each warrant is read with its preamble and annexure A, it is clear that the warrants only authorised searches for and seizure of documents that meet two requirements. The first is that the document must be of a kind 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 into the offences mentioned. Only documents which meet both these requirements may be seized under the warrants.

101. The Hulley warrant[125] differs from the others in that paragraph 1 of annexure A is very specific in its definition of the documents that may be searched for and seized:

> "*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 adviser to Jacob Zuma"*.

We later deal with the genesis of this paragraph and with its execution which made it clear that it was a very specific consignment of documents that Mr Shaik's attorney Mr Parsee had sent to Mr Hulley.

102. The last paragraph of the warrants comprises a general description of documents in very wide terms if read in isolation. We submit however that the meaning of this clause should not be determined by reading it in isolation. It should also be read purposively in the context of the document as a whole. We submit that the majority of the SCA were correct when they said that the "*catch-all*" clause does not differ materially from the other paragraphs of annexure A. The material it encompasses is also confined to material that has or might have a bearing on the investigation.[126]

[125] Hulley warrant Zuma-Hulley 2:125

[126] Zuma-Hulley SCA judgment para 102

The warrants read on their own

103. We submit that the warrants read on their own, fully comply with all the requirements of s 29. They indeed provide greater particularity of the materials which may be sought and seized than is necessary under s 29.

104. We emphasize again that they must be judged under s 29 and not by some pre-conceived generalisation about the degree of particularity required of warrants generally. We mention a few examples of the application of this principle before we turn to the warrants at hand.

105. In Bogoshi the SCA upheld a warrant under s 6(1) of the Investigation of Serious Economic Offences Act 117 of 1991, the predecessor of s 29 of the NPA Act. The warrant authorised the investigators,

> "*for the purposes of an inquiry instituted by the Director in terms of section 5(1) of the Act relating to the matter of alleged irregularities concerning claims submitted to (the MVA Fund)",*

to enter an attorney's offices and *inter alia*,

> "*seize … anything on or in the premises which in their opinion has a bearing on the inquiry in question or if they wish to retain it for further examination or for safe custody"*.[127]

The SCA held that,

> "*It is true … that the documents to be seized are not specifically particularised. But section 6(1)(d) does not require that this be done. The discretion which is afforded to those authorised is, as the court a quo found, in accordance with the terms of the section itself. The*

[127] Bogoshi v Van Vuuren NO 1996 (1) SA 785 (A) at 796H to J

(warrants) were thus not too vague. … Only documents which, in the opinion of those authorised, have a bearing on the inquiry, may be seized. So there can be no question of documents unrelated to the inquiry being able to be removed. But is the inquiry sufficiently identified? I think it is. Even though there is no mention of what the alleged irregularities are or who committed them, the inquiry is one which relates to alleged irregularities in the submission of claims to the Fund. There is no reason to think that the persons authorised would not have known what this inquiry was."[128]

106. In Rudolph's case[129] the SCA upheld a warrant which authorised a SARS inspector to exercise all the powers under s74(3) of the Income Tax Act 58 of 1962 in relation to Mr Rudolph at his home or at any other premises at all.[130] It authorised the investigator in unspecified terms,

- to enter the premises and "*search for any monies, books, records, accounts or documents*";
- to "*open or cause to be opened or removed and opened, any article in which he suspects any monies, books, records, accounts or documents to be contained*";
- to "*seize any books, records, accounts or documents as in his opinion may afford evidence which may be material in assessing the liability of any person for any tax"* and

[128] Bogoshi v Van Vuuren NO 1996 (1) SA 785 (A) at 797B to F

[129] Rudolph v CIR 1997 (4) SA 391 (SCA)

[130] 396H to J

- to "*retain any such books, records, accounts or documents for as long as they may be required for any assessment or for any criminal or other proceedings under this Act"*.

107. The leading case on the topic in the House of Lords is the case of Rossminster.[131] It upheld warrants which recited,

> "*that there is reasonable ground for suspecting that an offence involving fraud in connection with or in relation to tax has been committed and that evidence of it is to be found on the premises"*,

and went on to authorise the investigators to enter the named premises where,

> "*you may seize and remove any things whatsoever found there which you have reasonable cause to believe may be required as evidence for the purposes of proceedings in respect of such an offence."*[132]

The warrants said no more of the suspected offences than that they "*involved fraud in connection with or in relation to tax".* They went on to authorise the investigators to search for and seize any documents which they (the investigators) had reasonable cause to believe "*may be required"* as evidence for purposes of any proceedings "*in respect of such an offence"*. In upholding the warrants, the law lords made the following points:

107.1. Lord Wilberforce made the point that the people whose premises were being searched, were merely told that the search was in connection with a tax fraud, but were not told "*what the precise nature of the fraud*

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[131] IRC v Rossminster [1980] 1 All ER 80 (HL)

[132] 86(d) to (f)

was, when it was committed, or by whom it was committed".[133] He justified the lack of particularity however because,

> "*To require specification at this investigatory stage would be impracticable given the complexity of 'tax frauds' and the different persons who may be involved (companies, officers of companies, accountants, tax consultants, taxpayers, wives of taxpayers etc)."*[134]

107.2. Viscount Dilhorne referred to the views expressed by Lord Denning MR and his colleagues in the Court of Appeal that "*a warrant must specify the offence suspected and that the seizure is limited to those things authorised by the warrant"*.[135] These are the views upon which Justice Farlam placed reliance in his judgment in this case.[136] Viscount Dilhorne however expressly rejected them:

> "*My lords I do not find myself able to agree. The section does not require the warrant to state what criminal offence or offences are suspected. Officers of the Board when making their searches and deciding what to seize, act in accordance with the instructions they have received and do not rely on the terms of the warrant for guidance. The warrant does not authorise*

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[133] IRC v Rossminster [1980] 1 All ER 80 (HL) at 83(e) to (f)

[134] 84(a) to (b)

[135] 88(c)

[136] Zuma-Hulley SCA judgment para 44

seizure or say what may be seized. It is sub-section (3) that does that."[137]

107.3. Lord Diplock made the point that it may be contrary to public policy to require the prosecution, at such an early stage of the investigation, to identify the suspects and the crimes of which they are suspected:

"*To identify a suspect where the search extends to premises that are not in his personal occupation, is to alert him to the suspicions of the Revenue, and if they are well-founded it may give him an opportunity of covering his tracks; while if the suspicions ultimately turn out to be groundless, his reputation with those whose premises have been searched will be unnecessarily besmirched."*[138]

108. The Privy Council recently followed and applied Rossminster in the case of Williams.[139] Lord Hoffman delivered the unanimous judgment of the Privy Council. They upheld a Jamaican warrant which merely recorded that there was good reason to believe that there was on the premises concerned, "*uncustomed goods on which the duty leviable by law has not been paid or books, documents or instruments relating thereto"*. It went on to authorise the investigators to enter the premises,

137 IRC v Rossminster [1980] 1 All ER 80 (HL) at 88(d)

138 92(c) to (d)

139 Attorney-General v Danhai Williams [1997] UKPC 22 (12th May 1997)

> "*to seize all such goods and other articles reasonably supposed to have been used in connection with goods which may be found in the said place and to take further action in the premises as the law allows"*.[140]

Lord Hoffman specifically posed the question whether "*the need for the occupier to be able to satisfy himself that the search is lawful, gives rise to any implied requirements about what the warrant should say".*[141] He referred to Rossminster but said merely that it was "*highly desirable for the warrant to contain an express statement of the statutory authority under which it was issued"*.[142] He specifically went on to say that it was not necessary for the warrant to specify the materials subject to it with any greater particularity:

> "*As for the references to a personal search, instruments and articles, their Lordships do not see how it is possible to imply some formal requirement in the language of the warrant which the inclusion of these infelicities would infringe."*[143]

109. We submit that this approach is the one that should be adopted in this case to ensure that s 29 remains useful for the purpose for which it was designed. Its primary purpose is the investigation of complicated organised crime. It may be invoked at an early stage of the investigation when there is no more than a reasonable suspicion that such a crime has been committed. When there is such a suspicion, it may even be invoked in a preparatory investigation in terms of ss 28(13) and (14) to determine whether there are reasonable grounds for a

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140 Attorney-General v Danhai Williams [1997] UKPC 22 (12th May 1997) at para 9

141 Para 41

142 Para 43

143 Para 43

plenary investigation in terms of s 28(1). The Investigating Director will in these circumstances often suspect on reasonable grounds that a specified offence has been committed but not know when, by whom or how it was done. He will similarly often know or on reasonable grounds suspect that there would be evidence of a suspected offence at the suspect's home, in his office or in the office of his bookkeeper without knowing precisely what the evidence at those premises would be. Section 29 is designed to allow the Investigating Director to gather the available evidence by search and seizure in these circumstances. He would however not be able to do so if every warrant under s 29 were required to specify,

- when, by whom and in what way the suspected offences were commited and
- what the nature is of the evidence that may be seized on the premises to be searched.

110. The considerations of public policy Lord Diplock mentioned in Rossminster are moreover equally applicable to s 29. If the Investigating Director is always required to identify the suspects and to specify when and how they are suspected of having committed the offences under investigation, it may on the one hand hamstring the investigation and on the other unfairly besmirch the names of suspects who later turn out to have been innocent.

111. We submit that the warrants in this case were perfectly valid even if they were to be read on their own without reference to any extraneous material. They went further than they were required to do in their identification of the materials authorised to be sought and seized under them. The parameters of the search

were set by s 29(1) and need not have been set by the terms of the warrant issued under it.

The warrants read with the "*investigation"*

112. If this court should hold that we are wrong in our submission that the warrants read in isolation, sufficiently described the parameters of the search, then we submit that the majority of the SCA were in any event correct in holding that the warrants could be read together with the description of the investigation to which they refer, to determine whether they define the parameters of the search with adequate precision. It is clear that on that basis they were sufficiently specific.

113. The investigation plays a central role in the scheme of s 29:

113.1. The application for the warrant must describe the nature of the investigation in terms of s 28(5)(a).

113.2. The judicial officer may only issue the warrant if he is satisfied of the need for it for purposes of the investigation in terms of s 29(5)(c).

113.3. If a warrant is issued, the search may only be undertaken in terms of s 29(1) for the purpose of the investigation.

113.4. The person who executes the warrant, may only search for and seize evidence "*which has a bearing or might have a bearing on the investigation"*.

114. The investigation is accordingly central to the basis upon which a search may be authorised, the purpose for which a search may be undertaken and the parameters within which the search must be executed. We submit that the legitimacy of the warrant can and must only be determined in the light of the investigation from which it arises.

115. The warrant need not describe the investigation. The scope of the warrant may accordingly not be apparent from the warrant read on its own. The person targeted by the search, can however readily determine the nature and scope of the investigation in two ways:

115.1. He may ask the investigator in terms of s 29(9)(b) for particulars regarding his authority to execute the warrant. If the warrant defines his authority with reference to the investigation, then he is obliged to furnish particulars of the nature and scope of the investigation.

115.2. The nature of the investigation must in any event always be described in the application for the warrant in terms of s 29(5)(a). It establishes the objective benchmark against which the parameters of the search are determined.

116. We submit in the circumstances that the majority in the SCA were correct in holding that a warrant which defines its parameters with reference to an identified investigation, must be read and judged against the background of that investigation. The purpose of the warrant is to establish objective boundaries for the search so that both the searcher and the searched may determine what is

permissible and what is not. It is not necessary for that purpose to insist that the warrant be read on its own without reference to any extraneous matter.

117. The law is replete with examples of written instruments which are required to provide objective certainty but are at the same time permitted to do so by reference to and incorporation of extraneous material:

117.1. Incorporation by reference is for instance a well known style of parliamentary drafting which is frequently adopted. In Groeschel, Van den Heever J described it as "*a shortcut in practical legislation"*.[144]

117.2. Another well-known example is that of contracts which are by law required to be in writing. They have frequently been held to permit incorporation by reference to extraneous matter.[145]

118. The minority in the SCA however held that the warrant must on its own and without reference to extraneous material define the parameters of the search with sufficient particularity. The only purpose of such a requirement would be to enable the person subject to the search to determine "*there and then"* what the parameters are of the searcher's authority. The only point of such a requirement would be to enable the person concerned to employ self-help by resisting any attempt to execute the search beyond his perception of what is permissible. We

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144 Groeschel v Groeschel 1938 SWA 9 at 11 quoted in End Conscription Campaign v Minister of Defence 1993 (1) SA 589 (T) 592H to I

145 Van Wyk v Rottcher's Saw Mills 1948 (1) SA 983 (A) 990 to 992; Johnston v Leal 1980(3) SA 927 (A) 937 to 938; Industrial Development Corporation of SA v Silver 2003 (1) SA 365 (SCA) paras 6 to 9

submit however that there is no policy of the law to facilitate or even encourage self-help of this kind.

119. The person being searched is sufficiently protected as long as the parameters of the search are objectively determined, even if he is not immediately able to determine its boundaries but can only do so in due course. The investigators executing the search warrant, know that they do so at their peril. If they stray beyond the permissible boundaries objectively determined, they expose themselves to civil and even criminal liability. The person subject to their search may not be able to resist and stop them there and then, but has the full range of remedies permitted by law available to him thereafter.

120. There is no suggestion in this case that the materials seized went beyond the boundaries permitted under the warrants read with the investigation for purposes of which they were issued. The debate is accordingly an entirely theoretical one. We are not concerned with any actual unlawful intrusion. We are concerned only with the technical validity of the language of the warrants.

121. We submit in the circumstances that the warrants were sufficiently clear and specific and accordingly valid.

Alternatively severance

122. If this court should however hold that any part of the warrants is unduly vague or wide, then we submit that the appropriate remedy is to sever the vague or wide part from the remainder which is good rather than to invalidate the whole warrant.

This has been held by the SCA to be the appropriate remedy where it is possible to sever the good from the bad.[146]

123. There cannot be any constitutional objection to severance which strikes down a defective part of a warrant but upholds the remainder of it. This court frequently deals in this way with legislation found to be unconstitutional and invalid in part only. It did so again in its recent judgment in SA Liquor Traders Association.[147] The court reiterated that there are two important considerations in fashioning a remedy. They are "*the need to give appropriate and effective relief to the aggrieved litigant; and the principle of the separation of powers which requires a court to pay appropriate respect to the proper role of the legislative and executive arms of government*".[148] On this approach a court is obliged to sever the bad from the good rather than to strike down the whole where severance is possible.

124. Severance is all the more appropriate in this case because there is no suggestion that the people who executed the searches in any way relied on the "*catch-all clause*" in the searches they conducted or in the evidence they seized. The applicants do not even allege that they did so. There is moreover clear evidence at least in the case of the search of Mr Hulley's offices, that it was confined to the documents described in paragraph 1 of annexure A and that nothing else was sought or taken (i.e. if paragraph 2 of annexure A and annexure B as a whole were severed, that would not make any practical difference). We deal with this

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[146] Divisional Commissioner of SA Police Witwatersrand Area v SA Associated Newspapers 1966 (2) SA 503 (A) 513A to B; Cine Films v Commissioner of Police 1972 (2) SA 254 (A) 268D; Powell N.O. and Others v Van der Merwe N.O. and Others 2005 (5) SA 62 (SCA) paras 56 and 58

[147] South African Liquor Traders Association and Others v Chairperson, Gauteng Liquor Board and Others 2006 (8) BCLR 901 (CC) para 31

[148] Para 35

evidence in greater detail when we deal with the attack on the conduct of the search of Mr Hulley's offices in the next chapter.

OTHER FEATURES OF THE WARRANTS

The addressee

125. Each of the warrants was addressed to and conferred its authority on the Head of the DSO "*or any person authorised by him/her in writing*". The Head of the DSO in turn conferred written authority on the particular DSO officers who executed the warrants.

126. Thint contends that the judge who issued the warrants should have identified the particular DSO officers authorised to execute them and should have named them in the warrants.[149] It bases this contention on the High Court judgment in Naidoo.[150] It differed from this case in two material respects:

    126.1. The warrant in that case, had been issued under s 25(1)(b) of the Criminal Procedure Act. It provided that a magistrate may issue a warrant to "*a police official*". The High Court held that it meant that the warrant had to be issued to a particular police official.

    126.2. The warrant was held to be invalid because it was issued "*To all police officers*" without distinction.

127. This case is different from that one in both respects:

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[149] Thint heads 41:119 and 50:150 to 156

[150] Naidoo v Minister of Law and Order 1990 (2) SA 158 (W) 161C to D

127.1. Section 29(1) provides that a search may be undertaken by an Investigating Director "*or any person authorised thereto by him or her in writing"*. Section 29(4) goes on to say that such a search may only be performed by virtue of a warrant issued by a judicial officer. The judicial officer's role is in other words to authorise the search. It is then up to the Investigating Director to execute the warrant himself or to authorise someone else in writing to do so.

127.2. The warrants accorded with this scheme. They were not simply issued to "*all police officers"*. They were addressed specifically to the Head of the DSO and allowed him to authorise anybody else in writing to execute them.

The computer materials

128. The operative part of each warrant provided for computer-related objects to be sought and seized in the manner authorised in annexure B to the warrant. It provided in turn for mirror-images to be made of all computers, laptops, notebooks or hard drives or any other electronic device on which information can be stored or saved, and 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"*.

129. Thint contends that this provision for off-site searches was not competent under s 29(1) of the NPA Act.[151]

130. The making of "*mirror images*" and "*digital images*" of computer-related storage devices for further examination[152] is a practical and safe way of making copies of information on them.[153] The mirror image is in the first place necessary to have proof of what is on the computer and what is not. It is also a matter of convenience to remove the mirror image to a facility where it is possible to restore access to the deleted data. The data on the mirror image is examined to determine what falls within the parameters of the warrant and what not. It does not involve any greater access to the underlying material than would have been gained if the papers in a file had been perused in the ordinary way. If this examination is done elsewhere by using the mirror image, it is also far less disruptive for the person whose premises are being searched than either the seizure and removal of such devices and any computers in which they are housed or their examination on the premises being searched.

131. This method is not only sensible but we submit clearly permitted by s 29(1):

131.1. Section 29(1)(d) allows the person who executes the warrant to seize anything such as a computer or a mirror-image of its hard drive,

- if it has a bearing or might have a bearing on the investigation or

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151 Thint heads 41:120 and 54:162 to 168

152 The process used and the reasons it is used are described by Labuschagne Thint 5:411 to 414:5 to 9(c)

153 Du Plooy warrant application Thint 7:588:37.3.18; Du Plooy opposing affidavit 4:357:37

- if he wishes to retain it for further examination or
- if he wishes to retain it for safe custody.

131.2. If on further examination of the computer or its mirror-image, electronic documents are identified which have a bearing or might have a bearing on the investigation, then it is permissible to make copies of them in terms of s 29(1)(c).

131.3. In other words, even if a computer or its mirror-image contains material unrelated to the investigation, it remains lawful to seize it for further examination and then to retain it in safe custody, if not for any other purpose then at the very least to prove what was seized and what not.

131.4. We submit that Du Plessis J accordingly correctly held that,

> "*to the extent that it may be said that the computers in question did not contain information that (had) a bearing or might have (had) a bearing on the investigation, they could be seized for purposes of further examination"*.[154]

132. Thint says that paragraph 4 of annexure B is not authorised by section 29(1) of the NPA Act because unlike section 29(1)(d), it refers to "*a search and not further examination*".[155] But section 29(1)(d) provides that the person authorised by the warrant may seize anything he or she wishes to retain for further examination.

[154] Thint High Court judgment 10:867 lines 13 to 16

[155] Thint heads 56:168

We submit however that the "*searches by way of forensic analysis*" referred to in paragraph 4 of annexure B are indeed types of "*further examination*".[156]

The possibility of privileged materials

133. The applicants and Thint in particular, contend that the warrants were defective because they should have included a mechanism for the protection of privileged material or at least a reference to the mechanism under s 29(11).[157] We submit that this contention is unfounded but in any event entirely moot because no privileged material was in fact seized.

The issue is moot

134. The search only proceeded after Thint had received legal advice both from an attorney and counsel.[158] The mirror image of Ms Govender's computer was made during the search of their offices.[159] The original hard-drive was left at their offices.[160] Thint had every opportunity thereafter to have it analysed to ascertain whether it contained any privileged material.[161]

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[156] The Oxford English Dictionary, Oxford University Press 2004, defines "*examination*" to mean inter alia "*the action or process of searching or inquiring into (facts, opinions, statements); investigation, scrutiny*".

[157] Thint heads 56:169 to 198; Zuma-Hulley heads 32:54(b) and 60:87 to 88

[158] Moynot Thint 1:48 to 50:20 to 26; Govender 3:215 to 216:8 to 9.6; Advocate GJ Nel 5:428:5 and 7; SSI G Nel 5:436 to 438:9 and 14

[159] Du Plooy opposing affidavit Thint 4:358:37(b)

[160] Du Plooy opposing affidavit Thint 4:359:37(f)

[161] Du Plooy opposing affidavit Thint 4:359:37(f)

135. In the letter by Thint's attorney to the DSO the day after the search, he did not assert legal-professional privilege in respect of any particular documents on the mirror-images. Instead, he asked the DSO for an undertaking that should any privileged documents appear in the mirror-images, no copies be made of them. He further asked the DSO to return any such copies as had already been made.[162]

136. The DSO undertook that once the forensic analysis was complete, its computer expert would "*extract such information as appears to fall within the scope of the search warrant*" and that copies would be provided to Thint's attorney and a representative of the NPA, who would jointly go through them to determine that it was indeed covered by the warrant.[163]

137. Thint's attorney appeared satisfied with this undertaking and added that during the joint exercise the parties could try and reach agreement on how any disputes that may arise, would be resolved.[164] This *modus operandi* ultimately failed because, as the DSO explained in a letter to Thint's attorney dated 28 September 2005, the DSO's computer expert could not on his own determine what was relevant and what was not and had to be assisted by the DSO investigators.[165]

[162] Annexure PM21 Thint 2:169 to 170

[163] Annexure PM34 Thint 2:182:3

[164] Annexure PM40 Thint 2:188:lines 23 to 27

[165] Annexure PM42 Thint 2:190

138. Mr Du Plooy says that by 24 February 2006 no-one who examined the hard-drive on behalf the DSO had encountered any document or information which might be privileged[166] and on that day the DSO was instructed to cease the examination.[167]

139. On 7 March 2006 the DSO provided Thint's attorneys with discs containing all the previously deleted material that the state's experts had retrieved from the hard-drive so that Thint could have ready access (without the intervention of an expert) to everything on Ms Govender's computer.[168] In the covering letter the Deputy DPP Advocate Baloyi asked Thint to consider these materials and,

> "*advise us within two weeks of the date of this letter of any privileged documents which may appear thereon. If we do not hear from you within two weeks we shall assume that privilege is not claimed in respect of any of the files contained on Govender's computer. The search will then resume. If you client does identify files in respect of which it claims privilege, such will be removed by the forensic specialists from the data base available to the investigators, and lodged with the Registrar in the manner contemplated by Section 29(11) of the Act. The search will then resume with respect to the remainder of the files*".[169]

140. Thint responded with lots of heat but no light. In a letter dated 10 March 2006 its attorney admonished Advocate Baloyi for communicating with them directly and

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[166] Du Plooy opposing affidavit Thint 4:361:37(l)

[167] Du Plooy opposing affidavit Thint 4:361:37(k)

[168] Du Plooy opposing affidavit Thint 4:361 to 362:37(m) to (n)

[169] Annexure A Thint 4:392:line 21 to 393:line 2

not through the State Attorney. He said it was "*not only inappropriate in the extreme but incomprehensibly impertinent"*.[170]

141. Apart from this emotional outburst, Thint failed to demonstrate that there was any privileged material on Ms Govender's computer despite the fact that it has had access to all the materials on the computer since no later than March 2006 (or since August 2005, but in any event well <u>before</u> launching the application). Mr Moynot says he instructed Thint's attorney not to receive delivery of the discs until Thint had received the respondent's answering affidavits.[171] Thint did not ask that the discs be delivered thereafter,[172] apparently for tactical reasons, because Thint had been advised

> "*that the proposals, invitations and suggestions made by the Respondents [are] inappropriate in relation to computer data that was seized unlawfully and in respect of which a decision by the court is sought by the Applicants*".[173]

142. The question is whether Thint's rights of privilege have in fact been breached. It has deliberately failed to demonstrate anything of the kind. The highwater mark of its case is a theoretical possibility that it might have been breached. But such a theoretical risk is irrelevant to the validity of the execution of the warrant. We

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170 Annexure PM56 Thint 9:831 to 832

171 Moynot replying affidavit Thint 6:505:23(q)

172 Cf. Moynot replying affidavit Thint 6:505:23(r)

173 Moynot replying affidavit Thint 6:505:23(s)

submit that Du Plessis J correctly held that the debate about privileged information on the computers was "*academic*".[174]

The mechanism under section 29(11)

143. Section 29(11) provides that, if during the execution of a search warrant anybody,

- claims that any item found on or in the premises contains privileged information and
- for that reasons refuses the inspection or removal of the item concerned,

then the investigator must either abandon the item or, if he deems it relevant to and necessary for the investigation, then he must request the Registrar of the High Court to seize and hold the item in safe custody until a court has determined whether it is privileged or not.

144. It must be borne in mind that the applicants accept the constitutional validity of s 29 including s 29(11). They must not be allowed to impugn the mechanism for the protection of privileged material in s 29(11) through the back door, by suggesting that it is inadequate and that the Constitution demands more and greater protection.

145. It is not necessary for purposes of this case to determine whether there might be circumstances in which a judicial officer who is asked to issue a search warrant, ought to insist that it incorporates greater protection of privileged material than that provided by s 29(11). Even if such cases were notionally possible, this is not

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[174] Thint High Court Judgment Thint 10:868 lines 9 to 12

one of them. We deal separately with the search of Mr Hulley's offices in the next chapter. The searches of the premises of Mr Zuma and Thint were not out of the ordinary and did not call for special measures. Both are sophisticated and affluent citizens well able to protect themselves and to employ lawyers to help them do so. They were in the event well-protected as a matter of fact.

The investigation of Mr Zuma's defences

146. Mr Zuma and Mr Hulley contend that some of the paragraphs of annexure A to the warrant suggest that the DSO improperly sought access to privileged material concerning Mr Zuma's defence strategy.[175]

147. There is however no justification at all for the inference upon which Mr Zuma and Mr Hulley base this accusation, that the prosecution were after Mr Zuma's privileged defence strategies. Mr Du Plooy explained in his application for the warrants, that the state's evidence left unanswered questions and gaps which needed to be filled. He added that in the ordinary course, as the state's case unfolds in the course of trial, it is common for new questions to arise which require further investigation. It is for instance not uncommon for the defence case only to be revealed in the course of the trial and, when that happens, it often gives rise to the need for further investigation of the issues raised by it.[176]

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[175] Zuma-Hulley heads 26:44 and 35:54(d)

[176] Du Plooy warrant application, Zuma-Hulley supplementary vol 1:11:23

148. Mr McCarthy mentions an example of an investigation of this kind.[177] He says that Mr Shaik only suggested for the first time in the course of his trial, that his payments to and on behalf of Mr Zuma were a loan to the latter. When he raised this defence, it became necessary for the state to investigate whether such an agreement ever existed and, if it did, in what circumstances and for what purpose it had been created.

149. We submit that investigations of this kind are entirely permissible and legitimate. The prosecution is indeed under a duty to investigate the legitimacy of any defences as and when they are raised. If they turn out to be legitimate, the state will be under a duty to reconsider its prosecution. If they turn out to be illegitimate however, then it is also encumbent on the state to gather the evidence necessary to refute them.

150. Mr Hulley and Mr Zuma however misconstrue this approach and interpret it to amount to an illicit attempt to discover the confidential and privileged plans and strategies of the defence for the conduct of their case. They fail to distinguish between the state's legitimate investigation of possible defences as and when they are disclosed on the one hand and an illicit attempt to gain access to privileged defence plans and strategies on the other. They fail to make this distinction and so read sinister implications into some of the paragraphs of the search warrants.

151. They add into the mix an assumption that any search for documents that reflects Mr Zuma's response to critical events or issues such as the encrypted fax, must

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[177] McCarthy Zuma-Hulley 4:332:34

have been an attempt to gain access to his privileged communications with his lawyers.[178] But there is no basis for this assumption at all. Mr Zuma's responses to the encrypted fax are a good example. He may well have communicated with his alleged co-conspirators Mr Shaik and Thint or with his colleagues in government or with his friends or family about the encrypted fax which attracted so much publicity. Those communications would not have been privileged. It is entirely permissible for the state to seek access to them.

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178 Zuma-Hulley heads 32:54(a) and 35:55 read with Hulley Zuma-Hulley 11:961:68(c) and 1000 to 1003:104 to106

THE SEARCH OF MR HULLEY'S OFFICES

Introduction

152. Mr Zuma, Mr Hulley and Thint raised very many complaints in their papers about the manner in which the searches of their premises had been conducted. The only serious criticism of the execution of the search warrants in which they appear to persist in this court, is their criticism directed at the execution of the warrant for the search of Mr Hulley's offices.[179]

The background to the warrant

153. Mr Du Plooy and Mr Steynberg described the events which triggered the Hulley warrant.[180] The facts are also recited in the judgments of Justice Farlam[181] and Justice Nugent.[182]

154. On 19 July 2005 Mr Shaik's attorney Mr Parsee sent a letter to the prosecutors informing them that Mr Shaik had resigned as Mr Zuma's financial adviser and that they had accordingly forwarded all Mr Zuma's documentation to his new attorney Mr Hulley. (This is the "*consignment of documents*" referred to by

[179] Zuma-Hulley heads 34:54(b)(iii) and 60:87 to 88

[180] Du Plooy warrant application Zuma-Hulley supp vol 1:62:39; Steynberg 5:407:5

[181] Zuma-Hulley SCA judgment paras 20 to 23

[182] Zuma-Hulley SCA judgment paras 105 to 107

Mr Hulley in his affidavit in support of this application.[183]) The letter did not say whether the documentation was in hard copy or in electronic form or both and did not specify by what means it had been delivered to Mr Hulley.[184]

155. The letter also did not say when the documentation had been forwarded to Mr Hulley. The DSO accordingly did not know whether it still existed in a separate parcel or whether it had been integrated into other documents in Mr Hulley's office.[185]

156. They were however for obvious reasons anxious to obtain the documentation because there was every reason to believe that it would be revealing of Mr Zuma's financial affairs generally and his relationship with Mr Shaik in particular.

157. This background explains the formulation of the warrant and particularly annexure A which defined the documents to be sought and obtained.[186]

158. The purpose of the search was also confined to these documents. The evidence was that Mr Van Loggerenberg, the leader of the team assigned to the search of Mr Hulley's office, 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*

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183 Hulley Zuma-Hulley 11:930:39(b)(i)

184 Steynberg Zuma-Hulley 5:408:5(d)

185 Steynberg Zuma-Hulley 5:409:6(b)

186 Hulley warrant JZ7 Zuma-Hulley 2:125 at 126:A1

to search the premises unless it was strictly necessary to locate this documentation."[187]

The execution of the warrant

159. One of the members of Mr Van Loggerenberg's team was Advocate Muller, a senior state advocate of the office of the NPA. His specific role was "*to deal with matters relating to privilege during the operation, should any arise"*.[188]

160. Mr Hulley arrived at his offices at about 07h35. The search team was already there.[189] Mr Van Loggerenberg gave Mr Hulley a copy of the search warrant which he read. Mr Hulley then informed Mr Van Loggerenberg that he could assist them by showing them the Zuma documents he had received from Mr Parsee. Mr Van Loggerenberg's evidence was that Mr Hulley had no doubt which documents they were looking for. He took the searchers to his filing offices where he pointed out two boxes which were still sealed.[190] There was an inventory stuck to the side of each box. Mr Hulley asked whether he could copy them and Mr Van Loggerenberg agreed, which Mr Hulley then did.[191]

161. Mr Hulley was entirely co-operative and did not demur in any way. He never asserted or even suggested that any of the documents were or might be

[187] Steynberg Zuma-Hulley 5:409:6(c)

[188] Muller Zuma-Hulley 5:385:5(b)

[189] Van Loggerenberg Zuma-Hulley 5:433:3(a)

[190] Van Loggerenberg Zuma-Hulley 5:433:3(c), (d) and (g)

[191] Van Loggerenberg Zuma-Hulley 5:433:3(d) and (e)

privileged. He could not have done so because the boxes were still sealed and he had never seen their contents.[192]

162. Mr Hulley left for the airport and the search team also left after they had checked the contents of the boxes against their inventories. They completed their task and left at 09h00.[193] Mr Hulley confirmed that the search team did not search for any other documents and did not take anything other than the two boxes received from Shaik's attorney.[194] There was accordingly no actual search of Mr Hulley's offices.

163. On his way to the airport, Mr Hulley telephoned Adv Steynberg and said that he wanted to challenge the lawfulness of the searches and for that purpose needed a copy of the affidavit pursuant to which the warrant had been obtained. After contacting Adv Downer, Adv Steynberg told Mr Hulley that he could uplift a copy of the affidavit from the Registrar of the Pretoria High Court.[195]

164. Mr Hulley asked Adv Steynberg whether all of the documents could be sealed and lodged with the Registrar of the High Court until the lawfulness of the search had been determined. Adv Steynberg responded that he would check with Adv Downer but that the law did not make provision for the documents to be lodged with the Registrar for that purpose.[196]

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[192] Van Loggerenberg Zuma-Hulley 5:435:5(e), 436:7(a) and 437:9; Muller 5:385:4 to 5

[193] Van Loggerenberg Zuma-Hulley 5:436:8(a)

[194] Hulley Zuma-Hulley 2:158:25

[195] Steynberg Zuma-Hulley 5:410:7(b) to (e)

[196] Steynberg Zuma-Hulley 5:411:7(f)

165. Mr Hulley again telephoned Adv Steynberg who referred him to Adv Downer. By this time the documents taken from Mr Hulley's offices had already been removed and returned to the offices of the DSO.[197]

166. Mr Hulley telephoned Adv Downer and asked him to stop the searches until he had obtained a copy of the affidavit used in support of the application for the search warrants and had had an opportunity to apply to court for an order declaring the search of his offices to be unlawful. Adv Downer declined his request. Mr Hulley asked him what would happen if any of the documents were privileged. Adv Downer said that he had to decide which documents he considered to be privileged. He also told him 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 the documents Mr Shaik had held in his capacity as Mr Zuma's financial adviser.[198]

167. Mr Hulley also spoke to Adv Baloyi, who had been asked to liaise with him with a view to furnishing him with a copy of the papers filed in support of the application for the search warrants. Mr Hulley asked Adv Baloyi to persuade Adv Downer to agree to his suggestion that the documents taken from his offices be deposited with the Registrar. He explained that he was first going to study the papers filed in support of the application for the search warrants and would then decide whether or not to mount a challenge of the warrants.[199] He did not claim privilege in respect of any documents. Adv Baloyi and Mr Hulley agreed to meet the

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[197] Steynberg Zuma-Hulley 5:411:7(j) and (k)

[198] Downer Zuma-Hulley 3:220:7(a) to (d)

[199] Baloyi Zuma-Hulley 3:203:4(a) to (d)

following morning which they did and Adv Baloyi handed Mr Hulley a copy of the warrant application.[200]

168. Only on the afternoon of the day after the search on 19 August 2005, did Mr Hulley for the first time suggest that the documents taken from his office might have been privileged. He did so in vague and ambiguous terms:

> "*As per our 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.*"[201]

169. The letter was firstly ambiguous because it did not make it clear whether it was contended that Mr Hulley had expressed this view to Adv Downer and Adv Baloyi the previous day. If it did, it was untrue. It was secondly ambiguous in that it merely asserted that "*a certain privilege attaches to the entire body of documents*" without any clarification or explanation. Mr Hulley went on to express the view that in terms of the NPA Act, all the documents ought to be lodged with the Registrar of the High Court.

170. Adv Steynberg responded to this demand in a fax to Mr Hulley on 22 August 2005.[202] He recorded that the only documents taken from Mr Hulley's office were those he had pointed out to the search team and that neither he nor any of his staff had ever indicated that any of the documents were or might be privileged. He accordingly declined to agree to Mr Hulley's suggestion.

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[200] Baloyi Zuma-Hulley 3:205:5(a)

[201] Hulley fax AS2 Zuma-Hulley 5:426 to 427

[202] Steynberg fax AS3 Zuma-Hulley 5:428

The execution was lawful

171. We submit with respect that the DSO can in the circumstances not be faulted for failing to take greater care to preserve the confidentiality of privileged documents in Mr Hulley's office.

172. They knew that the purpose of their search was merely to locate and seize the documents Mr Shaik's attorney had forwarded to Mr Hulley. They were documents Mr Shaik had held in his capacity as Mr Zuma's financial adviser. It would have been most unlikely for them to include any privileged documents.

173. They took the precaution nonetheless to include Mr Muller in their search team to be on hand to advise and assist if any issues of privilege were to arise. His advice and assistance were ultimately not necessary because there was never any suggestion of privilege.

174. The search team could not expect Mr Hulley to be *au fait* with s 29(11) of the NPA Act but they could expect him to know, and he undoubtedly did know, that he could invoke legal-professional privilege at common law. But Mr Hulley and his staff never suggested that the documents they had received from Mr Shaik's attorney were or might be privileged. He did not even avail himself of the opportunity to check them to determine whether any privilege might attach to them. He has never offered any explanation for his failure to take any steps whatever to protect such privilege as might have attached to the documents concerned. The only reasonable inference is that, like the search team, he had no reason at all to think that the documents might be privileged.

175. His belated assertion the following day that "*a certain privilege attaches to the entire body of documents"* made without ever seeing them, was clearly absurd. It was not a serious attempt made in good faith to assert a claim of privilege, whether in terms of s 29(11) or at common law. Section 29(11) is triggered only if "*during the execution of a warrant or the conducting of a search in terms of this section, a person claims that any item … contains privileged information"*. The privilege at common law is also one that must be asserted for its protection to come into operation.[203]

176. Mr Hulley never made any effort whatever to find out whether any of the documents taken from his office were indeed privileged. He had ample opportunity to do so. His complete failure to make any effort to this end makes no sense at all unless he realises that he is better off with a mere hypothetical possibility of privilege because the facts will prove otherwise and deprive him of a debating point.

177. We accordingly respectfully submit that Justice Nugent's conclusion that "*there was no reason for the appellants to have thought that the boxes might contain privileged information*"[204] was justified and that the High Court's criticism of the state's conduct was unfair. Even if it was blemished in some way, it was in any event of no consequence because there is absolutely no reason to think that any privileged document was ever disclosed or at risk of disclosure to the state.

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[203] Bogoshi v Van Vuuren NO 1996 (1) SA 785 (A) 792J to 793A and 793H to 793I

[204] Zuma-Hulley SCA judgment para 107

ALTERNATIVELY, A PRESERVATION ORDER

Introduction

178. We have submitted that the attacks on the warrants and their execution are unfounded and that the majority of the SCA correctly dismissed them. If this court should however uphold any of those attacks, then we submit in the alternative that the materials affected by the flaw in the process should be preserved. The kind of preservation order for which we contend, is one along the lines suggested by Justice Farlam in his minority judgment in the SCA.[205]

A preservation order is competent

179. If this court finds that the warrant or the manner of its execution was unlawful, then it would follow that the search affected by it was also unconstitutional. The search was then an unlawful violation of the privacy of the person in occupation of the premises in violation of s 14 of the Constitution. This conclusion will thus trigger s 172(1) of the Constitution which enjoins the court to declare the state's unconstitutional conduct invalid and to make any further order "*that is just and equitable*"[206] including an order suspending the declaration of invalidity and limiting its retrospective effect.[207]

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[205] Zuma-Hulley SCA judgment paras 53 to 70

[206] Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) paras 19, 60 and 69; Minister of Health v Treatment Action Campaign 2002 (5) SA 721 (CC) paras 102 to 104; 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) paras 18, 42 and 43;

180. This power has significant implications. When the court suspends an order of invalidity it has made, it sanctions the continuation of the law or conduct which is unconstitutional. The court's powers to suspend or limit the retrospectivity of an order of invalidity, are however merely instances of the general power of the court to make just and equitable orders.

181. The Constitution has introduced a new paradigm. The court can forge new remedies to give just and equitable relief. The Constitution mandates and requires not only that new remedies be created but also that old ones be reconsidered. In a case such as this one, the court must consider a range of values and interests, not just the enquiry under the old law whether there has been an unlawful search which led to an automatic remedy. The Constitution now requires the court to accommodate other values and gives the court the tools to do so.

182. The starting point is that the victim of a constitutional violation is normally entitled to effective relief. But the court must also take into account other relevant circumstances, including the interests of others and the public interest.[208]

MEC, Department of Welfare, Eastern Cape v Kate 2006 (4) SA 478 (SCA) paras 23 to 25

[207] Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another 2005 (1) SA 580 (CC) paras 126 to 129

[208] See 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) para 42

183. Where the court finds that a search and seizure by the state was unlawful and thus unconstitutional, the appropriate remedy depends on the circumstances of each case but may include one or more of,

- an order for the return of the original documents;
- an order for the return of all copies made of the original documents;
- an order for the payment of damages particularly where the unlawful invasion was wilful;
- the exclusion of the evidence obtained by the search in the subsequent prosecution of the person from whom it was seized, and
- the exclusion of all derivative evidence obtained as a result of the evidence unlawfully seized in any subsequent prosecution of the person from whom it was seized.

184. These remedies are all directed at redress of the victim of the unlawful search. But the interests of the victim are not the only interests at stake. When the court exercises its remedial discretion under s 172(1) of the Constitution, it commonly takes into account, not only the need to afford effective redress to the victim of a constitutional violation, but the public interest as well. In a case such as this one, there is a very real public interest at stake, namely the public interest in the prosecution of serious crime. It is a constitutionally mandated public interest deserving of consideration and protection by the courts.[209]

[209] S v Motloutsi 1996 (1) SA 584 (C) 590A to 592G; Key v Attorney-General, Cape Provincial Division 1996 (4) SA 187 (CC) paras 13 and 14; 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 2001 (1) SA 545 (CC) paras 53 and 54; S v Basson 2005 (1) SA 171 (CC) para 33

A preservation order is appropriate in this case

185. The applicants' only motive with this case, is to deprive the state of the use of the evidence gathered under the warrants in the upcoming criminal trials of Mr Zuma and Thint. They have always had access to all the material seized and have been given or offered copies of all of them. They have in other words not been deprived of any of the information seized from them. They have never suggested that there is any particular reason to recover the originals but even that could be arranged on the basis that the state keeps copies and the parties agree that they would be admissible in the criminal trial if the originals are no longer available. But none of this is of any interest to the applicants. Their only concern is to deprive the state of the use of the evidence in the criminal prosecution.

186. It would of course have been open to Mr Zuma and Thint simply to wait for their criminal trials and then to object to the admission of any evidence which they contend has been unlawfully obtained. They do not follow that route however because they do not like the balance the Constitution strikes between their interest and the public interest. It does so in s 35(5). It provides that evidence obtained in violation of the Bill of Rights is not automatically excluded but only "*if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice*". The evidence remains admissible unless it would render the trial unfair or otherwise be detrimental to the administration of justice.

187. The applicants however seek to have the issue determined in these proceedings in the hope that it be done purely on the basis that the evidence was unlawfully obtained without regard to the public interest in their prosecution. We submit

that, as a matter of policy, the court should not pre-empt the issue and should make such order as might be necessary to preserve the prerogative of the trial court to strike the balance the Constitution envisages in s 35(5) between the private interests of an accused on the one hand and the public interest in his prosecution on the other.

188. It is not possible or desirable for this court to strike the balance under s 35(5) or to predict how the trial court will do so. The trial court will be by far the best placed to evaluate and strike the appropriate balance between the private and public interests at stake. It would not be appropriate for this court to attempt to second guess it.[210]

189. There is a further reason in this case why it is imperative that a preservation order be made. It is that both Mr Zuma and Thint have already suggested that the searches intruded upon privileged material. They have carefully refrained from any identification of the privileged material alleged to have been seized. There is a very real risk that they may one day contend that their trial has been rendered unfair by the violation of their privileged material. It will then be critical to have an indisputable record of exactly what was seized and what not.

190. We accept that, when a court finds in a case such as this one, that a search has been unlawful in some respect, it may sometimes simply order return of all the documents. We do not suggest that a preservation order is always appropriate.

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[210] Ferreira v Levin NO 1996 (1) SA 984 (CC) para 153; Key v Attorney-General, Cape Provincial Division 1996 (4) SA 187 (CC) para 14; S v Mphala (1) 1998 (1) SACR 388 (W) 399; S v Maputle 2003 (2) SACR 15 (SCA) para 11

We submit for the following reasons however that this case is where the court ought to exercise its discretion in favour of a preservation order:

190.1. It is clear that the state at all times acted in good faith.

190.2. We have submitted that the searches were lawful but, even if we are wrong, the highwater mark of the applicants' case is that there were relatively minor flaws in the process. This is in other words not a case of crass or gross violations of human rights.

190.3. Any violation of privacy that has occurred cannot be undone. A preservation order will prevent any further invasion of privacy because the documents will be sealed and lodged with the Registrar.

190.4. The applicants have had copies of the documents since September 2006. They will be no better off by the denial of the preservation order than they would be if preservation were granted.

190.5. The applicants will get effective relief. They have copies and will get the originals once the purpose of the preservation has been achieved or even sooner if they have a legitimate reason to get them. Conversely, the state will not get a benefit to which the Constitution does not entitle it. In the trial the state will have to justify the admission of the evidence despite its pedigree.

190.6. If the documents are kept by the registrar the only advantage the applicants will lose, is the opportunity to destroy the documents. But in

this case the law should not give priority to their option to do so because the documents are needed as evidence in pending proceedings.

190.7. Privacy is a relative right in the sense that it can be limited by other competing rights.[211] If this court orders the preservation of documents under seal of the Registrar, there is no infringement of a legally protected component of the right to privacy. But even if there is, the privacy interest is outweighed by the public interest in preserving the information under seal of the registrar. On either approach the court's order will not invade the applicants' privacy.

190.8. The search and seizure was undertaken in the course of an investigation of serious crimes of high public interest. Everybody concerned in it including the accused, the state and the public it represents, have a material interest in the search for the truth in this case. The materials seized from the applicants' premises can only contribute to that end. It is vital that an order be fashioned which preserves the evidence and does not expose it to the risk that it might be lost.

190.9. It would be anomalous that if applications such as the present are brought before the start of the criminal trial and it is found that there has been an unlawful invasion of privacy (e.g. a technicality leading to

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[211] Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another 1993 (2) SA 451 (A) at 462E-G; Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC) para 68

unlawfulness), the response (order) should be the automatic return of the documents; whereas if the same point is raised during the criminal trial the documents may nevertheless may be admitted under section 35(5) of the Constitution. The applicants in this case are seeking to exploit that anomaly.

190.10. There is a further vital reason why in this case a copy of the evidence should at the very least be preserved. It is because all the applicants already suggest that Mr Zuma's privilege or that of the Thint companies, might have been breached by the searches. This may well become a contentious issue in a future trial if Mr Zuma or Thint were to attempt to impugn the trial on the grounds of the irreparable violation of the confidentiality of its legal-professional materials. If that should happen, it would be absolutely vital to have a definitive copy of exactly what was seized to determine what it included and what it did not. Without such a copy, the state will be at the mercy of the accused in the debate on the issue. The interests of justice require that such a morass of uncertainty be avoided by the preservation of the originals or copies of all the materials seized.

191. We submit that the elements of a preservation order should include the following:

191.1. The originals of the seized documents should be sealed and kept by the registrar of the court in which the relevant proceedings for the setting aside of the warrants commenced. The relevant applicants should be entitled to copies. If any of the applicants shows a

legitimate interest in getting back the originals then the originals not copies can go back.

191.2. The state must get access to those documents only by subpoena, search warrant or court order. The state should only be allowed to gain access after giving reasonable notice to the applicants that it intends to do so, in order that they can intervene to contend that the state should not get access.

191.3. If the criminal trial court does not determine the fate of the materials within a reasonable time, the relevant applicants may apply on the same papers duly amplified, for an order directing the registrar of the court where the evidence is preserved to release the materials to them.

192. We appreciate that the only issue before this court is whether the applicants should be given leave to appeal. The question of the appropriate remedy if they should succeed in showing that the search and seizures were unlawful, is not up for determination. We submit however that it is relevant and material to make the point that, even if the applicants should succeed in showing that the search and seizures were unlawful, the likelihood is that this court will fashion a remedy which preserves the evidence for use in a criminal trial in accordance with that court's direction. It emphasizes that it is not in the public interest to grant the applicants leave to appeal. All the interests legitimately at stake in this application, can be adequately taken into account and protected by the trial court in the manner contemplated in the Constitution. There is no other reason to prolong these proceedings. The applicants seek to do so purely to steal an

advantage which they think they will not have if the issue is left to the trial court for its determination.

CONCLUSIONS AND PRAYER

193. The respondents' answers to the applications for leave to appeal were delivered two days late. It proved impossible to answer all four applications for leave to appeal within the ten days permitted by the rules of this court because of the sheer volume of the work involved and the limited availability of counsel. The respondents have applied for condonation and the applicants do not oppose their application. We submit that condonation should be granted.

194. The respondents filed a supplementary answer to place on record that Mr Zuma and Thint had been recharged at the end of last year. They applied for leave to do so. The applicants do not oppose the application. We submit that it should be granted.

195. The respondents ask that the applications for leave to appeal be dismissed with costs including the costs of three counsel.

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28 February 2008

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