

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No. **CCT90/07**

In the matter between:

THINT HOLDINGS (SOUTHERN AFRICA) (PTY) LTD

First Applicant

THINT (PTY) LTD

Second Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Case No. **CCT92/07**

And in the matter between:

JACOB GEDLEYIHLEKISA ZUMA

Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

RESPONDENT'S SUBMISSIONS

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INTRODUCTION

The proceedings in the Durban High Court

1. On 4 December 2006 the NDPP applied¹ in the Durban High Court in terms of section 2(2) of the International Co-operation in Criminal Matters Act 75 of 1976² for the issuing of a “letter of request” to the Attorney-General of the Republic of Mauritius:
 - to transmit to the Republic of South Africa 14 documents³ in the possession of the Independent Commission against Corruption of Mauritius (“the ICAC”) that were seized on 9 October 2001 by the Economic Crime Office of Mauritius (“the ECO”) in Mauritius (“the seized documents”); and
 - to obtain and transmit to South Africa statements under solemn affirmation according to the law of Mauritius, from the relevant officials and former officials of the ICAC and the ECO, giving details of the origin, authenticity and chain of custody the seized documents.

2. Due to prior undertakings, the NDPP gave notice of the application to Thint Holding (Southern Africa) (Pty) Ltd and its associated company Thint (Pty) Limited (the applicants in CCT90/07) and to Mr Jacob Zuma (the applicant in

¹ Notice 1:1 to 2. The records in CCT90/07 and CCT92/07 are the same up to the applications for leave to appeal to this court. The only differences thereafter are the differing applications for leave to appeal. Consequently, we normally refer to the record in CCT92/07. Where we refer to the record in CCT90/07, which we do only when referring to Thint’s application for leave to appeal, we include “Thint” between the description of the document and the volume number (volume 15), e.g. Moynot Thint 15:etc.

² Unless otherwise stated all references to statutory provisions are to the Act.

³ List of seized documents annexure LM11 2:91.

CCT92/07).⁴ (Previously the Thint group and its companies were variously known as “Thomson-CSF” and “Thales”.)

3. Mr Zuma and the Thint companies opposed the issuing of the letter of request.⁵ On 2 April 2007 the Deputy Judge President of the Natal Provincial Division of the High Court, Levinsohn DJP, gave judgment granting the application⁶ and issued the letter of request.⁷
4. Mr Zuma and the Thint companies applied for leave to appeal to the SCA against the High Court judgment. The application was opposed by the NDPP. In order to expedite the process the NDPP eventually consented to the granting of leave to appeal to the SCA⁸ – otherwise the application could not be heard for about four months as Levinsohn DJP was away on long leave.⁹
5. The NDPP applied for leave to execute pending the determination of the appeal. On 5 June 2007 Hugo J granted the NDPP leave to request the relevant authorities in Mauritius to start the proceedings required to give effect to the letter of request forthwith on condition that if the requested documents were handed over to the South African authorities before the conclusion of the SCA appeal they should be sealed and kept by the South African High Commissioner to Mauritius or the Registrar of the Durban High Court and if the appeal were to

⁴ Du Plooy 1:7:20.

⁵ Thint notice of opposition 4:261 to 262; Zuma notice of opposition 4:259 to 260.

⁶ Levinsohn DJP judgment 2/4/07 14:1208 to 1238.

⁷ Letter of request 14:1241 to 1245.

⁸ Sooklal letter 14:1266 to 1267; Levinsohn DJP order 23/4/07 14:1268.

⁹ Du Plooy 16:1394:17.

succeed they had to be handed back to the authorities in Mauritius without the NDPP having had access thereto.¹⁰

The appeals to the SCA

6. On 8 November 2007 the SCA dismissed the appeals.¹¹ Nugent JA, with whom all of the other Judges of Appeal agreed, held that the letter of request had been properly issued and, in addition, that Mr Zuma and the Thint companies had no standing in law to contest the actions of Levinsohn DJP and his decision to issue the letter of request was not appealable because it was not definitive or dispositive of any rights of the applicants.

The scheme of our submissions

7. We commence with a chapter outlining the relevant facts.
8. Then there is a chapter in which we deal with the applicants *locus standi* and the appealability of the High Court judgment. We submit that it did not affect any of the applicants' rights or have any direct or substantial effect on their interests. Consequently, the applicants lack *locus standi* and the High Court judgment was not appealable.

¹⁰ Hugo J judgment annexure JDP8 18:1610 to 1616.

¹¹ Zuma and Others v National Director of Public Prosecutions [2008] 1 All SA 234 (SCA).

9. Thereafter there is a series of chapters dealing with each of the grounds of attack which the applicants have raised in this court:¹²

9.1. We submit that when the request was made and granted the state was not entitled to proceed under s 2(1) because there were no criminal proceedings pending. But even if there were, the state would have been entitled to proceed under s 2(2).

9.2. We submit that s 2(2) allows the state to request evidence for use in a criminal trial, including evidence seized earlier following a request made outside the provisions of the Act.

9.3. We submit that s 2(2) is not limited to requests for the examination of witnesses.

9.4. We submit that the applicants have not raised any good grounds for interfering with the exercise by the High Court of its discretion under s 2(2).

9.5. We submit that the applicants are not entitled to raise in this court arguments to the effect that the state approached the High Court with “*unclean hands*”, which they did not press in the SCA. The upshot of all of the arguments is that the documents were unlawfully seized and

¹² The applicants’ complaints have shifted, in some instances significantly so, from the first instance proceedings in the Durban High Court to the application for leave to appeal to this court. We confine our responses to points raised in their applications for leave to this court or their written submissions to this court.

copies of the documents were unlawfully released to and taken away by the NPA.

9.6. We submit that those arguments are impermissible collateral challenges to the letter of request directed to the Mauritian authorities in September 2001 and the Mauritian and South African authorities' actions in September and October 2001 relating to that letter of request.

9.7. We deal with the applicants' attacks on the making of the request in September 2001 and the making and taking of copies of the seized documents in October 2001. We submit that they were regular and lawful.

9.8. We submit that in any event the "*unclean hands*" arguments do not avail the applicants even if they are correct.

10. We conclude with a chapter on the interests of justice. We submit that neither of the applications has any prospects of success. The applicants' only motive with this case, is to take every point they possibly can, in their attempt to deprive the prosecution and ultimately their trial court, of the incriminating evidence obtained from Mauritius which if admitted will contribute to proof of their guilt. The interests of justice weigh heavily against leave to appeal being granted.

FACTUAL BACKGROUND

The September 2001 request to Mauritius

11. On 10 September 2001 the Directorate of Special Operations in the NPA applied for mutual legal assistance from the Mauritian authorities.¹³ The assistance sought from the Mauritian authorities included searches of the business premises of Thales International Africa – a company in the Thales (now Thint) group of companies¹⁴ – and its registered office at Valmet Mauritius Ltd (since renamed Mutual Trust Management Mauritius Ltd (“MTMM”)), and the residences of Mr Thétard and of another Thales International Africa officer Mr Yann de Jomaron, to find and seize *“any correspondence or documentation which may provide evidence of or which refers to the payment of or requests received to pay bribes to persons or entities in relation to the arms acquisition process of the South African government”*.¹⁵ The DSO requested that *“any documents forwarded be duly certified and authenticated”*¹⁶ and the Mauritian authorities permit South African officials to assist them.¹⁷

¹³ Ferreira letter 10/9/01 annexure IDP23 12:1004. See also Ngcuka letter 11/9/01 annexure IDP4 10:838 to 839.

¹⁴ McCarthy 1:35:30.

¹⁵ Ferreira affidavit 1/10/01 annexure PM26 6:436:8 (bottom of the page). As explained by Du Plooy reply 9:695:13.2.8 the supporting affidavit by Gerda Ferreira 1/10/01 6:435 to 458 was in all respects identical to an earlier affidavit dated 8 September 2001 which was attached to her letter of 10 September 2001.

¹⁶ Ferreira affidavit 1/10/01 annexure PM48 6:458:71.

¹⁷ Ferreira affidavit 1/10/01 annexure PM48 6:458:72.

12. On 2 October 2001 the Mauritian authorities invited William Downer SC of the NPA to come to Mauritius to assist them with their response to the request.¹⁸

The October 2001 searches and seizures in Mauritius

13. On 5 October 2001 the Director of the ECO¹⁹ and the State Attorney of Mauritius²⁰ applied to the Supreme Court of Mauritius in terms of s 30 of the Economic Crime and Anti-Money Laundering Act 2000 for a search warrant.
14. The same day to the Mauritius Supreme Court issued a warrant for the search and seizure operations at the premises of Thales International Africa and Valmet Mauritius Ltd (i.e. MTMM) and the residences of Mr Thétard and Mr De Jomaron.²¹ The warrant authorised the searchers to “*remove any document or material for the purposes of executing the request*”.²²
15. On 9 October 2001 the Mauritian authorities carried out the searches at the premises of Thales International Africa and MTMM and the residence of Mr Thétard and documents relevant to the investigation by the NPA into alleged corruption in the arms acquisition process were seized from the Thales and

¹⁸ Maghooa letter 2/10/01 annexure IDP10 10:850. See also Downer letter 2/10/01 annexure IDP11 10:851 to 852 and Downer letter 8/10/01 annexure MS3 12:1086.

¹⁹ Manrakhan statement 5/10/01 annexure PM3 to PM8 6:413 to 418.

²⁰ “Praecipe” 5/10/01 annexure PM9 to PM11 6:419 to 421.

²¹ Mauritius search warrant 5/10/01 annexure LM2 1:63 to 66 and annexure PM12 to PM15 6:422 to 425; see also Mauritius authorisation 9/10/01 annexure PM16 to PM18 6:426 to 428.

²² Mauritius search warrant 5/10/01 annexure PM13 6:423:(b).

MTMM premises.²³ One of the documents seized from the Thales premises was Mr Thétard's diary for the year 2000, which included an entry on 11 March 2000 that reflected a meeting with "J Zuma + SS" in Durban on that day at 10h30.²⁴

16. During the searches and seizures in Mauritius two members of the NPA who were present at the searched premises but did not participate in the searches, namely Mr Downer and an investigator Carla da Silva-Nel, identified the relevant documents from among those seized. The following day the documents seized from the Thales International Africa premises were copied. The copies were certified as true copies and handed to Mr Downer, who brought the copies back to South Africa assisted by Ms Da Silva-Nel. Some of the originals seized from the Thales premises were retained by the ECO.²⁵

The injunction sought in Mauritius

17. On 17 October 2001 Thales International Africa, MTMM and Mr Thétard brought an application in the Mauritius Supreme Court for, amongst other things, orders requiring the Director of the ECO to state whether copies of the materials seized had been made and prohibiting the Director from communicating to the South African authorities any document not related strictly to the warrant and the request on which it was based.²⁶

²³ Du Plooy 1:8:22.3; annexure SO73 to SO75 8:609 to 611 (Thales International Africa).

²⁴ McCarthy 1:31:16; Downer 4/2/05 annexure LM5 1:72 to 73:11-114; see Thétard diary 11/3/00 annexure LM4 1:68.

²⁵ Du Plooy 1:8:22.1 to 22.2; McCarthy 1:32:18; Downer 4/2/05 annexure LM5 1:75:19 to 23.

²⁶ "Proecipe" annexure SO3 to SO4 8:595 to 596.

18. Mr Thétard made an affidavit in support of the application saying that the documents and computer disks relating to Thales seized included sensitive and confidential information unrelated to the South African authorities' request and in respect of which no-one at the ECO could say for certain whether or not copies had been made.²⁷ As is apparent from this affidavit and the relief sought, the applicants did not take issue with the Mauritian authorities' right to seize and deliver to the South African authorities information related to latter's request. On the contrary, they said that they were "*prepared to fully comply with the order of the Honourable Judge and to collaborate for that purpose with the officers of the ECO and Mauritius Authorities in the execution of the request of the South African authorities*".²⁸
19. Thus the only cause of complaint raised in the application, was that documents had been seized which fell beyond the scope of the search authorized by the court order. This understanding was again made clear by counsel for the applicants when the matter came up in court on 16 November 2001. He said that the application did "*not relate to all materials and information contained in the diskettes which were seized by virtue of the order*" but was confined to certain specified materials "*which are found outside the scope of the said order*".²⁹
20. It was also implicit in the application that it would have been permissible for the Mauritian authorities to give the South African authorities the documents or

²⁷ Thétard 17/10/01 annexure SO5 to SO15 8:603:9, 8:604:12.2 and 8:605 to 606:17 to 18.

²⁸ Thétard 17/10/01 605:18.

²⁹ Mauritius Supreme Court order 16/11/01 annexure SO94 8:630 lines 15 to 20.

copies of the documents seized within the scope of the order. That was so because their complaint was confined to the risk that the documents that fell beyond the scope of the order or copies of those documents, might be communicated to the South Africans.

The need for a fresh request for the originals of the seized documents

21. On 25 September 2002 the Commissioner of the ICAC wrote to Mr Downer saying that due to an institutional re-organisation in Mauritius the ICAC had taken over the work of the ECO. He added that they had 13 documents in their custody. He listed the documents. He said that Thales had applied to court for return of the documents. He asked whether the South Africans would still require the 13 documents and if so, when.³⁰
22. On 7 October 2002 Mr Downer replied. He said that the listed documents had been "*of invaluable assistance in the investigation*". He clearly assumed that the Commissioner of ICAC knew that he had copies of the documents. He said that, in the event of a prosecution, the documents will in all probability be used and that it was particularly important that Mr Thétard's diary "*be retained at all costs*".³¹
23. On 17 January 2003 the Deputy Commissioner of the ICAC wrote to Mr Downer. He made the point that the earlier request for assistance had not specified to whom the documents should be delivered and suggested that the South Africans

³⁰ Beekarry letter 25/9/02 annexure LM7 1:86 to 87.

³¹ Downer letter 7/10/02 annexure LM8 1:88.

make a fresh request for assistance which mentioned to whom the documents should be produced.³²

24. In late January 2003 the South African authorities delivered to the Mauritian authorities a supplementary request.³³ They said that at the time of the search in October 2001 the Director of the ECO had “*duly caused copies of all relevant documentation that had been seized to be made*” and had handed them to Mr Downer, who in turn brought them to South Africa.³⁴ They asked that the originals of the seized documents be kept by the ICAC or the ECO as appropriate and that should the NDPP request them, they be handed to the South African High Commissioner in Mauritius for forwarding to the NDPP.³⁵

The 27 March 2003 Mauritius Supreme Court order

25. It appears that documents were returned to the Mauritian applicants from time to time³⁶ and that the hearing of the Mauritian application was postponed from time to time.³⁷

³² Basasur letter 17/1/03 annexure LM9 1:89.

³³ Supplementary request 31/1/03 annexure IDP14 10:863 to 871. See also McCarthy 1:33:24.

³⁴ Ferreira 31/1/03 annexure IDP14 868 to 869:10 to 12.

³⁵ Ferreira 31/1/03 annexure IDP14 869 to 870:14(ii).

³⁶ Thétard 17/10/01 annexure SO12 8:604:12.1, Mauritius Supreme Court order 27/11/01 annexure SO95 8:631 lines 15 to 17, Mauritius Supreme Court order 25/9/02 annexure SO102 8:638 lines 15 to 17, Poubarlen 14/10/02 annexure SO104 to SO105 8:640 to 641 and Mauritius Supreme Court order 27/3/03 annexure SO110 8:646 lines 20 to 23.

³⁷ Mauritius Supreme Court orders annexures SO90 to SO103 8:626 to 639, annexure SO106 8:642 and annexure SO108 8:644.

26. On 27 March 2003 the Mauritian application was finally settled and the Mauritius Supreme Court made an order by agreement that the Mauritian authorities could retain the documents which remained in their possession (13 such documents are mentioned). The order records that the Mauritian authorities had undertaken not to communicate to anyone else any of the material or documents seized during the searches unless, after notice to the applicants, a court order in Mauritian authorising the communication was first obtained.³⁸
27. The preamble to the order records that in the earlier proceedings the Mauritian authorities had undertaken that none of the seized material or documents (or copies) would be communicated or sent to the South African authorities and had given an assurance that there was no record of any copies of the seized documents.³⁹ As regards this aspect, the Mauritian authorities' records must have been defective because, as stated, shortly after the search copies of the seized documents that were relevant were indeed made and given to Mr Downer and Ms Da Silva-Nel.⁴⁰ This was mentioned in the January 2003 supplementary request.⁴¹

³⁸ Mauritius Supreme Court order 27/3/03 annexure LM17 3:257 to 258 and annexure SO110 to SO111 8:646 to 647.

³⁹ Mauritius Supreme Court order 27/3/03 annexure LM17 3:257:(b) and (c). The matter of the communication of copies to the South African authorities is first mentioned (by counsel for Thales and the other applicants) in Mauritius Supreme Court order 25/9/02 annexure SO102 8:638. The first undertaking by the Mauritius authorities (made by counsel) not to communicate the documents to the South African authorities is recorded in Mauritius Supreme Court order 15/10/02 annexure SO 103 8:639. The undertaking is reiterated in Mauritius Supreme Court order 16/1/03 annexure SO 106 8:642. See also Oozeer 8:589 to 590:17 to 19.

⁴⁰ Du Plooy reply 9:688:10.10.6.

⁴¹ Ferreira 31/1/03 annexure IDP14 868 to 869:10 to 12.

28. The agreement was nevertheless carefully crafted to make it clear that the respondent gave no assurances that no copies of any of the seized documents had been passed on to the South Africans. This is particularly evident from a comparison between the final order⁴² with the draft which preceded it.⁴³ A possible explanation for the uncertainty about any copies that might have been made of the original documents, may be that the documents were initially seized by ECO but that it had subsequently been succeeded by ICAC. The only undertaking the respondent gave, was not to communicate any of the material or documents to anybody else in future, unless they first obtained a court order permitting them to do so.
29. The South Africans were not party to the settlement discussions and were not aware of the order made by agreement. As appears from an affidavit made later by Mr Downer for purposes of the Shaik trial, he only learnt of the order in the course of the Shaik trial and first saw a copy of it on 8 November 2004.⁴⁴

The Shaik trial

30. On 23 August 2003 the NDPP announced that he had decided to prosecute Mr Shaik, companies in his Nkobi group and Thint, but not to prosecute Mr Zuma.⁴⁵

⁴² Mauritius Supreme Court order 27/3/03 annexure LM17 3:257 to 258 and annexure SO110 to SO111 8:646 to 647.

⁴³ Annexure SO112 to SO113 8:648 to 649. See Du Plooy reply 9:685:10.8.

⁴⁴ Downer 4/2/05 annexure LM5 1:79:37 to 38.

⁴⁵ Ngcuka press statement 23/8/03 annexure IDP12 10:853 to 858.

31. On 2 April 2004, in response to the South African authorities' January 2003 supplementary request, the Deputy Commissioner of the ICAC wrote to Mr Downer saying that due to another institutional re-organisation in Mauritius the Attorney-General had taken over responsibility for "*Mutual International Assistance*" and consequently that the request should be addressed to the Attorney-General.⁴⁶ On 13 April 2004 he sent Mr Downer a list of 14 documents secured by the ECO in 2001 which were in the possession of ICAC.⁴⁷
32. On 11 October 2004 the charges against Thint were withdrawn pursuant to an agreement with the NDPP.⁴⁸
33. By June 2005 the investigations into alleged corruption in the arms acquisition process had led to the successful prosecution of Mr Schabir Shaik and ten companies in his Nkobi group in the Durban High Court on charges of corruption, fraud and money laundering. The convictions related to corrupt payments to Mr Zuma and in one instance (involving Thint) an agreement to make corrupt payments to Mr Zuma.⁴⁹ The Court found, amongst other things, that the prosecution had proved the existence of a bribery agreement between Mr Shaik, Mr Zuma and Mr Thétard (a representative of the Thint companies) to pay Mr Zuma and that the payment of R250 000 by Thales International Africa to one of

⁴⁶ Basasur letter 2/4/04 annexure LM10 1:90.

⁴⁷ Basasur letter 13/4/04 annexure LM11 2:91 to 92.

⁴⁸ Moynot 5:325:4(b).

⁴⁹ S v Shaik and others 2007 (1) SACR 142 (D).

Mr Shaik's Nkobi companies pursuant to a bogus "service provider agreement" set up by Mr Thétard amounted to the money laundering of a bribe payment.⁵⁰

34. As things turned out during the Shaik trial, some of the copies of the documents seized in Mauritius and handed to Mr Downer, were tendered and admitted as evidence against the accused and consequently there was no need for a further request aimed at obtaining the original documents.⁵¹ The admission of the copies as evidence in the Shaik trial followed on an objection, evidence, argument and a detailed ruling.⁵²
35. The evidence on this issue comprised the testimony of Inspector Coret from Mauritius and an affidavit from Mr Downer.⁵³ In the affidavit Mr Downer explains that Inspector Coret came to South Africa on 8 November 2004 to give evidence in the Shaik trial. To Mr Downer's surprise, he brought the original documents with him. Mr Downer then took the initiative to obtain a copy of the Mauritius Supreme Court order and, in the light of its provisions, decided not to make any use of the original documents. Inspector Coret took the original documents back with him when he returned to Mauritius.⁵⁴

⁵⁰ Cf Du Plooy 1:10:23.1.

⁵¹ Du Plooy 1:8:22.4.

⁵² Squires J judgment on admissibility annexure IDP2 10:821 line 18 to 830 line 10.

⁵³ Downer 4/2/05 annexure IDP5 1:70 to 80.

⁵⁴ Downer 4/2/05 annexure IDP5 1:79:38.

The application for a letter of request under section 2(1) of the Act

36. On 4 and 12 November 2005 Mr Zuma and the Thint companies were indicted for trial in the Durban High Court on 31 July 2006 on corruption charges based on those on which Mr Shaik and his Nkobi group companies had been convicted earlier that year.⁵⁵ The legal representatives of Mr Zuma and the Thint companies indicated that if any of the seized documents are to be tendered as evidence against the accused, they will insist on the originals and oppose the admission of copies.⁵⁶
37. On 7 December 2005 the prosecution applied in the Durban High Court under section 2(1) for the issuing of a letter of request to the Attorney-General of Mauritius for the release to the South African High Commissioner in Mauritius of the originals of the documents seized on 9 October 2001.⁵⁷ On 22 March 2006 Combrinck J delivered a judgment postponing that application to a date to be arranged with the Court hearing the criminal trial, saying that the criminal trial Court was the only one with jurisdiction to hear the application and that the application should wait until after the accused had pleaded.⁵⁸

⁵⁵ Du Plooy 1:4 to 5:9 to 10; Indictment annexure LM14 2:125 to 166.

⁵⁶ Du Plooy 1:8 to 9:22.4; Zuma 4:311:66(a); Du Plooy 17:1538 to 1539:246.2.

⁵⁷ Du Plooy 1:5:11.

⁵⁸ Combrinck J judgment 22/3/06 annexure IDP1 1:14 to 26.

38. On 20 September 2006 Msimang J refused a request by the prosecution for a postponement of the criminal trial⁵⁹ and as the prosecution then indicated that it was not ready to proceed with the trial he struck the matter from the roll.⁶⁰

The application for a letter of request under section 2(2) of the Act

39. On 4 December 2006, i.e. after the criminal proceedings against Mr Zuma and the Thint companies had been struck from the roll, the NDPP brought the present application for the letter of request which was eventually issued by Levinsohn DJP on 2 April 2007. The relief the NDPP sought and the course the application took in the Durban High Court are set out in paragraphs 1 to 5 above.
40. Pursuant to Hugo J's decision on 5 June 2007 that the NDPP could request the Mauritian authorities to start the proceedings there to give effect to the request,⁶¹ proceedings have commenced in the Mauritius Supreme Court for an order authorising the release of the documents to the South African authorities and Thales International Africa has filed affidavits opposing their release.⁶² (In an earlier affidavit in this matter Thales International Africa had indicated that it will not consent to the 27 March 2003 Mauritius Supreme Court order being varied to permit the handing of the documents to the South African authorities.⁶³)

⁵⁹ Msimang J judgment 20/9/06 annexure PM66 7:558 to 582; see also Du Plooy 1:6:16 and McCarthy 1:36:34.

⁶⁰ Transcript 20/9/06 annexure PM61 7:481.

⁶¹ Hugo J judgment annexure JDP8 18:1610 to 1616.

⁶² Du Plooy 17:1521:222.

⁶³ Boucharat 8:650:5.

The impending criminal trial to which the letter of request relates

41. In late December 2007 the NPA reinstated criminal proceedings against Mr Zuma and the Thint companies by summoning them for trial on 4 August 2008 in the NPD⁶⁴ on charges of racketeering, corruption, money-laundering and fraud (the fraud charges relating to Mr Zuma alone).⁶⁵
42. The prosecution intends using as evidence in those proceedings the original documents and statements sought under the letter of request.⁶⁶

⁶⁴ Summons 27/12/07 annexure JDP13 20:1763 to 1764.

⁶⁵ Indictment 27/12/07 annexure JDP14 20:1765 to 1852; see also Steynberg letter 28/12/07 annexure JPD19 21:1934 to 1935.

⁶⁶ Du Plooy 1:9:22.8 and 1:11:23.3 and McCarthy 1:39:43(d).

LOCUS STANDI AND APPEALABILITY

The SCA's findings

43. The SCA held that the issuing of the letter of request was not definitive or dispositive of any rights of anyone at all, let alone any rights of the applicants.⁶⁷

The SCA also held that the fact that the applicants were at risk of being prosecuted and the fact that the documents that are sought might assist in their prosecution, did not give the applicants had standing to prosecute an appeal against the decision of Levinsohn DJP.⁶⁸

44. We respectfully submit that this finding cannot be faulted. Section 2(2) of the Act does not say that a suspect must be involved in the application for issuing of a letter of request. The documents that were seized in Mauritius do not belong to any of the applicants and they were not seized from the applicants' premises.

45. The applicants have no greater interest in the request than a suspect normally has in any request made by an investigating officer to a witness for information or documents about the crime under investigation. The only difference in this case is that the witness is abroad. But it does not give the suspect any greater interest in the request than any suspect would ordinarily have. A suspect would of course always be interested in such a request because it might one day have an effect on his fate. The request does however not have any impact on any rights or

⁶⁷ SCA judgment paras 2 and 15 to 16.

⁶⁸ SCA judgment paras 17 and 20.

interests of the suspect. He has no legal interest in it. He accordingly does not have standing to oppose the application for the request.

46. In this court the applicants have however attacked the SCA's finding that they lacked *locus standi* on various grounds, which we shall consider in turn.

An infringement of the applicants' right to a fair criminal trial?

47. In their affidavits delivered in the Durban High Court, Mr Zuma⁶⁹ and the Thint companies⁷⁰ said that because the prosecution had refused to withdraw the charges against them on 20 September 2006 they remained accused persons when the present application for a letter of request was brought on 4 December 2006 or granted on 2 April 2007.

48. It is no longer clear from Mr Zuma's counsel's submissions to this court what his stance is on this issue. It appears to be that although in fact he was not an accused person at the relevant times, he should be treated as if he was an accused person entitled to the rights in section 35(3) of the Constitution because he has subsequently been re-indicted.

- 48.1. His counsel first appear to repudiate the point that Mr Zuma was an accused person when the present application was brought and granted, when they say:

⁶⁹ Zuma 4:267:3.

⁷⁰ Moynot 5:336 to 338:10.

“At the date on which the application for the [letter of request] was launched (December 2006), and as at the date on which the [letter of request] was issued by Levinsohn DJP (April 2007), the applicant was not an accused person. He was not an accused person only by virtue of the fact that his criminal trial had been struck from the roll by Msimang J ... on 20 September 2006, following upon an unsuccessful application for a postponement of the trial by the State that recorded that it was not ready to proceed therewith.”⁷¹

48.2. After referring to the fact that Mr Zuma was re-indicted on 28 December 2007 and that the present application for the letter of request was brought during the “*hiatus*” between Msimang J’s decision and his re-indictment,⁷² his counsel then equivocate by submitting:

“this application for leave to appeal falls to be determined on the basis that the applicant should be regarded as an accused person for all purposes in the State’s application under Section 2(2) of the ICCM Act and that the applicant was therefore at all material times entitled to rights afforded him under Section 35(3) of the Constitution.”⁷³

48.3. Later still his counsel appear to argue on the basis that at the time the letter of request was sought and issued Mr Zuma was a potential

⁷¹ Zuma submissions 23:33.

⁷² Zuma submissions 24:34.

⁷³ Zuma submissions 25:35.

accused (*“the party who is going to be accused of a crime, if anyone is”*), saying that *“such a person”* may approach a court for appropriate relief if the investigation infringes or threatens to infringe his or her rights.⁷⁴

49. In their application for leave to appeal and their written submissions to this court the Thint companies have not persisted with the contention that they were accused persons when the present application was brought and granted. They do however contend that Levinsohn DJP issued the letter of request unlawfully (a matter discussed in the following chapter) and in so doing infringed or threatened their right to a fair trial in s 35(3) of the Constitution.⁷⁵ In their submissions to this court they point out that the prosecution intends tendering the evidence sought in the letter of request as evidence in the criminal trial under s 5(2) of the Act.⁷⁶ They contend that that *“might render the criminal trial unfair as the Applicants will be deprived, during the trial, of an opportunity to challenge evidence on the basis of it having been obtained unlawfully, viz. pursuant to an unlawfully issued [letter of request]”*.⁷⁷ They say in other words that the High Court judgment cannot be revisited by the judge in the criminal trial.⁷⁸

⁷⁴ Zuma submissions 35:50 to 51.

⁷⁵ Thint submissions 4:8 and 8:23.

⁷⁶ Thint submissions 29:111.

⁷⁷ Thint submissions 29:112.

⁷⁸ Thint submissions 22:78 to 81 and 29:113 to 115, relying on the statement in *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) paras 35, 36 and 38 that the decision of a judge may not be reviewed, and criticising the statement in the SCA judgment para 2 that the applicants' right to object to the admission of the requested documents as evidence in the criminal trial, remains intact.

50. The point relevant to *locus standi* raised by the applicants' submissions, is whether the request may violate the applicants' right to a fair trial. We submit there is no risk that it might do so. Between the request and the admission of the documents in evidence against the applicants, a number of conditions have to be fulfilled and at various stages in the process the applicants will have standing to protect their interests:

50.1. The Mauritian authorities must first be persuaded to assist as requested. We understand that they have agreed to do so.

50.2. The Mauritian authorities must obtain affidavits from the responsible officials who can testify to the origin of the seized documents. They must be persuaded to provide those affidavits. The request does not envisage that they would be compelled to do so.

50.3. The Mauritian authorities must obtain the leave of the Supreme Court to release the remaining seized documents to the South African authorities.

50.4. The Mauritian authorities must moreover comply with whatever other requirements there might be under Mauritian law for the seized documents and the affidavits to be surrendered to the South African authorities.

50.5. The state must finally decide which of the seized documents and affidavits to tender in evidence against the applicants, if any.

50.6. If and when the state tenders any of the seized documents and affidavits in evidence, the applicants will have an opportunity to oppose their admission. The court will then exercise a very broad discretion firstly in terms of s 5(2)(b) of the Act which allows for the evidence to be admitted only if it is in the interests of justice to do so.⁷⁹ If it were to be shown that the evidence was obtained in violation of the applicants' constitutional rights, the trial court will moreover have a discretion to exclude it under s 35(5) of the Constitution. The trial court will lastly retain an overriding discretion in terms of s 35(3) to exclude the evidence if its admission would render the trial unfair.

An infringement of Mr Zuma's right of access to courts?

51. Mr Zuma contends that the dispute over whether the letter of request should be issued or has been validly issued, is a justiciable dispute and s 34 of the Constitution ensures a right of access to courts to have justiciable disputes adjudicated.⁸⁰ Mr Zuma accepts that the "*consequences*" of the decision to issue the letter of request "*will have an effect*" that may be challenged in subsequent criminal proceedings, but argues the decision itself cannot be revisited by the criminal trial court.⁸¹

⁷⁹ The court can determine the factors to be taken into account in addition to the nature of the proceedings, the nature of the evidence, the purpose for which the evidence is tendered and any prejudice to any party which the admission of the evidence might entail.

⁸⁰ Hulley 15:1312:42 and Zuma submissions 27 to 28:38 to 40.

⁸¹ Hulley 15:1313:42(b).

52. For the reasons given above, we submit that the granting of the application for the letter of request will not preclude Mr Zuma and the Thint companies from objecting in the forthcoming or any subsequent criminal proceedings to the admission as evidence of any documents obtained from the Mauritian authorities pursuant to the letter of request, on the ground that the letter of request should not have been issued. The applicants' right of access to courts is not infringed by an interpretation and application of the Act which requires that they wait until the right proceedings (the criminal trial) and the right time (when the state tenders the Mauritian documents as evidence) before challenging the issuing of the letter of request by means of which the Mauritian documents were obtained.

“There must be a remedy for unlawful judicial conduct”

53. The Thint companies contend that Levinsohn DJP “*conducted himself ... unlawfully*” (a matter discussed in the following chapter) and then contend that the SCA was wrong to hold that “*that is not an abstract or academic question of law*” unless someone’s rights are affected.⁸² They say that the SCA “*sanctioned the invalid act of Levinsohn DJP*”.⁸³

54. In response we submit, first, that the SCA “*sanctioned*” the High Court judgment because, it held, the applicants’ attacks were bad. The applicants are wrong to characterise the SCA’s further finding that the applicants lacked *locus standi* to appeal against the High Court judgment, as “*sanctioning*” that decision.

⁸² Moynot Thint 15:1289 to 1290:14 to 15, referring to SCA judgment para 15.

⁸³ Thint submissions 4 to 5:10 to 14, 6:16 and 8:24.

55. Secondly, what in effect the Thint companies are saying is “*there must be a remedy for unlawful judicial conduct*”. The SCA disposed of this argument as follows:

*“It is true, as counsel for the appellants reminded us, that the rule of law and the principle of legality requires state conduct (which includes the conduct of a judge) to be in accordance with law, but it does not follow that it might be challenged when rights are not affected by the conduct. The courts do not generally concern themselves with academic or abstract questions of law”.*⁸⁴

56. We submit respectfully submit that the SCA’s approach is borne out by s 38 of the Constitution, which although broadening standing in Bill of Rights cases to include e.g. anyone acting the public interest, nevertheless requires every such litigant to allege “*that a right in the Bill of Rights has been infringed or threatened*”. It also conforms to this court’s own statements on the subject of academic or abstract constitutional litigation. In Zantsi this court said that it “*is not ordinarily desirable for a Court to give rulings in the abstract on issues which are not the subject of controversy and are only of academic interest*”.⁸⁵ In Ferreira this court explained that the principal reasons for this objection,

*“are that in an adversarial system decisions are best made when there is a genuine dispute in which each party has an interest to protect. There is moreover the need to conserve scarce judicial resources and to apply them to real and not hypothetical disputes”.*⁸⁶

⁸⁴ SCA judgment para 15.

⁸⁵ Zantsi v Council of State, Ciskei, and Others 1995 (4) SA 615 (CC) para 7.

⁸⁶ Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) para 164.

57. In a related submission made in the papers before the Durban High Court, the Thint companies contend that they have to have *locus standi* because if they are denied *locus standi* there will be no way in which anyone can challenge in a court the issuing of the letter of request.⁸⁷ They say that unlike other persons they (and presumably Mr Zuma) have standing because they are at risk of being prosecuted.⁸⁸
58. In this regard they rely on the statement by the Cape High Court in Kolbatschenko that if applicant challenging the issuing of a letter of request is at risk of being prosecuted, that is sufficient to “*elevate his interest to what is required in this regard*”.⁸⁹ This statement was however criticised and not followed in the SCA judgment in this matter, as follows:

“Underlying the reasoning in Kolbatschenko appears to be the assumption that a person who faces the risk of prosecution if a warrant for search and seizure is executed has standing to challenge the validity of the warrant and hence, by parity of reasoning, that he or she also has standing to challenge the validity of a request for the issue of such a warrant. None of the cases that were referred to in Kolbatschenko support that reasoning. In all those cases the applicant who challenged

⁸⁷ Moynot Thint 15:1304 to 1305:52 to 54 and Thint submissions 21:77, relying on Minister of Home Affairs v Eisenberg & Associates: In re Eisenberg & Associates v Minister of Home Affairs and Others 2003 (5) SA 281 (CC) para 28. That case is however inapposite because there the respondent’s constitutional challenge was based on the state’s failure to comply with a statutory notice and comment procedure and the respondent had an interest as a member of the public in asserting that right.

⁸⁸ Moynot Thint 15:1303 to 1304:49 to 50.

⁸⁹ Kolbatschenko v King 2001 (4) SA 336 (C) 350E to 350F, applying Jacobs en ’n Ander v Waks en Andere 1992 (1) SA 521 (A) 533J to 534E.

the validity of the warrant was threatened with an invasion of his or her rights of privacy and property if the warrant was executed. I do not think that a person who is at risk of prosecution if a warrant for search and seizure is executed has standing to challenge the validity of the warrant for that reason alone. That being so it also cannot afford him or her standing to challenge the validity of a letter requesting that such a warrant be issued and in my view Kolbatschenko was incorrectly decided in that respect.”⁹⁰

59. In their written submissions to this court the Thint companies initially appear to reiterate that they have *locus standi* because they are at risk of being prosecuted,⁹¹ but later they repudiate this point saying instead that in the SCA they “*did not rely at all upon the rights articulated in the obiter reasoning in Kolbatschenko as considered and rejected by the SCA.*”⁹² In the circumstances, nothing more need be said about the statement in Kolbatschenko which the SCA rejected.

An infringement of Mr Zuma’s constitutional right to dignity?

60. Mr Zuma contends that he has *locus standi* because in the letter of request he is “*targeted and labelled ... a criminal (having allegedly committed ... serious offences)*”⁹³ and consequently the transmission of the letter of request to the law

⁹⁰ SCA judgment para 18.

⁹¹ Thint submissions 5:12.

⁹² Thint submissions 20:70 to 72.

⁹³ Zuma submissions 30:46(b)(i).

enforcement officials in Mauritius infringed his right to dignity under section 10 of the Constitution.⁹⁴

61. What Mr Zuma contends for, in essence, is a right not to be named as a suspect in a criminal investigation. We submit that there is no such right. As Mr Zuma has frequently pointed out, he is presumed innocent until proven guilty, something which the Mauritian prosecution authorities must be presumed to understand.⁹⁵ In other words the information that he is being investigated on suspicion of having committed an offence does not signify his guilt, which is yet to be determined by a court of law.

62. The fact that Mr Zuma is being investigated on the charges is furthermore objectively true and is a fact which is already in the public domain. It is also a fact which is already well known to the Mauritian authorities.⁹⁶

The Thint companies are “*closely connected*” to Thales International Africa

63. Relying on another part of Kolbatschenko⁹⁷ the Thint companies contend that they have *locus standi* because as co-subsidiaries of Thint (France) they are “*closely connected*” to Thales International Africa (the premises of which were searched and from which documents were seized in Mauritius).⁹⁸ They point out

⁹⁴ Hulley 15:1306 to 1307:34 and 15:1309:38(a); and Zuma submissions 17 to 23:28 to 32.

⁹⁵ Du Plooy 17:1515:210.

⁹⁶ Du Plooy 17:1515:210.

⁹⁷ Kolbatschenko v King 2001 (4) SA 336 (C) 348H to 349C.

⁹⁸ Moynot Thint 15:1293:24 to 25 and 15:1302 to 1303:47 and 48.

that at the time of the searches in Mauritius Mr Thétard was a director of the Thint companies and of Thales International Africa.⁹⁹ They go so far as to say that for these reasons the Thint companies and the targets of the letter of request “*are inextricably linked*”.¹⁰⁰

64. It is correct that Kolbatschenko the court held that the applicant there had a sufficient interest in a s 2(2) request because he had a close interest in the documents sought that extended beyond a pure trial related interest. But the facts of the present case are distinguishable because the Thint companies do not claim any proprietary or other specific rights in respect of any of the items sought in the letter of request.

65. Moreover, the persons from whom the documents in question were seized, namely Thales International Africa and Mr Thétard, have taken (and, in the case of Thales International Africa, are taking) the steps in Mauritius which they consider necessary to protect their rights.

65.1. Shortly after the searches and seizures in October 2001 they brought proceedings in the Mauritius Supreme Court aimed at preventing the Mauritian authorities from communicating to the South African authorities any documents or copies thereof which did not fall strictly within the scope of the letter of request and the search warrant issued by that Court.

⁹⁹ Thint submissions 19:68.2, referring to Du Plooy Zuma 17:1520:220.

¹⁰⁰ Thint submissions 20:69.

- 65.2. In March 2003 those proceedings were settled and they consented to the Mauritius Supreme Court ordering that the 14 documents remaining in the possession of the Mauritian authorities be retained by them, provided that they would not be communicated to the South African authorities without the permission of the Court to be sought on notice to them.
- 65.3. Pursuant to Hugo J's decision on 5 June 2007 that the NDPP could request the Mauritian authorities to start the proceedings there to give effect to the request, proceedings have commenced in the Mauritius Supreme Court for an order authorising the release of the documents to the South African authorities and Thales International Africa has filed affidavits opposing their release.¹⁰¹

Consent to *locus standi*?

66. Mr Zuma contends that instead of disputing Mr Zuma's *locus standi* in the application for the letter of request, from the outset the NDPP had invited him to participate in it.¹⁰² The Thint companies contend that they have *locus standi* because they had the right to receive notice and comment on the application for the letter of request.¹⁰³ The Thint companies add that during the argument of the application counsel for the NDPP agreed with comments by Levinsohn DJP that

¹⁰¹ Du Plooy 17:1521:222.

¹⁰² Hulley 15:1305:33, referring to Du Plooy 1:7:20 to 21; Zuma submissions 34:49.

¹⁰³ Moynot Thint 15:1304 to 1305:52 to 54, also relying on Minister of Home Affairs v Eisenberg & Associates: In re Eisenberg & Associates v Minister of Home Affairs and Others 2003 (5) SA 281 (CC).

Mr Zuma and the Thint companies had the necessary standing to oppose the order sought from him.¹⁰⁴

67. The question whether, on a given set of facts, the party has standing or not, is a question of law, namely that party's interest in the subject-matter of the case is a "direct interest" or "an interest that is not too remote" or "some grievance special to himself".¹⁰⁵ Although *locus standi* is not a technical concept with clearly delineated parameters and the assessment as to whether a litigant's interest suffices always depends on the facts of every individual case,¹⁰⁶ the decision that a litigant does or does not have *locus standi* is a decision on a legal question.¹⁰⁷
68. Counsel for the NDPP and Levinsohn DJP were both mistaken when they concluded that the applicants had standing in the matter. Their mistake cannot confer standing on the applicants when none existed before.
69. Nothing turns on the fact that the prosecution undertook to give the applicants notice of the s 2(2) application and honoured that undertaking. At best for the applicants, the undertaking, like counsel's agreement with Levinsohn DJP that Mr

¹⁰⁴ Moynot Thint 15:1296:32. Cf. Levinsohn DJP judgment 4/2/07 14:1209 lines 17 to 19 ("Since the respondents have a clear interest in these proceedings they were given notice of the application for the request.").

¹⁰⁵ Dalrymple and Others v Colonial Treasurer 1910 TS 372 at 390 and 392; see also Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1988 (3) SA 369 (A) at 388B to H.

¹⁰⁶ Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A) 534A to D.

¹⁰⁷ In Ex parte Mouton and Another 1955 (4) SA 460 (A) 463H Van den Heever JA referred to the requirement of *locus standi* as a "*gemeenregtelike prosesreël*". In his concurring judgment in Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd 1933 AD 87 Beyers JA said: "*Locus standi is by uitstek iets wat op die beginsels van die Romeins-Hollandse Reg en die ontwikkeling daarvan in Suid-Afrika, oor beslis moet word*". Section 38 of the Constitution now lays down special rules for *locus standi* in Bill of Rights cases.

Zuma and the Thint companies had the necessary standing, entails a concession on a point of law.

70. It is trite that a court is not bound by a legal concession if it considers the concession to be wrong in law. Thus in *Azapo*¹⁰⁸ this court firmly rejected the proposition that it is bound by an incorrect legal concession because that would lead to the intolerable situation where a court would be bound by a mistake of law on the part of a litigant.

71. For the reasons given earlier in this chapter, we submit that none of the applicants have *locus standi* in this matter.

The High Court judgment appealable?

72. We submit that a decision to issue a letter of request under s 2(2) lacks two of the three key attributes of a judgment or order that may be taken on appeal under s 20(1) of the Supreme Court Act, namely, it must be definitive of the rights of the parties and it must have the effect of disposing of at least a substantial portion of the relief claimed in the “*main proceedings*”.¹⁰⁹ For the reasons given above, the issuing of a letter of request is neither definitive nor dispositive of the rights of the applicants. It is a procedural aid to the investigators in an investigation which may or may not lead to a criminal trial. If the investigation does culminate in a criminal trial (as has happened here), the issuing of the letter of request will not

¹⁰⁸ *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC) para 16.

¹⁰⁹ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J to 533B.

preclude the accused from objecting to the admission of any evidence obtained pursuant to it.

SECTION 2(2) OF THE ACT

An accused person?

73. In the Durban High Court Mr Zuma contended that the NDPP should have used s 2(1) not s 2(2) because he was an accused person in pending criminal proceedings.¹¹⁰ (Although the Thint companies took the same point in the Durban High Court,¹¹¹ in this court they have not mentioned the contention that when the present application was brought and granted they were accused persons.)

74. We understand Mr Zuma's point to be that, because he is in substance an accused person within the meaning of s 35(3) of the Constitution, the state was not entitled to proceed under s 2(2) and should have proceeded under s 2(1). But he is wrong for at least one or possibly two reasons. The first is that s 2(1) only applies when there are criminal proceedings pending and there were none when this application was launched.¹¹² The second is that s 2(2) may be available to the state even when there are criminal proceedings pending. In other words s 2(2) is always available to the state even while there are criminal proceedings pending while s 2(1) provides an additional avenue but only when there are criminal proceedings pending.¹¹³

¹¹⁰ Zuma 4:273 to 274:11 to 14.

¹¹¹ Moynot 5:343:13 and 5:358 to 359:24.

¹¹² SCA judgment para 10.

¹¹³ Du Plooy 17:1528 to 1529:237 to 237.2.

Section 2(2): “information” not “evidence”

75. The applicants contend that the request was not competent under s 2(2) because it was a request for evidence for use in a criminal trial while the section only authorizes a request for information necessary for use in an investigation.
76. What the prosecution sought to in this case was to secure the 14 original documents and formal affidavits from the Mauritian authorities, in advance of what at the time was a possible trial. It did so as part of its continuing investigation. There is nothing unusual about that. It is what the prosecution does in a criminal investigation. It marshals evidence and documents for filing in the docket to prepare for any trial that might eventuate. As the affidavits before Levinsohn DJP established and as the SCA confirmed, a criminal investigation does not consist solely of the discovery of unknown information about a suspected offence (i.e. “solving” the crime). It includes analysing such information and obtaining it in a form which will be admissible at a subsequent prosecution. In respect of eye witnesses, this involves obtaining their affidavits and filing them in the docket. In the case of documentary evidence, this involves obtaining the original document for presentation to court even if copies are already on file. Apart from its evidential value, an original document also has potential value for the investigation which a copy does not. For instance, the diary of Mr Thétard may be subjected to handwriting analysis should its authenticity be disputed; alterations and forgeries may be more easily detected; documents may be fingerprinted and paper and ink analysed, etc.¹¹⁴

¹¹⁴ Du Plooy 17:1526:232.

77. It is also clear from other provisions of the Act that information obtained under a s 2(2) letter of request may include evidence. Section 5(2) clearly contemplates that the information obtained may be admitted as evidence at a subsequent prosecution. Section 3(2) read with s 5(1) makes provision for the examination of witnesses under oath. If the purpose of s 2(2) was simply to obtain “information” in the narrow sense contended for by the applicants, this procedure would be completely superfluous.
78. We thus respectfully submit that the SCA was right to hold that a criminal investigation referred to in s 2(2) is conducted not only to inform the investigator whether an offence was committed, but also to gather evidence that will prove its commission in due course.¹¹⁵ Given the applicants’ stated intention to oppose the admission as evidence of the copies of the documents sought in their criminal trial, it is undoubtedly “*necessary in the interests of justice*” that the requested documents (i.e. the originals and affidavits proving their authenticity etc) be obtained from the Mauritian authorities. It is in any event the task of the investigator and the prosecutor and the Court determining an application under s 2(2), in the exercise of the powers and discretion conferred upon them by the Act and the NPA Act (the present investigation being one under s 28 of the NPA Act), to determine what information and evidence they regard as “*necessary*” for their investigation and it is not within a suspect’s or an accused’s rights to direct such investigations over their shoulder.

¹¹⁵ SCA judgment para 14.

“Section 2(2) limited to requests for the examination of witnesses”

79. The Thint companies have contended that the Act does not provide for the assistance sought in the letter of request, namely documentation and an affidavit relating to the chain of custody of the documentation. More specifically, they contend that ss 3(1), 4(1) and 5(1) make it clear that a letter of request issued under s 2(2) may permissibly “*relate only to the examination of a witness and the incidents relating to such examination*”.¹¹⁶
80. Section 2(2) provides for the obtaining of information “... *from a person or authority in a foreign state*” (s 2(2)(c)). The section does not restrict the types of information that may be obtained or the manner or circumstances in which it may be obtained. The information which may be obtained in terms of s 2(2) is “*such information as is stated in the letter of request*”. The Act accordingly provides that the person requesting the information may define what is required, provided it also satisfies the three jurisdictional requirements. It is accordingly entirely permissible for the prosecution to request that information in the form of documents or affidavits, depending on the exigencies of the investigation.
81. While it is correct that s 3(2) makes provision for the examination of witnesses, this section is clearly permissive and not peremptory. There is accordingly no reason in the present case, where information is already in the possession of the foreign authority, why the prosecution should be required to go through the unnecessary charade of questioning a witness when all it requires is the

¹¹⁶ Thint submissions 45 to 48:186 to 196.

documents already in its possession and a simple affidavit confirming their authenticity.

“Section 2(2) cannot be used to complete requests made outside the Act”

82. Mr Zuma has contended that the Act does not provide for assistance in the form of search and seizure operations, but only for the examination of witnesses and the production of documents by them. He contends that the NDPP had procured the October 2001 searches and seizures in Mauritius by means of a request to the Mauritian authorities outside the provisions of the Act. Consequently, he contends, the NDPP cannot rely on the Act to complete that process by asking for a letter of request under s 2(2), which in turn asks the Mauritian authorities to ask the Mauritius Supreme Court to lift the embargo on the transmission of the seized documents to the South African authorities.¹¹⁷

83. In response we reiterate that s 2(2) does not restrict the types of information that may be obtained or the manner or circumstances in which it may be obtained.

The High Court’s discretion

84. Mr Zuma contends that the decision whether or not to issue a letter of request under s 2(2) is a discretionary decision and that Levinsohn DJP should have exercised the discretion against issuing it. He says that the issuing the letter of request under s 2(2) not s 2(1), precluded him from participating fully in the Mauritian process and cross-examining the witnesses there. He stresses that the

¹¹⁷ Hulley 15:1324 to 1326:59 to 63 and Zuma submissions 43:64.

NDPP had relied on s 2(2) not s 2(1) because the criminal proceedings against him had been struck from the roll. He says that he should not be deprived of the opportunity of participating fully in the Mauritian process because of the prosecution's "*wrongdoing*".¹¹⁸

85. We submit that the argument is bad, for the following reasons.
86. First, the essence of the argument is that because the letter of request was issued under s 2(2) not s 2(1), he will not be able to cross-examine the Mauritian witnesses. However, if Mr Zuma has good grounds for believing that the admission of the Mauritian documents and statements by their mere production would unfairly deprive him of the right to cross-examine the relevant witnesses he can resist that under s 5(2) of the Act or s 35(3) of the Constitution. Should the court uphold his complaint, then the prosecution will either have to abandon its reliance on the documents or call the relevant witnesses to testify (either to attend the trial in person or on commission in terms of the provisions of section 2(1)). In the latter eventuality he will have the opportunity to cross-examine the witnesses. If, on the other hand, the court finds that the admission of the documents would not unfairly infringe his right to cross-examine, then his right to a fair trial will not be infringed.¹¹⁹
87. Secondly, although Mr Zuma is right that s 2(2) confers a discretion on the judge or magistrate concerned, none of his reasons for saying that Levinsohn DJP should have exercised the discretion in his favour constitutes a ground on which

¹¹⁸ Hulley 15:1321 to 1333:72 and Zuma submissions 43 to 44:66.

¹¹⁹ S v Ndhlovu and Others 2002 (2) SACR 325 (SCA) para 50.

an appellate court may to interfere with the exercise of the discretion. Mr Zuma does not allege that the discretion, which is a discretion in the narrow sense involving a choice between two or more different but equally permissible alternatives,¹²⁰ was not exercised judicially or that its exercise was influenced by wrong principles or a misdirection on the facts.¹²¹

¹²⁰ See the cases collected in *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA).

¹²¹ *Ex parte Neethling and Others* 1951 (4) SA 331 (A).

“UNCLEAN HANDS”

88. The applicants contend for several reasons that the documents were unlawfully seized and copies of the documents were unlawfully released to and taken away by the NPA and consequently the NDPP approached the Durban High Court with “*unclean hands*”.

An impermissible ground of appeal to this court

89. The first difficulty, which applies equally to Mr Zuma and the Thint companies, is that at the hearing before the SCA neither of them seriously pressed these “*unclean hands*” arguments, a fact reflected in the judgment of the SCA, which deals only with those issues which were seriously pressed in oral argument.¹²² We submit that they should not be permitted to raise as grounds of appeal to this court against the decision of the SCA, points not seriously pressed in argument before the SCA and which were consequently not canvassed by the SCA in its judgment.

Impermissible collateral challenges

90. The second difficulty arises from the fact that what the applicants are seeking to do is to challenge collaterally in the proceedings for the issuing of the letter of request both the letter of request directed to the Mauritian authorities in

¹²² Du Plooy 17:1524:228 to 229.

September 2001 and the Mauritian and South African authorities' actions in September and October 2001 relating to that letter of request.

91. If the October 2001 proceedings were irregular in all the respects contended for by the applicants, then the following direct challenges would have been open to them and their Mauritian associates:

- An application in South Africa for review of the NDPP's decision to request the Mauritian authorities for assistance.
- An application in Mauritius to have the Supreme Court order of 9 October 2001 and/or the searches undertaken pursuant to that order set aside and for the seized documents to be returned.
- An application against the NPA in South Africa, for return of the copies of the documents unlawfully obtained and exported from Mauritius.

92. We point out that in the six years since then, the applicants have not applied for judicial review of the NDPP's decision to request the Mauritian authorities for assistance or applied for return of the copies of the documents which they say were unlawfully obtained and exported from Mauritius. Moreover, neither Thales International Africa nor Mr Thétard (i.e. the persons whose documents have been retained) has taken any steps to challenge the legality of the searches or the letter of request on which they were based. On the contrary, as explained, they contented themselves with bringing proceedings aimed at preventing the Mauritian authorities from communicating to the South African authorities any documents (or copies) which did not fall strictly within the scope of the letter of request and the search warrant. It is clear from the papers in those proceedings

that their only concern was that certain documents had been seized by the Mauritian authorities which fell outside the scope of the warrant and which contained sensitive trade secrets. Those proceedings were settled on the basis that the Mauritian authorities could retain the documents which remained in their possession on condition that they not release them to the South African authorities without applying to the Mauritius Supreme Court, on notice to Thales International Africa or Mr Thétard, for an order authorising their release.

93. In the circumstances, we submit, it is not open to the present applicants to challenge collaterally in the present proceedings the course of events leading up to and immediately following the October 2001 searches and seizures in Mauritius. If any such challenge is to be brought, that must be done by the right party, in the right proceedings at the right time.¹²³

The complaints do not avail the applicants

94. All of the complaints contend in essence that the documents were unlawfully seized and copies of the documents were unlawfully released to and taken away by the NPA.

95. We submit those contentions do not avail the applicants even if they are correct:

95.1. Whether the documents were lawfully seized and whether copies were lawfully released to the NPA, are matters of Mauritian law. There is no

¹²³ Cf. *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 35.

admissible evidence before the court on these matters under Mauritian law.

95.2. Even if the documents were unlawfully seized under Mauritian law, it would not affect the validity of the South African request subject to appeal in this case, for the documents to be provided to the South African authorities. The present request remains valid, even if one postulates that the Mauritian authorities hold the documents unlawfully. It would be a matter for Mauritian law to determine whether to accede to the request despite the unlawful possession of the documents.

95.3. The question whether the copies were unlawfully released to and taken by the NPA, is similarly irrelevant to the validity of the present request. Even if one postulates that the original export of the documents was unlawful, then the current request is a fresh attempt by the NPA to obtain the documents lawfully. A fresh attempt to obtain the documents lawfully cannot be invalid merely because copies of the documents were previously obtained unlawfully. On the contrary, if the copies were unlawfully obtained, the appropriate course of conduct for the state (anxious to act lawfully at all times), would be to make a fresh attempt to obtain the documents in a lawful manner.

The making and taking of copies of the seized documents

96. We submit for the following reasons there is no substance to the accusations that the release of copies of the documents to Mr Downer was unlawful and that he was or should have been aware that it was so.

97. The director of ECO was responsible for the application to the Mauritius Supreme Court and the execution of its order. Mr Downer was merely there in an advisory capacity. He was entitled to assume that the director of ECO conducted the operation strictly in accordance with Mauritian law. He was incompetent and it would have been presumptuous of him to presume to check up on the director's conduct under Mauritian law.
98. As the Shaik trial court found¹²⁴ it was implicit in the Supreme Court order that the director of ECO could release the documents or at least copies of the documents to the South African authorities pursuant to their request. The very purpose of the Supreme Court order was to obtain the documents to provide them to the South African authorities in response to their request.
99. Even if the release of the copies was not impliedly authorized under the Supreme Court order, it was also not prohibited by it. Whether it was in the circumstances lawful for the director of ECO to release copies to the NPA, is a matter of Mauritian law on which there is no admissible evidence before this court.
100. Mr Downer was in any event at all times entirely innocent and justified in his assumption that all the proceedings were lawfully executed and that the copies were lawfully released to him. He was fully entitled to leave it to the Mauritians to ensure compliance with their domestic law and to assume that they had done so.

¹²⁴ Squires J judgment on admissibility annexure IDP2 10:821 line 18 to 830 line 10.

101. The complaint is also stale. As stated, there has never been such a challenge launched in the more than 6 years since the searches occurred. Mr Thétard and the officers of the entities searched were entirely co-operative and indeed expressed their desire to assist in the investigation in any way they could. In these circumstances, there was nothing to foreshadow and no reason whatsoever for Mr Downer to believe that there would be any litigation aimed at returning the documents.¹²⁵

102. Finally in this regard, it is not correct that the removal of the copies prevented the owners from challenging the search and seizure and so restoring the *status quo ante*, had they so wished. The persons searched were perfectly able to challenge the search warrant and, if successful, obtain an order to have it set aside and for the return of all documents seized and any copies thereof. If that were to have happened and since requests for mutual legal assistance are premised upon cooperation and comity between the law enforcement authorities of the respective countries, the copies would have been returned should the Mauritian authorities have requested this.¹²⁶

The 2001 request was not made through “*the usual diplomatic channels*”

103. In the Durban High Court the Thint companies said that the September 2001 request was delivered by Ms Gerda Ferreira of the DSO directly to Ms Indira Manrakan, the Director of the ECO in Mauritius, instead of being submitted through the “*usual diplomatic channels*” (i.e. via the Departments of Foreign

¹²⁵ Du Plooy 17:1532 to 1533:239.2.

¹²⁶ Du Plooy 17:1533 to 1534:239.3.

Affairs of South Africa and Mauritius).¹²⁷ In support of this contention (and a related one which they have not pursued in this court), they relied on the statement in Ms Ferreira's affidavit that due to the urgency of the matter "a certified copy of this application is being forwarded in advance of its progress through the usual diplomatic channels"¹²⁸ and contended that in fact the DSO did not subsequently submit an application through the ordinary diplomatic channels.¹²⁹ They then contended that the process was "fatally flawed"¹³⁰ because there was no "arrangement or practice that existed between the Republic of South Africa and the Republic of Mauritius that justified the informal request and procedure that was followed in this instance" (and hence s 31 of the Act did not avail the NDPP).¹³¹ Consequently, they alleged, the NDPP had initiated a process that was unlawful and was approaching the Court "with unclean hands".¹³²

104. In their written submissions to this court the Thint companies contend that informal requests "do not and cannot lawfully cover mutual legal assistance including the use of coercive measures such as employed in the instant case".¹³³ More specifically, they contend:

¹²⁷ Moynot 5:326 to 329:5(a) to (g) and 5:361:29(a).

¹²⁸ Ferreira 1/10/01 6:458:70.

¹²⁹ Moynot 5:355 to 356:19 to 20.

¹³⁰ Moynot 5:330:5(j).

¹³¹ Moynot 5:330 to 331:5(k) to (l) and 5:345 to 347:15.

¹³² Moynot 5:356:21.

¹³³ Thint submissions 33:126 and 42:168.

- 104.1. The NDPP did not prove that the Director-General of Foreign Affairs (South Africa) transmitted the request to Mauritius¹³⁴ or that the Ministry of Foreign Affairs in Mauritius approved Mr Downer's proposed visit.¹³⁵
- 104.2. The NDPP's deponent Atkinson, "*despite purporting to substantiate the existence of practices and arrangements*" for purposes of the prosecution's reliance on s 31 to justify the September 2001 request, "*does not mention one instance of coercive measures being sought*"¹³⁶ let alone "*make out a case for the existence of a clearly ascertainable practice or arrangement with Mauritius*".¹³⁷
- 104.3. "*A request for a commission rogatoire and search and seizure seeks coercive powers and can thus never be validly sought through an 'informal' process, without employing diplomatic channels.*"¹³⁸
- 104.4. The NDPP "*did not have the power to represent the Republic in any international relations such as the submission of the request to a foreign state.*"¹³⁹ The NDPP's power is limited to "*the formulation of requests and submissions to the Director-General of Justice and*

¹³⁴ Thint submissions 36:143.

¹³⁵ Thint submissions 38:151 to 152.

¹³⁶ Thint submissions 42:169.

¹³⁷ Thint submissions 42:170 and 43:175.

¹³⁸ Thint submissions 33:129.

¹³⁹ Thint submissions 34:137, criticising the NDPP's reliance on ss 179(2) and (7) of the Constitution and ss 7 and 20 of the NPA Act in Atkinson 11:913 to 914:51 to 53.

Constitutional Development (South Africa) for transmission to a foreign state”.¹⁴⁰

105. In this section we will demonstrate that the request was indeed made through diplomatic channels but that it in any event does not avail the applicants, even if it was not.

106. The relevant facts are as follows:

106.1. On 10 September 2001 Ms Ferreira wrote to the Mauritian High Commissioner in South Africa. She did so on behalf of the NDPP. She requested his assistance in “*the obtaining of evidence for purposes of a criminal investigation*”. More specifically, she requested that the Mauritian Ministry of Justice “*conduct a commission rogatoire and search and seizure*”. She said that the “*precise nature of the relief sought is set out in detail in the enclosed certified copy of the original application, which is being forwarded through the usual diplomatic channels*”.¹⁴¹

106.2. On 11 September 2001 the NDPP wrote to the Director-General of the South African Department of Foreign Affairs attaching, amongst other things, a copy of the request to the Mauritian Ministry of Justice to

¹⁴⁰ Thint submissions 41:162.

¹⁴¹ Ferreira letter 10/9/01 annexure IDP23 12:1004.

conduct the *commission rogatoire* and search and seizure in Mauritius.

The NDPP asked the DG to “*deal with this request urgently*”.¹⁴²

106.3. On 25 September 2001 the South African High Commissioner in Mauritius forwarded to Ms Ferreira a letter from the Mauritian Parliamentary Counsel to the Mauritian Ministry of Foreign Affairs and Regional Co-operation dated 18 September 2001, saying that Mauritian law was clear on a *commission rogatoire* as regards witnesses but unclear on “*the search and seizure as regards suspects and their depositions*”.¹⁴³

106.4. On 26 September 2001 the First Secretary to the Mauritian High Commission in Pretoria wrote to Ms Ferreira in response to her letter of 10 September 2001, saying that as Thales International Africa and Mr Thétard (amongst others) were not potential witnesses but suspects in the investigation underway in South Africa they may avail themselves of their right to silence under the Mauritian Constitution and thus resist being interrogated in the *commission rogatoire*. He also said that “*no search and seizure order can be made in Rogatory Commission proceedings*”. He however then said that if far more details were provided about the participation of the Mauritius-based suspects in serious economic crimes in South Africa, it might be possible to conduct a search and seizure under the Mauritian Economic Crime and Money Laundering Act 2000. The application

¹⁴² Ngcuka letter 11/9/01 annexure IDP4 10:838 to 839.

¹⁴³ Domah letter 18/9/01 annexure IDP5 10:841.

needed to disclose a *prima facie* case, which it did not do at that stage.¹⁴⁴

106.5. On 26 September 2001 the South African High Commissioner in Mauritius forwarded to Mr Downer a document entitled "*Position of the Mauritian authorities on the Request by South Africa for a Commission Rogatoire and Search and Seizure in a Criminal Matter*", the contents of which were identical to the First Secretary's letter to Mr Ferreira summarised above.¹⁴⁵

106.6. On 27 September 2001 Mr Downer sent to the South African High Commissioner in Mauritius a memorandum by him in response to the Mauritian authorities' "*Position*" document, requesting that the High Commissioner forward the memorandum to the Mauritian authorities who were responsible for the "*Position*" document and further requesting that the High Commissioner "*confirm that the original request has been forwarded to the Director, Economic Crime Office (Ms Indira Manrakhan ...). As of the morning of 27 September 2001 she had not yet received the documents.*"¹⁴⁶ In the memorandum Mr Downer asked that the request for the proposed commission *rogatoire* be held over to a later stage of the investigation in view of the difficulties that may arise with it. He then said that those from whom

¹⁴⁴ Michel letter 26/9/01 annexure IDP6 10:843 to 844.

¹⁴⁵ SA High Commissioner letter 26/9/01 annexure IDP7 10:845 to 846.

¹⁴⁶ It appears that the South African High Commissioner responded telephonically to Mr Downer's letter shortly after receiving it: see Sooklal 7/3/07 annexure MS2 12:1080:2(a) and (b) and Steynberg 8/3/07 annexure MS3 12:1082 to 1083:2(a) and (b).

evidence was sought were not suspects but persons (e.g. secretaries and administrative assistances at the premises to be searched) who could identify and explain any documents that may be found there during the search and seizure. He requested that even if the Mauritian authorities decided that they could not obtain the evidence of witnesses of that sort, "*the search and seizure operation should nevertheless proceed on its own at this stage*".¹⁴⁷ Next he dealt with the Mauritian authorities' request for evidence establishing a *prima facie* case against the Mauritius-based suspects. He said that s 29 of the Mauritian Economic Crime and Money Laundering Act 2000 required a reasonable suspicion not a *prima facie* case that an economic crime has been committed. He said that the evidence referred to in the request establishes a least a reasonable suspicion that the Mauritius-based suspects had committed the offences referred to in the request.¹⁴⁸ Finally, he said that the NPA asked the Mauritian authorities to reconsider the request and said that the "*urgency of the matter cannot be over-emphasized*".¹⁴⁹

106.7. On 27 September 2001 Mr Downer also wrote to the Mauritian Director of Public Prosecutions attaching copies of the "*Position*" document and his memorandum in response to it. He then said that although he had requested that the original South African request be forwarded to Ms Manrakhan she had not yet received it and consequently because of

¹⁴⁷ Downer memo (undated) annexure IDP24 12:1006:1 to 4.

¹⁴⁸ Downer memo (undated) annexure IDP24 12:1006 to 1007:6.

¹⁴⁹ Downer memo (undated) annexure IDP24 12:1007:7 to 8.

the urgency he had “*faxed to her a set of the documents in both French and English*”. He recorded that Ms Manrakhan had said that she would discuss the request with the Mauritian DPP, in order to apply to a judge as soon as possible. Finally he said that “*the matter is extremely urgent, as it is likely that the intended action will take place in South Africa and France next week. It is highly desirable that the Mauritian action should take place at the same time.*”¹⁵⁰

106.8. Between 27 September and 1 October 2001 Ms Ferreira apparently made some changes to her affidavit at the request of the Mauritian authorities and again deposed to it on 1 October 2001.¹⁵¹ She again said in her affidavit that for reasons of urgency, a certified copy of the application “*is being forwarded in advance of its progress through the usual diplomatic channels*”.¹⁵² That was indeed done as appears from the formal documents authenticating her affidavit.¹⁵³

106.9. On 2 October 2001 the Mauritian DPP wrote to Mr Downer referring to a telephone conversation (amongst other things) in which Mr Downer had stated his willingness to visit Mauritius for the purpose of discussing the matter with the Attorney-General's Office and the DPP, and requesting Mr Downer to inform the Mauritian Ministry of Foreign

¹⁵⁰ Downer letter 27/9/01 annexure IDP9 10:848.

¹⁵¹ Ferreira 1/10/01 annexures PM25 to PM48 6:435 to 458.

¹⁵² Ferreira 1/10/01 annexure PM48 6:458:70.

¹⁵³ Authentications 2/10/01 annexures PM19 to PM23 6:429 to 433.

Affairs, through diplomatic channels, of that and to request the Ministry's approval of his proposed visit.¹⁵⁴

- 106.10. On 2 October 2001 Mr Downer wrote to the South African High Commissioner in Mauritius, requesting him to inform the Ministry of Foreign Affairs in Mauritius, through diplomatic channels, that he was willing to travel to Mauritius and to request the Ministry for its approval of his proposed visit. He added that he had been told that his assistance was required to assist the Mauritian authorities to compile an application to a judge in Mauritius to authorise the searches and seizures. He also asked that the Ministry be requested to approve travel to Mauritius by two DSO officials in time for the searches to be on hand to assist the Mauritian authorities during and after the searches in identifying explaining the relevant documentation that may be found. He said that as the searches in France and South Africa were scheduled to take place on 9 October 2001 the matter was extremely urgent. Finally, he recorded that he had been asked by the office of the Mauritian DPP "*to bring with me further documentation which may be required*".¹⁵⁵ The NDPP's replying affidavit explains that this "*further documentation*" "*included Ferreira's duly authenticated application dated 1 October 2001 that the DPP had requested. This authenticated application*"¹⁵⁶ was in [all] other respects identical to

¹⁵⁴ Maghooa letter 2/10/01 annexure IDP10 10:850.

¹⁵⁵ Downer letter 2/10/01 annexure IDP11 10:851 to 852.

¹⁵⁶ Application for a commission *rogatoire* and search and seizure annexures PM19 to PM48 6:429 to 458. See especially the application annexure PM24 6:434 and the supporting affidavit by Ferreira 1/10/01 6:435 to 458.

Ferreira's application dated 8 September 2001 which had been duly forwarded through diplomatic channels".¹⁵⁷

106.11. On 8 October 2001 Mr Downer wrote to the South African High Commissioner in Mauritius. In this letter Mr Downer referred to "*the application for mutual legal assistance which the Republic of South Africa directed to the Republic of Mauritius and which was granted by a Judge in Chambers of the Supreme Court of Mauritius on 5 October 2001.*" He also asked the High Commissioner to "*convey to the Mauritian authorities from the South African National Prosecuting Authority its sincere appreciation for their assistance to date and for entertaining successfully the application for mutual assistance*".¹⁵⁸

107. After setting out the sequence of events described above, the NDPP's replying affidavit then says:

*"It is evident from the above that the original application ... was sent through diplomatic channels. A certified copy was sent directly to the Ministry of Justice in Mauritius. A further copy was sent to the Director of ECO. Downer personally handed the original duly authenticated to the DPP and the Director of ECO in Mauritius at the request of the DPP. He had requested the South African High Commissioner to inform the Mauritian Ministry of Foreign Affairs of this."*¹⁵⁹

¹⁵⁷ Du Plooy reply 9:695:13.2.8.

¹⁵⁸ Downer letter 8/10/01 annexure MS3 12:1086.

¹⁵⁹ Du Plooy reply 9:695:13.3.

108. Mr Downer made an affidavit confirming the correctness of the NDPP's replying affidavit insofar as it related to him.¹⁶⁰ It is moreover common cause that in early October 2001 the Mauritian authorities acceded to the request that they apply to court for an order authorising the searches and seizures and that Mr Downer (and Ms Da Silva Nel) travelled to Mauritius to assist the authorities with the searches and seizures. When these facts are considered against the backdrop of the Mauritian DPP's insistence that notwithstanding the urgency of the matter the Mauritian Ministry of Foreign Affairs first signify its approval of the intended visit by Mr Downer and the DSO officials and Mr Downer's letter to the South African High Commissioner in Mauritius asking that he seek such approval from the Mauritian Ministry of Foreign Affairs through diplomatic channels, there is no reason to doubt that the South African High Commissioner in Mauritius did in fact communicate with the Mauritian Ministry of Foreign Affairs through diplomatic channels and seek and obtain its approval of Mr Downer's proposed *modus operandi*. The NDPP's supplementary replying affidavit is thus correct in saying,

"it is inconceivable that the South African High Commissioner in Mauritius would not have sought the necessary authority in accordance with the request that he should do so. It is even more implausible that he should receive Downer in Mauritius and that the Mauritian ECO office should receive Downer and da Silva in the absence of Mauritian approval... The papers are silent because the transactions between the South African High Commissioner and the Mauritian authorities are not within the Applicant's knowledge, nor could they be expected to be.

¹⁶⁰ Downer 10:888:3.

*This does not indicate an absence of authorisation. The probabilities indicate the contrary and THINT has no evidence to dispute this.*¹⁶¹

and

*“It is necessary to point out that the precise details of the transmission of the request after it was delivered to the Director-General of Foreign Affairs are not matters that are or would be within Applicant’s knowledge. As I have stated, the reaction that was obtained from the Mauritian authorities indicates that the request was indeed sent as it should have been, either by the Director-General or the Mauritian High Commissioner in South Africa, or both.”*¹⁶²

109. It follows that this complaint by the Thint companies falls at the first hurdle, i.e. the request was in fact submitted via the diplomatic channels.¹⁶³

110. In any event, there was no requirement under South African law that a request for mutual legal assistance had to be communicated to the foreign state through “*the usual diplomatic channels*”. (The request was not one made under s 2 of the Act, which provides that except in cases of urgency such letters of request must be communicated to the foreign state by the Director-General: Justice.)

111. Alternatively, even if there was such a requirement under South African law, it would be of no consequence. The logic of Thint’s contention that it would render

¹⁶¹ Du Plooy supplementary reply 13:1157:34.6 to 34.7; see also 13:1166:37.1 to 38.2 and 13:1186:67.5.

¹⁶² Du Plooy supplementary reply 13:1159:35.2.

¹⁶³ Du Plooy reply 9:697:13.8.

the current proceedings nugatory, has to be an argument along the following lines and with the following difficulties:

- 111.1. The failure to communicate the request through the usual diplomatic channels, rendered it an invalid request under Mauritian law. But there is no admissible evidence on the question whether Mauritian law required an incoming request to be communicated through the usual diplomatic channels.
- 111.2. Because the incoming request was invalid, the application to the Supreme Court made by the director of ECO was also invalid. But there is no admissible evidence that under Mauritian law, an invalid request invalidated the director's application to court in response to it.
- 111.3. The invalid request or the director's invalid application based upon it, rendered the order of the Mauritius Supreme Court invalid. But there is again no admissible evidence that that would have been so under Mauritian law. It would indeed be most surprising if Mauritian law allowed the validity of a court order made and executed in 2001, to be impugned in 2007.
- 111.4. Because the Supreme Court order was invalid, the searches were also unlawful. There is again no admissible evidence to the effect that a search is unlawful despite the fact that it was executed under a facially valid Supreme Court order which has never been impugned or set aside.

111.5. Even if the Thint companies' argument overcomes all the hurdles up to this point, its conclusion is merely that ICAC's possession of the original documents is unlawful. Even if one were to assume that this was so, it would still not render the new South African request for those documents nugatory. The request remains valid. Whether the Mauritian authorities accede to the request or not, is a matter for them to determine under Mauritian law.

“Residual powers infringe the principle of legality”

112. In their written submissions in this court the Thint companies give a new reason why the October 2001 searches and seizures were invalid. They say that s 31 of the Act does not preserve for the NDPP any “*residual powers*” because that would infringe “*the principle of legality, which demands that the exercise of a public power must have a clear and definite legal source*”.¹⁶⁴

113. The starting premise of this argument is that the NPA has no authority to request mutual legal assistance beyond the four corners of the Act, i.e. that the power to request mutual legal assistance must be found in the Act. There is nothing to justify the premise. It can only be correct if there was no power vested in the state to request mutual legal assistance before the Act was enacted or if the latter must be construed to repeal and replace all existing power to request mutual

¹⁶⁴ Thint submissions 39 to 40:157 to 160, relying on *Reuters Group plc and Others v Viljoen and Others* NNO 2001 (12) BCLR 1265 (C) paras 36.7, 36.8 and 36.11 and referring to *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC) paras 30 to 32.

legal assistance. But neither proposition is correct. The fact is that, when the Act was enacted, there was a whole range of existing powers vested in various state agencies to request mutual legal assistance and the purpose of the Act was merely to supplement those powers and not to restrict them and even less to replace all of them.

114. There is no magic about the power to request mutual legal assistance. It is no more significant than the power of an investigating officer who investigates a crime to ask witnesses for information, documents or exhibits relating to the crime. The only difference between a request to a local witness and a request for mutual legal assistance is that the latter is a request to a foreign state agency. But it remains no more than a request for information.

115. The Thint companies say that there is a fundamental distinction between an informal request for mere information on the one hand, and a formal request for information which the foreign state can only obtain by means of compulsion. But they are only half right in making this distinction:

115.1. The law of the foreign state will usually for obvious reasons distinguish between requests for information which it has available or can obtain without compulsion and requests for information which it can only obtain by means of compulsion. The domestic law of the foreign state will usually set far stricter requirements for the collection of the latter category of information by compulsion. Those requirements may typically include a requirement that the request has to be an official request of a particular kind.

115.2. As a matter of South African domestic law however there are no set requirements for an informal request on the one hand and for a formal request to obtain evidence by compulsion on the other. The requirements for the request depend on the domestic law of the foreign state from whom the information is requested. The only question under South African law is whether the state agency concerned has the power to make a request of the kind required under the domestic law of the requested state.

116. The power of the NPA including the DSO to request information of a foreign state, is implicit in their power to investigate and prosecute crime. No state agency has explicit power to request mutual legal assistance. In the case of the NPA and the DSO (whose powers of investigation are more defined than those of the SAPS), their powers derive from the following provisions:

116.1. In terms of s 179(2) of the Constitution, the NPA has the power to institute criminal proceedings *“and to carry out any necessary functions incidental to instituting criminal proceedings”*.

116.2. In terms of s 20(1)(b) of the NPA Act, the NPA has the power to institute and conduct criminal proceedings and to *“carry out any necessary functions incidental to instituting and conducting such criminal proceedings”*.

116.3. In terms of s 7(1)(a) of the NPA Act, the DSO has the power,

- to “investigate, and to carry out any functions incidental to investigations”,
- to “gather, keep and analyse information” and
- where appropriate to institute criminal proceedings “and carry out any necessary functions incidental to instituting criminal proceedings”.

116.4. In terms of s 22(1) of the NPA Act, the NDPP has authority over the exercise of all these powers and the performance of all these duties and functions.

117. These provisions invest the NPA including the DSO with the power to request information from witnesses and institutions within South Africa and abroad. There is no logical basis upon which to say that they have the power to request information of witnesses and institutions locally but do not have the power to make the request if the witness or institution is based abroad. The powers are general and do not draw a distinction between information available locally and information only available abroad.

118. The NPA and the DSO of course do not have any powers of compulsion abroad. But the power they have exercised in the present case, is in any event a mere power of investigation which does not include any powers of compulsion. It is merely a power to ask other people for information. The NPA and the DSO have that power, whether the people or institutions from whom they request the information, are within South Africa or abroad.

119. This was the position which prevailed when the Act was enacted. The question is whether it repealed and replaced or restricted the existing powers of the South African state agencies charged with the investigation and prosecution of crimes. It seems clear that the Act was never intended to do so. Its only purpose was to supplement and not to replace or restrict:

119.1. The Act flowed from the SA Law Commission Report.¹⁶⁵ The report indeed included a draft bill.¹⁶⁶ It was enacted in substantially the same form and became the Act. It means that one can look to the SA Law Commission Report to determine the purpose of the Act.¹⁶⁷

119.2. As appears from the SA Law Commission Report, the purpose of the Act was merely to supplement the existing procedures for requesting and providing mutual legal assistance to cure a variety of shortcomings that were identified. There was never any suggestion that the new provisions should replace or restrict in any way.

119.3. If the Act was intended to cover the field and purported to do so, one might have inferred an implied intention to replace all existing mechanisms for requesting and providing mutual legal assistance. But it does not by any means purport to do so. It merely caters for a very limited form of mutual legal assistance and does not come close to an

¹⁶⁵ South African Law Commission Report on International Co-operation in Criminal Prosecutions, Project 98, December 1995 annexure PJA1 11:939 to 972 (incomplete).

¹⁶⁶ SALC draft bill annexure PJA1 11:970 to 972 (incomplete).

¹⁶⁷ De Ville Constitutional and Statutory Interpretation (2000) 229. Cf. Minister of Health and Another NO v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Another as *Amici Curiae*) 2006 (2) SA 311 (CC) paras 200 to 201.

attempt to cover the field. It for instance does not provide for requests for search and seizure which must be a common form of mutual legal assistance. This is merely one example to illustrate that its purpose was merely to supplement and not to replace or restrict.

- 119.4. There is nothing in the language of the Act to suggest that it was intended to be exhaustive or to replace or restrict such powers as already existed to request mutual legal assistance.
- 119.5. Section 31 had its origin in the SA Law Commission draft bill. Its purpose was clearly merely to emphasize that the purpose of the Act was to supplement and not to replace or restrict. It says that the Act does not prevent or abrogate or derogate from “*any arrangement or practice for the provision or obtaining of international co-operation in criminal matters*”. It merely reinforces the proper interpretation of the Act, namely that it merely supplements and does not replace or restrict.
- 119.6. The Thint companies interpret s 31 to mean that the Act repeals and replaces all existing powers to request mutual legal assistance save only that existing arrangements and practices for the provision or obtaining of mutual legal assistance are preserved. But there is firstly nothing in the language of s 31 or the Act as a whole, from which this intention to repeal and replace can be inferred. Moreover, if it was the intention to repeal and replace all other powers to request and provide mutual legal assistance, then it would have been a very obscure and badly defined provision which maintained “*any arrangement or practice*

for the provision or obtaining of international co-operation in criminal matters". What arrangements and practices are preserved? How broad or narrow is the preservation? If South Africa has a long-standing arrangement with its neighbours to request mutual legal assistance in a particular way, does this method remain available for all forms of mutual legal assistance or only for those requested in the past? And what of the phrase "*prevent ... any arrangement or practice*", which points to future arrangements and future practices?¹⁶⁸ There are simply no answers to these questions if s 31 is construed to preserve only the existing arrangements or practices concerned.

119.7. The better interpretation is that s 31 did not only preserve those arrangements or practices. It was meant merely to reinforce the proper interpretation of the Act, namely that it supplemented and did not repeal, replace or restrict any existing powers to request or provide mutual legal assistance or preclude future arrangements or practices for requesting or providing mutual legal assistance.

120. It was suggested in Reuters that, on this interpretation of the Act, it served no purpose because it could always be "*circumvented*" by an informal request beyond the scope of the Act.¹⁶⁹ But that is not so. The purposes of the mechanisms for requesting mutual legal assistance under s 2 for instance include the following:

¹⁶⁸ Atkinson 11:916:57.

¹⁶⁹ Reuters Group plc and Others v Viljoen and Others NNO 2001 (12) BCLR 1265 (C) paras 36.10 and 36.11.

- 120.1. The purpose of s 2(1) was to replace the existing mechanism for taking evidence on commission beyond the borders of South Africa in terms of s 171(1) of the Criminal Procedure Act. The SA Law Commission identified various weaknesses in that mechanism and for that reason replaced it with a mechanism in s 2(1). The Act at the same time amended s 171(1) of the Criminal Procedure Act 51 of 1977 to restrict its operation to South Africa.
- 120.2. The purpose of s 2(2) was to make the same mechanism for gathering evidence abroad available in the investigation of crime even when there are no criminal proceedings pending. The SA Law Commission identified the weakness in the existing system of taking evidence on commission, that it was only available when there were criminal proceedings pending, while there was often a need to gather evidence abroad when there were no criminal proceedings pending. That was why s 2(2) was enacted to make the mechanism available for the investigation of crime.
- 120.3. Sections 2(1) and (2) serve a range of useful purposes, despite the fact that the same kind of mutual legal assistance may also be informally requested. The advantages of requests under ss 2(1) and (2) include the following. Firstly, the domestic law of the foreign state sometimes requires the request to come from a South African court. There are secondly a range of consequences that flow from a request under ss 2(1) or (2) that would not follow from an informal request. Section 5(2) for instance renders evidence obtained under ss 2(1) and

(2) admissible in certain circumstances, which would not be the case if the request was informally made.

121. In the alternative we submit even if it should be held that the Act is exhaustive of the power to request mutual legal assistance subject only to the preservation of existing arrangements or practices by s 31, then the current request was in any event made in accordance with such an existing arrangement or practice as the evidence of Atkinson shows.¹⁷⁰

¹⁷⁰ Atkinson 11:917 to 930:59 to 89.

THE INTERESTS OF JUSTICE

122. Section 167(6)(b) of the Constitution provides that the criterion for determining whether to grant leave or not is whether this court is satisfied that it is in the interests of justice to do so. The decision to grant or refuse leave is a matter for the discretion of this court.¹⁷¹ In determining what is in the interests of justice, each case has to be considered in the light of its own facts and circumstances.¹⁷²

123. We submit that the granting of leave to appeal in the present cases would not be in the interests of justice.

124. The applicants' attacks on the decision to issue the letter of request are so weak that there is no reasonable prospect that this court will overturn the unanimous findings of the SCA on the merits.¹⁷³

125. The process of obtaining the original documents and affidavits from Mauritius ought to have been straightforward and has been unnecessarily complicated and protracted by the applicants' unfounded opposition. It is common cause that the documents are relevant to the present investigation. They are identified. They are lawfully held by an identified Mauritian authority. Both Mauritian and South

¹⁷¹ S v Boesak 2001 (1) SA 912 (CC) para 12.

¹⁷² S v Basson 2005 (1) SA 171 (CC) para 39; Prophet v National Director of Public Prosecutions 2006 (2) SACR 525 (CC) para 48.

¹⁷³ S v Pennington and Another 1997 (4) SA 1076 (CC) para 52; S v Boesak 2001 (1) SA 912 (CC) para 12.

African law make provision for such evidence to be requested and transmitted by way of mutual legal assistance.

126. The state ought to be able to conduct its lawful investigations into suspected criminal offences unhindered by those suspected of committing such offences.

127. The applicants' only motive with this case, is to take every point they possibly can, in their attempt to deprive the prosecution and ultimately their trial court, of the incriminating evidence obtained from Mauritius which if admitted will contribute to proof of their guilt. The applicants are of course entitled to protection against admission of the evidence if it would in any way render their trial unfair. But there is no risk that it would do so because the trial court will both have the power and be duty bound,

- in terms of s 5(2)(b) of the Act, to admit the Mauritian evidence only if it is in the interests of justice to do so;
- in terms of s 35(5) of the Constitution, to exclude the evidence if it was obtained in violation of the applicants' constitutional rights and if the admission of the evidence would render their trial unfair or otherwise be detrimental to the administration of justice, and
- in terms of s 35(3) in any event exclude the evidence if its admission would for any other reason render their trial unfair.

128. The trial court will moreover be in the best position to judge whether the Mauritian evidence should be admitted or excluded on any of these grounds. It should be allowed to do so. The applicants should not be allowed to pre-empt the trial court

by depriving it on purely technical grounds, of the opportunity to judge whether the interests of justice are best served by admission of the Mauritian evidence.

CONCLUSION AND PRAYER

129. 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.

130. 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.

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

Wim Trengove SC

A M Breitenbach

Chambers
Johannesburg and Cape Town
28 February 2008

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