Sneller Verbatim/lr

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION) REPORTABLE

JOHANNESBURG CASE NO: 19104/05

5 2005-09-09

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In the matter between

J MAHOMED Applicant

and

N D P P & OTHERS Respondents

15

J U D G M E N T

20 HUSSAIN, J:

[1.]Introduction.

The respondents are engaged in investigating a number of offences allegedly committed by Mr Jacob Zuma. Pursuant to such investigations they launched a prosecution against Mr Zuma. In furtherance of their 25 continuing investigations the respondents applied for and obtained a number of search warrants which were then executed in a coordinated nationwide operation.

[2.]The warrants were obtained in terms of section 29 of the National Prosecuting Authority Act 32 of 1998 as amended. I shall hereinafter refer to this as 30 the Act. The respondents in terms of section 29 of the Act brought an *ex*

parte application before a Judge in chambers and obtained some 21 warrants in terms requested by the respondents. The application was supported by an affidavit deposed to by a senior special investigator employed by the Directorate of Special Operations.

5 [3.]The applicant is a practising attorney of this Court and from time to time acted as such for Mr Zuma. Two of the 21 warrants obtained by the respondents were in respect of a search of the applicant's office and her residence. The warrants were executed and a number of documents, files and a laptop computer were seized and removed from her office and
10 her residence. These items, with the exception of her laptop computer, are presently in the safe custody of the Registrar of this Court. The applicant brought this application by way of an urgent application for the setting aside of the warrants and the release of her possessions that were seized and removed. At the first hearing of this matter I postponed
15 the hearing to enable the parties to file their answering and replying affidavits respectively. At the same time I granted an order that the applicant's laptop computer be returned to her after a mirror image of the hard-drive was made. The said mirror image was sealed and stored in safe custody together with the applicant's other possessions by the
20 Registrar.

For convenience I annex hereto marked A and B copies of the warrants in question. Annexure A is in respect of the applicant's office and Annexure B is in respect of the applicant's residence. The address in the warrant regarding the residence is incorrect, however, with the applicant's
25 consent her residence was searched in terms of this warrant without the need for the respondents to apply for a fresh warrant with the correct address. For purposes of this judgment it was agreed by the parties that I should treat Annexure B as if it was executed in respect of the applicant's residence. For purposes of this judgment I am not called upon to make
30 any decision relating to the other warrants. Save to make some

comments about the terms of the other warrants, I intend to confine myself only to Annexures A and B hereto.

[4.]<u>The issues.</u>

The applicant seeks an order setting aside the warrants principally on the basis
5 that they were improperly obtained and improperly executed. The main issues can be summarised as follows:

(a)The affidavit in support of the application for the warrants did not make a full and objective disclosure of all the material facts.

(b)The respondents failed to alert the learned judge in chambers to the potential
10 violation of attorney client privilege and thereby obtained a warrant in the widest terms possible.

(c)The warrants obtained were over-broad in their terms and were not justified nor needed in the circumstances.

(d)The wide terms of the warrant were not supported by any facts in the
15 respondents' affidavit that was placed before the learned Judge in chambers and;

(e)The warrant was executed without regard for the protections and safeguards afforded in section 29 of the Act and with no regard for attorney client privilege.

20 I shall deal with each of these issues. The respondents deny they conducted themselves in any manner other than what they were authorised to do in terms of the Act. The respondents further submitted that they were justified in the circumstances in applying for and obtaining the warrants in the terms that they were requested.

25 A debate was sparked between the parties as to whether or not I can for purposes of this application sit in review of the decision of the learned Judge who granted the respondent's *ex parte* application. Whether or not the decision is reviewable is to say the least debatable, however, for purposes of this judgment it will not be necessary for me to approach the
30 issues on the basis that I am called upon to review the decision of the

learned Judge who issued the warrants, see *Pretoria Portland Cement Company Ltd v Competition Commission* 2003 (2) SA 385 (SCA).

[5.] <u>Attorney client privilege and the provisions of the Act.</u>

It is common cause that the applicant is a practising attorney of this court. She is in private practise and one of her clients is Mr Zuma. At the outset it must be stated that it is further common cause that:

(a) The applicant herself is not being investigated in terms of the Act for any offence and;

(b) It is not alleged by the respondents that the applicant in her personal capacity or in her professional capacity is complicit with Mr Zuma in respect of any of the offences being investigated against the latter.

[6.] This application raises certain vital public policy issues that must be canvassed. On the facts of this application what in effect happened is that the office and residence of an attorney was searched and documents and a computer seized by the National Directorate of Public Prosecutions (to whom I shall refer to as the NDPP). The attorney was representing a person who is the subject of investigations and a prosecution at the hands of the NDPP. The applicant claims that the manner in which the warrants were obtained and executed violated attorney client privilege and on this basis alone public policy demands that the warrants be set aside.

[7.] Legal professional privilege is a right necessary for the proper functioning of the adversarial system and is not a mere evidentiary principle. It is a fundamental right and can be claimed not only in actual litigation but also to prevent seizure by warrant, See *Bogoshi v Director Office for Serious Economic Offences & Others* 1993 (3) SA 953 (T). In appropriate circumstances convictions were set aside on the basis that during the course of litigation there was a serious breach of attorney client privilege see *S v Mushimba & Others* 1977 (2) SA 829 (SCA).

Our courts have in the past even considered whether it can be said that the attorney client privilege confers general immunity against seizures in terms of general powers, see *Mandela v Minister of Prisons* 1983 (1) SA 938 (SCA). Our courts have held the opinion that due to the fundamental nature of a client's right to confidentiality *vis-a-vis* his legal representative it was in the public interests as well as in conformity with the demands of justice, fairness and reasonableness that such right had to be acknowledged. No erosion thereof, whether in the course of court proceedings of a judicial or *quasi* judicial nature or proceedings falling outside such ambit could be tolerated. I refer to *Sasol 3 (Edms) Bpk v Minister van Wet & Orde* 1991 (3) SA 766 (T).

Legal professional privilege has become firmly established in our law as a "fundamental principle upon which our judicial system is based". See *S v Sefatsa & Others* 1988 (1) SA 86A (SCA). I must associate myself with a passage quoted with approval in *Sefatsa's* case by Botha JA:

"The law came to recognise that for its better functioning it was necessary that there should be freedom of communication between a lawyer and his client for the purpose of giving and receiving legal advice and for the purpose of litigation and that this entailed immunity from disclosure of such communications between them.

Whilst legal professional privilege was originally confined to the maintenance of confidence pursuant to a contractual duty which arises out of a professional relationship, it is now established that its justification is to be found in the fact that the proper functioning of our legal system depends upon a freedom of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice. The restriction of the privilege to the legal profession serves to emphasise that the relationship between a client and his legal adviser has a special

significance because it is part of the functioning of the law itself.

The conflict between the principle that all relevant evidence should be disclosed and the principle that communications between lawyer and client should be confidential has been resolved in favour of

5 the confidentiality of those communications. It has been determined that in this way the public interest is better served because the operation of the adversary system, upon which we depend for the attainment of justice in our society, would otherwise be impaired.

10 The privilege extends beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence. It is a doctrine which is based upon the view that confidentiality is

15 necessary for the proper functioning of the legal system and not merely the proper conduct of particular litigation."

"Speaking for myself, I should have thought it evident that if communications between legal advisers and their clients were subject to compulsory disclosure in litigation, civil or

20 criminal, there would be a restriction, serious in many cases, upon the freedom with which advice or representation could be given or sought. If a client cannot seek advice from his legal adviser confident that he is not acting to his disadvantage in doing so, then his lack of

25 confidence is likely to be reflected in the instructions he gives, the advice he is given and ultimately in the legal process of which the advice forms part."

Even in the darkest days of apartheid our laws recognised attorney client privilege. Today in a post constitutional South Africa attorney client privilege

30 takes on even greater importance. Erosion of this principle in any form will

seriously damage the proper administration of justice. It is fundamental to an accused person's right to a fair trial that he or she be allowed to communicate with his or her legal representatives knowing that such communications will be treated in the strictest confidence. In my view any serious inroads into the
5 privilege cannot be compatible with any notion of an accused person receiving a fair trial within an adversarial system.

[8.]Section 29 of the Act.

Searches and seizures carried out pursuant to a warrant obtained *ex parte* by their very nature can be oppressive, invasive and a possible breach of
10 one's constitutional rights. The Constitutionality of section 29(5) of the Act and the general scheme of the Act was dealt with in the case of *Investigations Directorate: SEO v Hyundai Motor Distributors* 2001 (1) SA 545 (cc). I am in respectful agreement with the judgment of the Constitutional Court that neither section 29(5) nor anything in the
15 general scheme of the Act offends the Constitution. In dealing with the importance and purpose of the search and seizure provisions of the Act the following was stated:

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

functions, the investigating directorates have been granted the powers of search and seizure."

The court concluded that the provisions of section 29(5) were reasonably capable of a meaning that was consistent with the requirements of the
5 Constitution. In reaching this conclusion the Court stated as follows:

"The proper interpretation of section 29(5) therefore permits a judicial officer to issue a search warrant in respect of a preparatory investigation only when he or she is satisfied that there exists a reasonable suspicion that an offence which might be a specified offence has been committed. The
10 warrant may only be issued where the judicial officer has concluded that there is a reasonable suspicion that such an offence has been committed, that there are reasonable grounds to believe that objects connected with an investigation into that suspected offence may be found on the relevant premises and, in the exercise of his or her
15 discretion, the judicial officer considers it appropriate to issue a search warrant. These are considerable safeguards protecting the right to privacy of individuals. In my view, the scope of the limitation of the right to privacy is therefore narrow."

"[54.]There was no doubt that search and seizure provisions, in the
20 context of a preparatory investigation, served an important purpose in the fight against crime. That the State had a pressing interest which involved the security and freedom of the community as a whole was beyond question. It was an objective which was sufficiently important to justify the
25 limitation of the right to privacy of an individual in certain circumstances. The right was not meant to shield criminal activity or to conceal evidence of crime from the criminal justice process. On the other hand, State officials were not entitled without good cause to invade the premises of
30 persons for purposes of searching and seizing property;

there would otherwise be little content left to the right to privacy. A balance therefore had to be struck between the interests of the individual and that of the State, a task that lay at the heart of the inquiry into the limitation of rights."

[55.]On the proper interpretation of the sections concerned, the investigating directorate is required to place before a judicial officer an adequate and objective basis to justify the infringement of the important right to privacy. The legislation sets up an objective standard that must be met prior to the violation of the right, thus ensuring that search and seizure powers will only be exercised where there are sufficient reasons for doing so. These provisions thus strike a balance between the need for search and seizure powers and the right to privacy of individuals. Thus construed, section 29(5) provides sufficient safeguards against an unwarranted invasion of the right to privacy. It follows, in my view, that the limitation of the privacy right in these circumstances is reasonable and justifiable."

The Court concluded that the Act can be interpreted and applied in such a manner as to protect against unreasonable searches and unwarranted invasions of one's rights to privacy.

[9.]In my opinion having considered the Act as a whole it was never intended that the NDPP be given a licence to invade a person's privacy and more in point, nor was the NDPP given any licence to interfere with or erode

attorney client privilege. With regard to privilege the Act provides further safeguards in the form of section 29(11) which reads as follows:

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

It is of note that the warrants obtained by the respondents contain no safeguards to protect attorney client privilege - this relates not only to Mr Zuma, but to all of the applicant's other clients.

[10.]<u>Possible abuse.</u>

As is the case with other legislation and court procedures that provide for search and seizure the provisions of the Act are vulnerable to abuse. In my opinion it is not the terms of the Act that result in an invasion of a person's Constitutional rights. It is how the provisions of the Act are applied that can result in an erosion of those rights. It is <u>how</u> a warrant in terms of the Act is applied for and <u>how</u> the warrant is executed that can result in a possible invasion of one's rights including the right to claim attorney client privilege. In terms of the Act the onus is on the respondents to persuade a judicial officer that a warrant is needed. Equally the respondents bear the onus, in making application for a warrant, to strictly comply with the provisions of the Act. Anything less will result in an unjustifiable erosion of one's Constitutional rights. In

particular there must be strict compliance with the provisions of sections 29(1), 29(2), 29(4), 29(5), 29(9) and 29(11).

[11.] *Ex parte* applications.

Section 29 authorises the respondents to bring an application for a warrant

5 before a judicial officer in chambers without notice to the person who is the subject of the investigation. *Ex parte* applications by their very nature infringes one of the most fundamental principles of our law, namely the *audi ulteram partem* rule or the *audi* rule as it is more popularly known. Nevertheless our law recognises that in certain circumstances such

10 applications are necessary. The Act similarly recognises this in order to achieve its purpose. In certain circumstances *ex parte* applications are necessary. In order to limit the possible harm that can result from *ex parte* applications and in order to prevent abuse our law recognises certain practises and procedures regarding such applications. An

15 established requirement is that the applicant must act in the utmost good faith and is required to make a full and objective disclosure of all the material facts to the judicial officer. Anything less is unacceptable. This is so particularly because the person who is targeted by the warrant is not present and is not afforded an opportunity to contest the facts

20 relied upon by the applicant for the warrant, nor is the judicial officer afforded the benefit of hearing representations from all interested parties. Good faith is a *sine qua non* in *ex parte* applications, see *Schlesinger v Schlesinger* 1979 (4) SA 342 (W). If any material facts are not disclosed whether they be wilfully suppressed or negligently

25 omitted, the Court may on that ground alone dismiss an application or set aside an order, see *Schlesinger's* case.

The respondents and in particular the National Director of Public Prosecutions is not immune from these requirements when bringing an *ex parte* application for a warrant. Nothing less than a full objective disclosure of

30 all the material facts must be placed before the judicial officer in

question.

[12.]The respondents submit that in obtaining the warrants, namely Annexures A and B hereto, they acted squarely within the ambit of the Act and in particular they complied fully with the requirements of section 29. This is disputed by the applicant on a number of grounds.

[13.]<u>Failure to disclose.</u>

It is common cause that at all material times the respondents knew that the applicant was a practising attorney of the High Court and that Mr Zuma was one of her clients. In their affidavit before the learned judge president the applicant is described as follows: "Julekha (also known as Julie) Mahomed was at all relevant times 'Zuma's personal legal assistant."

I can find nowhere in the respondent's affidavit a disclosure to the judicial officer that the applicant is a practising attorney of the High Court. Even in Annexure A hereto the respondents obtained a warrant to search: "The offices of Julekha Mahomed, including those of her secretary's, employees and assistants and J Mahomed Attorneys at 23 Wellington Road, Parktown, Johannesburg."

I could find no reference in the respondent's affidavit explaining the relationship between "Julekha Mahomed" and "J Mahomed Attorneys". The terms of the warrant suggests that there is an entity called Julekha Mahomed who is "Jacob Zuma's personal legal assistant" and another entity called "J Mahomed Attorneys" without an explanation as to how the two are connected if they are connected in any way.

In my view the failure of the respondents to disclose to the learned Judge-president that the applicant was a practising attorney of the High Court was a material non disclosure. In their response to this the respondents concede that they failed to make the disclosure, but claim that this was "unintended" and it was an "error". The respondents further state that the learned Judge "could have had no doubt that the applicant is an

attorney." The respondents further state that in any event the applicant suffered no prejudice as a result of their admitted non disclosure. I will deal with each of the respondent's submissions in this regard.

It is not disputed that the respondents knew all along that the applicant was an attorney and that Mr Zuma was her client. How they could in "error" fail to disclose this is beyond me. In the context of the application for the warrants the respondents must have known or at the very least are reasonably expected to know that the fact that the applicant is an attorney and that Mr Zuma is her client was of vital significance to the application and in particular to the judicial officer to whom the application is made for the warrant. Instead the learned Judge-president was misled into believing that the applicant was merely "Zuma's personal legal assistant". The impression created in the papers before the learned Judge was that Mr Zuma had Schabir Shaik for a financial advisor and had Julekha Mahomed for a legal advisor. There is no factual basis for the respondents to suggest that the learned Judge-president was in no doubt that the applicant was an attorney. The respondents are merely speculating in this regard.

I do not accept that there was nevertheless no prejudice to the applicant and her client Mr Zuma. If the learned Judge-president was informed that the warrant was in respect of an attorney the learned judge would immediately have been alive to a possible infringement of attorney client privilege. By virtue of their non disclosure the respondents very conveniently steered the learned Judge away from any concerns over a breach of attorney client privilege. This then paved the way for the respondents to obtain a warrant in the broadest terms which allowed them to search both the applicant's offices and her private residence. If the learned Judge knew that the warrant was in respect of an officer of this court he would have immediately applied his mind to the protections such an attorney was entitled to, especially where there was potentially a

claim of privilege by the attorney's client or clients. It is imperative that the issue of privilege be considered very carefully before a warrant is applied for and indeed when it is granted.

In my opinion where the National Director of Public Prosecutions intends to apply for a warrant to search an attorney's premises, assuming that an *ex parte* application was warranted in the first place, then the following applies:

(a) There is a positive duty on the NDPP to disclose to the judicial officer that the subject of the search involves an attorney.

(b) There is a positive duty on the NDPP to draw the judicial officer's attention to the potential claims of privilege.

(c) There is a positive duty on the NDPP to draw the judicial officer's attention to the safeguards provided in the Act.

(d) There is a positive duty on the NDPP to assist the judicial officer in addressing those safeguards and in the execution of the warrant. The NDPP must assist the Judge in crafting an order which incorporates the protections afforded in the Act.

(e) There is a positive duty on the NDPP to canvass with the judicial officer the possibility of obtaining the information from an attorney by means of other less invasive means.

(f) There is a positive duty on the NDPP to draw the judicial officer's attention to the provisions of section 29(11) of the Act and then to satisfy the judicial officer that its requirements can be and will be complied with.

Absent the above the safeguards incorporated within the provisions of the Act may well be rendered entirely ineffective. It is abundantly clear that if the provisions of section 29 of the Act are applied without the safeguards, attorney client privilege will be breached - as the facts of this case ably demonstrate. The respondents in failing to make full disclosure misdirected the learned Judge. Whether this was done intentionally or

not is irrelevant. On this basis alone the applicant's application should succeed.

[14.]The breadth of the warrants.

It is trite that in granting a warrant in terms of section 29 of the Act the judicial officer enjoys a wide discretion. It is however, a discretion that must be exercised in a judicial manner. This discretion must be exercised upon a proper consideration of the facts presented by the NDPP to the judicial officer. The issuing of the warrant and the terms in which it is issued must be fully justifiable in the facts before the judicial officer.

Upon a consideration of the warrants, Annexures A and B hereto, it becomes clear that the warrants are cast in the widest terms. This in itself I do not find offensive, however, I am unable to find in the respondent's affidavit in support of the warrants the facts which would justify those wide terms. In their affidavit the respondents set out details of their investigation into a number of offences allegedly committed by Mr Zuma. In doing so a number of transactions are detailed involving many people an institutions. Insofar as it relates directly to the applicant the affidavit provides as follows:

"37.3.14.1Julekha (also known as Julie) Mahomed was at all relevant times 'Zuma's personal legal assistant'. She was called by the defence in the Shaik trial to testify as to the existence and creation of a 'revolving loan agreement' between Shaik and Zuma ostensibly on 15 June 1999.

37.3.14.2Mahomed testified that she was the author of the agreement and that she had witnessed Shaik and Zuma signing it. She testified further that the original document should have been kept in her office file but that despite a diligent search she was unable to locate it. She was unable to satisfactorily explain what had become of the document. She also testified that the laptop computer on which she

drafted the loan agreement had been stolen.

37.3.14.3 The court in the Shaik trial found as follows regarding this so-called revolving loan agreement:

'The evidence regarding the second such agreement that is the agreement of loan of 16 May 1999 is hardly any better as a genuine statement of what it purports to be. In our assessment therefore this document also can be safely disregarded as acceptable proof that these payments were loans. Like the two previous acknowledgements of debt it was merely for public consumption and not reflective of a genuine obligation to borrow or repay these amounts.'

37.3.14.4 In the light of the evidence and the court's findings I am of the opinion that it is accordingly necessary to search her office to try to obtain the original document and to forensically examine the computers to establish the true circumstances surrounding the creation of this document."

That is the sum total of all the facts presented to the judicial officer. This deals only with the revolving loan agreement of 15 June 1999.

The applicant was led and cross-examined in the Shaik trial over her involvement in the production of the loan agreement. The respondents do not express any view in their affidavit in order to justify the warrant that:

(a) There was any prospect of finding the original document;

(b) There was any prospect of finding the computer which applicant stated had been stolen;

(c) The applicant was dishonest in her evidence that the original agreement was missing and that her computer was stolen and;

(d) There was any link between computers now in the possession of the applicant

and the computer used to prepare the loan agreement.

The respondents failed to express these views simply because there was no factual basis for expressing them. The respondents do not even suggest in their affidavit that there was anything at all which might be found in the applicant's home which justified the search. In fact the respondents merely rely on the general ground that inferences may be drawn from the fact that applicant was "Mr Zuma's personal legal assistant."

The declaration in the warrants as to the scope of the need for a search and seizure is general and not particular to the applicant. The respondent's affidavit before the learned Judge-president failed to explain why the judicial officer was requested to determine for purposes of those warrants the general need for a wide search and seizure. The learned judge-president was required to authorise some 21 warrants, almost all of which appeared to be crafted in identical terms. This appears to be a case of one size fits all. The duty is upon the respondents to craft a warrant according to the justifiable need for it. A warrant should be tailored for the occasion, not simply taken from stock see *Pretoria Portland Cement v Competition Commissioner*. The respondents did not apply their minds to this nor did they assist the learned Judge.

The respondents justified the breadth of the annexures to the warrants by referring to two paragraphs in their affidavit namely paragraphs 37.3.15 and 37.3.19. 37.3.15 reads as follows:

"37.3.15As a result of all of the above I consider that it is necessary for the investigation to obtain the following further evidence:

37.3.15.1Evidence relating to the further and continuing payments by Shaik to Zuma that have occurred after the period previously investigated including any repayments or lack thereof by Zuma to Shaik and including any relevant evidence relating to the charges of corruption that may not have been discovered

previously because the relevant premises were not searched or because the relevant evidence was not at the time of the searches at the relevant premises.

5 37.3.15.2 Evidence that will update the financial position of Shaik, the Nkobi Group and Zuma for the period after that previously investigated and including any relevant evidence that may not have been discovered previously because the relevant premises were not 10 searched or because the relevant evidence was not at the time of the searches at the relevant premises.

37.3.15.3 Evidence relating to any further payments by Thomson-CSF/Thales/THINT or any other evidence regarding 15 the bribe agreement or payments that may have arisen after the previously investigated and including any relevant evidence relating to the charges of corruption that may not have been discovered previously because the relevant 20 premises were not searched or because the relevant evidence was not at the time of the searches at the relevant premises.

37.3.15.4 Further evidence relating to the funding provided to Zuma by Kogl, Fakue-Nkuna and Reddy including 25 evidence relating to any repayments or lack thereof by Zuma and including any relevant evidence that may not have been discovered previously because the relevant premises were not searched or because the relevant evidence was 30 not at the time of the searches at the relevant

premises.

37.3.15.The further evidence regarding the loan agreement of 16 May 1999 mentioned above from the offices of Mahomed."

37.3.19 reads as follows:

"In my opinion and in the light of all the circumstances mentioned above there is a need in regard to the present investigation for searches and seizures in terms of section 29 of the Act in respect of all the premises specified in the annexures to this affidavit."

Again insofar as it relates to the applicant there is no direct justification. Yet again the respondents appear to rely on the general ground that the applicant was "Mr Zuma's personal legal assistant" and the inferences that can be drawn from that. As set out elsewhere in this judgment this in itself misled or misdirected the learned Judge-president.

In order to avoid abuse of authority under search warrants the courts have consistently attempted to curtail the unnecessary invasion of the rights of the subject. The terms of the warrant must therefore be fairly strict, see *Powell NO v Van der Merwe & Others* 2005 (1) SA 149 (SCA). The terms of the warrants in this case I find to be unjustifiably wide. The respondents failed to justify a need for such sweeping terms in respect of the applicant bearing in mind the very limited involvement of the applicant in the various transactions described in the affidavit. The learned Judge-president's attention was not drawn to any alternative means of obtaining information from the appellant, an attorney, regarding the loan agreement. On this basis too the application must succeed.

[15.]Execution of the warrant

Even if the warrant was properly obtained, there can be abuse in

the manner in which it is executed.

At the outset it must be stated that the over broad terms of the warrants were not conducive to any selective or non invasive means of execution. Once the respondent's agents were handed the warrants all they could do was to search everything and attach everything of relevance.

If the warrants are not executed as contemplated in section 29 of the Act, then the safeguards provided in the Act may be undermined. There can be no point in having safeguards if in the execution of the warrants these are disregarded.

On the undisputed evidence before me the warrants were initially not executed in terms of the Act, and certainly not executed in the spirit of the Constitution. In particular the warrants were initially executed with scant regard for attorney client privilege and even less regard for the provisions of section 29(11) of the Act.

On the facts before me the respondent's agents arrived at the applicant's office and found the premises locked. The person in charge of the building contacted the applicant before she gave access for the search to commence. When the applicant arrived a copy of the warrant was handed to her. She allowed the search to begin. In keeping with the wide terms of the annexures to the warrants the respondent's agents proceeded to search and examine everything. During this process certain documents were set aside for seizure. While this was happening the applicant's attorney arrived and was handed a copy of the warrant. The applicant also called counsel on the telephone. Only after the search and seizure was well underway was the applicant advised that she could assert attorney client privilege in respect of documents and other items being inspected by the respondent's agents. At this point the applicant claimed privilege and the documents from that point onwards were dealt with as contemplated in section 29(11) that is they were sealed with the intention of handing them to the Registrar of this Court for safekeeping.

Thereafter a similar search and seizure took place at the applicant's residence. The items seized were taken to the registrar of this court and handed to him for safe custody. A dispute arose as to which documents were privileged and which not. The respondent's agents first decided that all the documents seized before the privilege was claimed were not subject to section 29(11). Only those documents seized after the privilege was claimed were to be sealed and placed in safe custody. After some discussion the parties agreed that all the documents will be sealed and placed in safe custody. That is what eventually happened.

It is not in dispute that when the warrant was executed:

(a)The applicant was not advised of her right to assert privilege and;

(b)Was not advised as to the provisions of section 29(11).

This in my opinion is unacceptable bearing in mind that this involves the execution of a warrant obtained *ex parte*. There is an onus on the respondents upon execution to inform the person in question:

(a)Of their rights in terms of section 29(11);

(b)Of their right to assert privilege and

(c)Of their right to have an attorney present.

The respondents justify their omission to advise the applicant of her rights by claiming that the applicant is an attorney, a fact which miraculously slipped their minds when they drafted their affidavit and she ought to know the law. This is not the answer. Everyone faced with this type of warrant including attorneys, are not expected to know the law. The respondents cannot be allowed to assume that the applicant knew the law. Even Mr Govender the applicant's attorney, was unfamiliar with the law. The applicant herself states that she did not know her rights and was only advised in this regard after the search was well under way.

The search should have commenced only after the applicant was advised of her rights. This way the protections afforded by the Act will be effective.

Before the applicant claimed privilege on behalf of her clients, files were read by

the respondent's agents and in this way the attorney client privilege was breached. If the respondents executed the warrant in keeping with the protections in section 29(11) such a breach would not have occurred. The respondents in fact anticipated that the applicant will assert her rights in
5 terms of section 29(11) because before the search commenced, they requested the Registrar of the Court to make someone available who will be able to receive and seal documents and other items for safe custody. In spite of this the respondents took advantage of the applicant's ignorance of her rights and proceeded to conduct the search without
10 first advising her of her rights. Thus attorney client privilege was breached. If the applicant was advised of her rights then she could have claimed privilege in respect of relevant documents which would then have been immediately sealed without the need for the respondent's agents to "flip" through them or "scan" them or "cursorily examined"
15 them.

The respondents argue that ultimately all the documents were dealt with in terms of section 29(11) of the Act. This does not assist the respondents as the damage was already done.

I accordingly find that the warrants were executed without regard for the
20 safeguards provided in section 29 of the Act and consequently there was a breach of attorney client privilege. This too forms a basis for granting the applicant relief in terms of this application.

Something must be said about the consent that applicant gave for her private residence to be searched. Before the search was conducted the
25 applicant under oath and in writing stated as follows:

"I Julekha Mahomed hereby make oath and state that I have no objection to your investigators conducting a search of my home without a search warrant subject to the condition that whatever you seize from my home is sealed and it is relevant to the investigation being
30 conducted by the National Prosecuting Authority in respect of the

matter of the *S v J G Zuma* is established. My home is corner Oxford and Riviera Road, Saxonwold, Flat 20. I claim attorney client privilege in respect of documents, items found at my home insofar as it relates to any of my clients."

5 Section 29(10(a)(i) provides for search and seizure to take place with the consent of a competent person.

It is clear that the applicant did not give her consent to an unlawful search and seizure. Her consent was given on the basis that the process was lawful in the first place. There is no allegation by the respondents that in fact 10 anything connected with the investigation was in the applicant's private residence or that any agent of the respondent suspected that such might be the case. Again the respondents merely arrived at the applicant's home to carry out the terms of a warrant that virtually gave them carte blanche.

15 [16.]It must be said that it is not the function of lawyers to defeat the ends of justice by deliberately concealing documents. If a lawyer did so then such a lawyer is subject to being disciplined at the hands of the profession and the High Court. If a specific document is known to be in the possession of an attorney it can be called for. There are other less 20 invasive means available to compel a lawyer to produce documents. It must be in only extreme cases where an attorney is subjected to the most invasive of means namely search and seizure which undermines attorney client privilege. In fact I cannot conceive of circumstances justifying disregard of attorney client privilege.

25 [17.]<u>The photographs.</u>

During the search the agents of the respondents took photographs of the applicant's office and home. The warrants did not specifically authorise them to do so. The applicant was not advised of this nor was her permission sought before photographs were taken. The applicant claims 30 that this was a further violation of her privacy and demands return of the

photographs. In my view there was nothing sinister in the respondent's agents taking photographs nor do I believe they did so in order to violate the applicant's privacy, although it may well have had this effect. In my experience the photographs were probably taken in order merely to keep a visual record of the search and seizure. Nevertheless if the applicant is successful in this application she is entitled to have all these photographs delivered to her. Counsel for the respondents did not seriously resist this claim and quite plainly the photographs were not taken for the purposes of furthering their investigations against mr Zuma.

In this regard applicant moved to amend her notice of motion in order to insert a prayer for delivery of the photographs. The applicant also moved an amendment to insert a prayer for the delivery to her of the mirror image of the hard drive of her computer that was made pursuant to the interim order I made. There can be no prejudice to the respondents if I granted these amendments and consequently I hereby grant the applicant's application to amend her notice of motion.

[18.]Appropriate relief.

In my view the warrants, Annexures A and B hereto were unlawfully obtained and unlawfully executed against the applicant. That being the case there is no scope for me to do anything other than to set aside the warrants and to declare the search and seizure pursuant to the warrants to be unlawful. As I have already stated, the terms of Annexure A to the warrants gave the respondents virtually untrammelled powers to carry out a "general ransacking" of the applicant's office and home. Accordingly the respondents should be made to start with a clean slate in furthering their investigations, see *Pretoria Portland Cement Company Ltd v Competition Commission*. In any event I was not called upon by the respondents to assist them in any way by possibly amending the terms of the warrants in order to make them less invasive. It was too late for that in any event.

[19.]Costs.

The applicant submitted that the respondent's conduct called for judicial rebuke in the form of a punitive cost order. The respondents resist such an order stating that all times they conducted themselves professionally in the execution of their duties. The question of costs is entirely a matter for my
5 discretion. Although I found against the respondents, I am not convinced that they acted negligently or vexatiously. They brought an application and executed warrants within an area of our law that is not entirely settled especially with regard to the question of attorney client privilege. They also brought their application and executed the warrants in the
10 absence of any clear guidelines. I am therefore not persuaded that a punitive cost order is appropriate.

[20.]The *amicus curiae*.

Finally I deal with an application for the admission of an *amicus curiae*. Mr Zahir Omar, a rather public spirited attorney, simply could not resist making
15 more work for me and adding to my burden. He represents the Society for the Protection of our Constitution. Until this point I must confess not to having ever heard of this society. The respondents resisted the application claiming dismissal with costs. Inasmuch as this application concerned matters of public interest I did not deem it necessary to
20 require the assistance of an *amicus curiae*. Accordingly I merely received the *amicus curiae's* written submissions and I did not afford them an opportunity to address me in court. The *amicus* has failed to comply with the provisions of rule 6 and rule 16(A) of the Uniform Rules of the High Court and on this basis alone their application must be
25 dismissed. In any event the *amicus curiae* in their written submissions are unnecessarily widening the scope of this application. Accordingly the application of the *amicus curiae* is dismissed. I make no order as to costs.

[21.]The conclusion.

30 Accordingly I find that the applicant must succeed. I make the following order:

1.The warrants against the applicant issued by the learned Judge in chambers on 12 August 2005 are set aside.

2The search and seizures carried out in execution of the said warrants is declared unlawful.

5 3.The respondents are to return forthwith all documents, files, records, notes, data and other property of the applicant seized under the aforesaid warrants.

4.The respondents are to forthwith deliver to the applicant the mirror image of the hard-drive of the laptop computer belonging to the applicant which

10 was seized on 18 August 2005.

5.The respondents are to forthwith deliver to the applicant all photographs taken of her office and home during the execution of the aforesaid warrants. Respondents are to deliver all hard copies as well as all copies stored in any electronic form or medium.

15 6.The respondents are ordered to pay the costs of the application.

ON BEHALF OF THE APPLICANT: ADV N B TUCHTEN (SC)

ON BEHALF OF THE RESPONDENTS: ADV MOERAME (SC)

ADV SALMON (SC)