REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION CASE NO 14116/05

In the mater between:

JACOB GEDLEYIHLEKISA ZUMA First Applicant

MICHAEL HULLEY Second Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS First Respondent

INVESTIGATING DIRECTOR:
DIRECTORATE OF SPECIAL OPERATIONS Second Respondent

INVESTIGATING DIRECTOR:
INVESTIGATING DIRECTORATE:
(SERIOUS ECONOMIC OFFENCES) Third Respondent

INVESTIGATING DIRECTOR:
INVESTIGATING DIRECTORATE:
(CORRUPTION) Fourth Respondent

DIRECTOR OF PUBLIC PROSECUTIONS
(DURBAN AND COAST DIVISION) Fifth Respondent

JUDGMENT

HURT J

On 6 November 2000, the Director of the Investigating Directorate: Serious Economic Offences, instituted a “preparatory investigation”, in terms of section 28(13) of the National Prosecuting Authority Act, Act No 32 of 1998 (to which I

shall refer as “the Act”). The preparatory investigation was aimed at ascertaining whether there were reasonable grounds for conducting an investigation, in terms of section 28(1)(a) of the Act, into allegations of corruption and/or fraud in connection with the acquisition of armaments by the Department of Defence. By 24th August 2001, the Investigating Director considered that there was reason to suspect that the offences had been committed and he accordingly decided to conduct an investigation as contemplated in section 28(1) of the Act. Mr J. du Plooy, a senior special investigator employed at the Directorate of Special Operations, was designated, in accordance with the provisions of section 28(2)(a), by the Investigating Director to conduct the investigation on his behalf. In terms of section 28(2)(b) a person thus designated has all the powers which an investigating director has under the provisions of sections 28 and 29. In October 2002, the scope of the investigation was allegedly extended to include inquiries into the suspected commission of the offences of fraud, corruption, theft and tax evasion by Mr Schabir Shaik and/or various companies controlled by Mr Shaik or in which he held interests. Mr Shaik and his companies were subsequently prosecuted in regard to some of these offences. Their trial commenced on 11th October 2004. Mr Shaik and some of the companies were found guilty and eventually sentenced on 8th June 2005. There are appeals pending in relation to certain of the convictions and sentences.

On 20th June 2005, the First Respondent decided to prosecute Mr J Zuma ("the First Applicant") on two counts of corruption related to the matters with which the investigation against Mr Shaik and his companies had been concerned. The First Applicant appeared in the Durban Magistrate's Court to face these charges on 29th June 2005, the matter being postponed for further investigation. It is apparent from the papers that the Investigating Director of Special Operations, through its delegate Mr du Plooy, took the view that the section 28 investigation in relation to the activities of Mr Shaik and his companies was still open and its scope was extended, on 8th August 2005, to include:

(i) fraud pertaining to declarations made by Jacob Gedleyihlekisa Zuma to the following persons or entities: the Registrar of Parliamentary Members' Interests, the Secretary for the Cabinet of the Government of South Africa, the South African Revenue Services and/or persons or entities associated with the abovementioned persons or entities, in respect of benefits received from Schabir Shaik and/or companies associated with Schabir Shaik;

ii) contraventions of the Income Tax Act, No 58 of 1962, in respect of the declarations referred to above.

On 11th August 2005, Mr du Plooy made an affidavit in support of an application for the issue of a number of search and seizure warrants under the provisions of

section 29 of the Act. Section 29 provides for search and seizure operations in the course of preparatory investigations and investigations under sections 28(13) and 28(1) respectively. I will be making frequent reference to section 29 in this judgment and it will be convenient to set out the relevant sections at this early stage. They read as follows:

> "29. Entering upon premises by Investigating Director
>
> (1) The Investigating Director or any person authorised thereto by him or her in writing may, subject to this section, for the purposes of an investigation at any reasonable time and without prior notice or with such notice as he or she may deem appropriate, enter any premises on or in which anything connected with that investigation is or is suspected to be, and may –
>
> (a) inspect and search those premises, and there make such enquiries as he or she may deem necessary;
>
> (b) examine any object found on or in the premises which has a bearing or might have a bearing on the investigation in question, and request from the owner or person in charge of the premises or from any person in whose possession or charge that object is, information regarding that object;
>
> (c) make copies of or take extracts from any book or document found on or in the premises which has a bearing or might have a bearing on the investigation in question, and request from any person suspected of having the necessary information, an explanation of any entry therein;
>
> (d) seize, against the issue of a receipt, anything on or in the premises which has a bearing or might have a bearing on the

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

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

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

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

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

…

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

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

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

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

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

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

…

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

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

…

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

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

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

…

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

(12) Any person who –

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

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

shall be guilty of an offence."

On 12th August 2005, an application was made, in terms of section 29(4) to **Ngoepe JP**, in the Transvaal Provincial Division of the High Court, for the issue of the warrants. It will be noted that section 29(4) includes a provision for a judge to authorise the issue of warrants which will be executed anywhere in the Republic. I have used the word "application", in relation to the method used to bring the papers before **Ngoepe JP**, in its broadest sense. It was certainly not an application in terms of Rule 6 of the Uniform Rules of Court. It is not even clear, on the papers before me, whether the matter was accorded a case number by the Registrar before being referred to the learned Judge President. In some parts of the papers the process is alluded to as an "*ex parte* application". The description is usefully concise in the sense that the learned Judge President was asked to perform a function and that he was asked to perform it in the absence of parties intended to be affected by it, but I think it is desirable to bear in mind that it was not an "*ex parte* application" to court in the sense contemplated in Rule 6. Section 29(4) refers simply to a "warrant issued in chambers".

In all, Mr du Plooy sought authority to execute about 21 warrants in various places in the Republic. The majority of them were authorised by **Ngoepe JP** on 12th August 2005 after the learned Judge President had required a modification to their wording so that the offences which were the subject of the

investigation were to be specified. After this amendment, the learned Judge President signed the authorisation for search and seizure on 12th August 2005. On 15th August a further warrant relating to premises owned by Mr Shaik was signed by **Ngoepe JP** and on 26th August, a final one, which related to the premises of the Department of Economic Development and Tourism at Marine Building, 22 Gardiner Street, Durban, was similarly authorised.

In his affidavit in support of the request to issue the warrants, Mr du Plooy stressed that the element of surprise was necessary to obviate the possibility of any evidence which it was hoped to recover in the course of the search and seizure procedure, being removed or destroyed. Accordingly the plan was to execute the warrants simultaneously at most of the premises concerned. On 16th August 2005, Mr A.T. Mngwengwe, the Acting Investigating Director: Directorate of Special Operations, executed a written instruction/authorisation naming the various employees of his department or of the National Prosecuting Authority who were to execute the warrants simultaneously on the morning of 18th August 2005.

Two of those warrants were for search and seizure operations at the premises of Ms J Mohamed, an attorney practising in Gauteng, who had, from time to time, acted as the legal adviser and representative of the Second Applicant. Ms Mohamed subsequently made application to the Witwatersrand Local Division of the High Court to have the warrants declared invalid and the items

taken during their execution returned to her. This application came before **Hussain J** under case No 19104/05 and, on 9th September 2005, he delivered a judgment setting aside the warrants and declaring that the search and seizure operation carried out under their purported authority was unlawful. He made an order for the return of all articles and other evidence seized and related relief aimed at restoring the *status quo* before the search.

This application was brought by the First and Second Applicants for similar relief to that sought by Ms Mohamed. It relates to seven of the warrants. Subsequent to the launching of the application, the State has conceded that the warrant issued in relation to premises allegedly owned by the First Applicant at 8, Epping Road, Forest Town, Johannesburg, was fatally defective and it has fallen out of the reckoning. So has the warrant in relation to the First Applicant's former office at the Presidency, Tuinhuis, Parliament Street, Cape Town, since I understand that that warrant has not been executed and it will by now have lapsed. The warrants which remain for consideration in these proceedings are the following:-

1. The warrants authorised on 12th August 2005 for the search of the following premises:

(a) the First Applicant's residence at 605 Killarney Wilds, Killarney, Johannesburg (the warrant being Annexure "JZ.2" to the First Applicant's affidavit);

(b) the First Applicant's residence at Nkandla traditional village, district of Nkandla ("JZ.3");

(c) the former office of the First Applicant at the Union Buildings, Pretoria ("JZ.4");

(d) the offices of the Second Applicant at Momentum House, Ordinance Road, Durban ("JZ.7").

2. The warrant issued on 26th August 2005 and executed on 8th September 2005 at the offices of the Ministry of Finance and Economic Development, 22 Gardiner Street, Durban ("JZ.5").

I have read the judgment of **Hussain J** in the matter of ***J Mohamed v NDPP & Others*** and I find myself in respectful agreement with his statements of principle and the application of those principles to the warrants with which he was concerned. However, the debate of the matter before me by counsel for the respective parties appears to have been different in a number of material respects to that before him and I consider that it is necessary for me to deal with

the various submissions in the order, manner and form in which they were presented to me and thus to set out my own approach to the resolution of the various issues. Having said that it will be apparent, from what follows, that I take the same view as did **Hussain J** in the case before him, as to the validity of the relevant warrants.

Jurisdiction

The Respondents contend that, the warrants having been issued in the Transvaal Provincial Division, that is the only Court which can effectively entertain the Applicants' challenge to them. The contention is that, in its effect, the issue of a warrant is similar to the grant of a rule *nisi* with interim relief. Accordingly, by making application to this Court to have the warrants, and the consequences of their execution, set aside, the Applicants are asking this Court unilaterally to "take over a case" from another Division of the High Court either as a form of original jurisdiction or of concurrent jurisdiction. They suggest that the objection to such a procedure possibly falls under the aegis of the general procedural objection of *"lis alibi pendens"*. There is an additional challenge to the jurisdiction of this Court in relation to those warrants which relate to premises outside this Court's jurisdiction. I do not consider that either of these objections is sound.

In the first place I have taken care, earlier in this judgment, to draw a distinction between the procedure which resulted in **Ngoepe JP** endorsing the warrants and that in an *ex parte* application for a rule *nisi*. The aspect common to an *ex parte* application and to the application for the endorsement of the warrants in this case is that both procedures take place in the absence of parties affected by them. But that is where the similarity ends. The grant of a rule *nisi* carries with it the prospect of a *lis*, in the true sense, and the ultimate representation of the cited parties before the Court which, in the absence of compromise, will have to adjudicate upon that *lis*. The authorisation of the warrants in this case has no such consequences. If anything, the "*lis*" in this case must be the criminal prosecution of the First Applicant which had already been initiated on 29th June 2005, within the area in which this Court exercises its jurisdiction.

In a large number of cases our Courts have reiterated the principle that when an order which has been granted *ex parte* in the absence of parties affected thereby is challenged by them, the Court hearing that challenge does not sit as a court of appeal (or *quasi* review) over the judge who granted the *ex parte* order. The matter is treated as a rehearing of the original application for relief, the order made *ex parte* being regarded as "provisional". (See ***Ghomeshi-Bozorg v Yousefi*** 1998 (1) SA 692 (W) at page 696D-E, cited with approval in ***Pretoria Portland Cement Company Limited & Another v Competition Commission & Others*** 2003 (2) SA 385 (SCA) at page 404.) The driving principle behind this procedural approach is that of *audi alteram partem*. In my

view, the approach reflected in the authorities to which I have referred and which predate the ***Pretoria Portland Cement*** decision (*supra*) applies *a fortiori* to the situation in which a judge has been asked to endorse a warrant in terms of one of the statutes which make provision for "search and seizure" operations. Clearly, such a judge performs a function which is both administrative and judicial. But the judicial aspect stems more from the assumption that he has the legal knowledge, expertise and experience to enable him to decide whether, on the information placed before him on affidavit and the submissions made to him by counsel, it is appropriate to authorise the issue of a warrant. The administrative aspect occurs when he gives the warrant his imprimatur. The document on which he records his authorisation is in the form of a communication addressed to the Investigating Director. All of the warrants with which this judgment is concerned are identical in this regard, save for the description of the premises at which the search and seizure operation is to take place. They read as follows:

"SEARCH WARRANT

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

TO: The Investigating Director: Directorate of Special Operations or any person authorised by him/her in writing.

WHEREAS it appears to me from information on oath setting out the nature of the investigation, that there exists a reasonable suspicion that an offence/offences has/have been or is/are being committed, to wit, Corruption in contravention of Act 94 of 1992, Fraud, Money Laundering in contravention of Act 121 of 1998 and/or the commission of tax offences in contravention of Act 58 of 1962, or that an attempt was or had been made to commit such an offence/offences, and the need in regard

> to the investigation, being an investigation into allegations of corruption, fraud, money laundering and/or the commission of tax offences for a search and seizure in terms of the above-mentioned section, of any object as per Annexure A, which has a bearing, or might have a bearing, on the investigation in question.
>
> AND WHEREAS it appears to me from the said information on oath that there are reasonable grounds for believing that an object(s) having a bearing or which might have a bearing on, or is/are connected with the investigation, is (are) on or in the premises or suspected to be on or in the premises of
>
> …..
>
> YOU ARE HEREBY AUTHORISED to enter the said premises during the daytime and there to inspect and search and make such enquiries that you may deem necessary, examine any object found on or in the premises which has a bearing or might have a bearing on the investigation in question and, against the issue of a receipt, to seize anything on or in the premises which has a bearing or might have a bearing on the investigation, or if you wish, to retain it for further investigation or for safe custody, (including inspecting, searching and seizing computer-related objects in the manner authorised in Annexure B) and to remain on the said premises and to complete the abovementioned inspection, search, enquiries, examination and seizure during the nighttime if necessary
>
> Given under my hand at ……..on this …… day of AUGUST 2005
>
> SIGNATURE
> Judge in Chambers”

All that the judicial officer who signs such a document is saying is, “On what I have read, on what I have been told and on the basis of my legal knowledge, I consider that it is appropriate to permit the Investigating Director to conduct a search and seizure operation.” Once he has signed the document he has discharged the functions delegated to him in terms of the relevant statute.

There are three possible stages at which the propriety of the grant of this *ex parte* authorisation may be called into question. The first is if any person who will be affected by the execution of the warrant learns of its existence before that execution occurs. The second would be at the time when the warrant is served and the search and seizure operation is about to begin or actually begins. The third is after the conclusion of the search and seizure operation. At any of these stages, it is open to the affected party to contend that the warrant should not have been authorised and issued in the first place. There may, of course, be further contentions that the limits of the warrant have been exceeded and/or that the search and seizure operation has been tainted by unlawful conduct. The challenge to the authorisation and issue of the warrant, or to its execution, invariably proceeds by way of an application in terms of Rule 6. This is the first manifestation of a *lis* between the affected party and (in this case) the Investigating Directorate. The question of which particular Division of the Court can exercise jurisdiction in respect of this *lis* falls to be decided by the application of ordinary common law principles read, of course, with the Supreme Court Act and Rules. In considering these, particularly in any case in which the warrants have been authorised by a judge of the High Court, the limited nature of the function which he has performed must be borne in mind. So must the issues which are raised by the challenge by the affected party. What the Court to which the affected party applies is required to decide is *not* whether the judicial officer who authorised the warrants was right or wrong. What it is asked to decide is whether, given all the material placed before it,

including the arguments of counsel on both sides, the warrant should have been authorised. This procedure can obviously not involve, or be construed as, a criticism of the judge who authorised the issue of the warrant because he, of necessity, had to draw a conclusion without the benefit of evidence from the affected party and argument from both sides. I agree entirely and respectfully with the *dictum* of **Oosthuizen AJ** (**Nel J** concurring) in ***Ferucci and Others v Commissioner, South African Revenue Services*** 2002 (6) SA 219 (C) at page 227-228 in this connection.

Accordingly, in my view, the submission that the Division of the High Court in which the warrants were originally authorised retains exclusive jurisdiction in any subsequent proceedings involving them is bad in law.

The second aspect of the jurisdiction point relates to the question of whether this Court can exercise jurisdiction to set aside warrants which were destined for execution at premises outside the area in which this Court presides. Of the five warrants which I have been asked to consider, only “JZ.2” and “JZ.4” are relevant to this objection. In the first place, the order which I am asked to make affects the two Applicants who are both *incolae* of this Court. In the second, the contentions on which the application to have the warrants and their execution nullified, in each separate instance, are virtually identical. It follows that the principle of convenience, where there are concurrent jurisdictions, or where some aspects of the *lis*, from a technical point of view, do not fall within the

jurisdictional ambit of this Court, is applicable. (See ***Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*** 2005 (6) SA 205 (SCA) at page 211-212 and the authorities there cited.) Finally, and in any event, the issue and execution of the warrants is plainly a procedure relating to the prosecution of the First Applicant, which is pending within the area in which this Court exercises its jurisdiction.

In the circumstances the second ground of objection to the jurisdiction of this Court must also fail.

Applicability of Sections 28 and 29 to Accused Persons

The Applicants contend *in initio* that, once a person has been arrested and charged with an offence (and thus falls under the category of persons contemplated in section 35 of the Constitution Act, Act No 108 of 1996) the investigative powers provided by sections 28 and 29 are no longer available to the prosecuting authority in respect of evidence in the possession of or under the control of that person. This would include evidence and related material in the possession of his attorney. Translated to the circumstances of this particular case, the contention is that, at least after the First Applicant was arrested, granted bail and appeared as an accused in the Magistrate's Court on 29th June 2005, it was no longer open to the Second Respondent to invoke the provisions of the sections for the purpose of obtaining evidence in the

possession of the First Applicant or his attorney. The contention is that the issue of the warrants was accordingly not sanctioned by any legislation and that they are invalid.

Counsel for the Applicants accept that there is no express provision in sections 28 or 29 or, for that matter, anywhere in Act No 32 of 1998, which thus limits the powers of the Respondents. But, relying on the judgment of the Constitutional Court in ***Investigating Directorate: Serious Economic Offence & Others v Hyundai Motor Distributors (Pty) Ltd & Others*** 2001 (1) SA 545 (CC), they contend that the Act must be interpreted as including such a limitation if it is to be in conformity with the Constitution. Requiring, as it undoubtedly does, words to be read into the legislation, it seems to me that this contention puts the cart before the horse. The "horse" in this case is the Act and, more particularly, sections 28 and 29. The "cart" is the manner in which the Courts interpret and apply the provisions of the Act, always keeping it along the path blazed by the Constitution and its Bill of Rights. The Constitutional Court has stressed, in the ***Hyundai*** case, that the mere possibility that a literal interpretation of the words of a statute may have a result which is not in conformity with the Constitution does not, *ipso facto*, have the result that the statute must be struck down. Rather, the Court must be astute to apply acceptable principles of interpretation which will result in conformity with the Constitution. One cannot, by applying recognised principles of interpretation, construe Act No 32 of 1998 so as to preclude the operation of sections 28 and 29 in respect of any accused person.

If that was what the legislature had intended, it would have been a simple matter to insert appropriate words in the Act. The Constitutional Court, in the ***Hyundai*** case has laid down clear guidelines as to how the Courts must approach, construe and apply the provisions of sections 28 and 29 of the Act so as to give proper recognition to the rights entrenched in Chapter 2.

For the purposes of dealing with the Applicant's submission, it will suffice to say that although the existence of a criminal charge against a person may have the effect of accentuating his right to privacy in terms of section 14 of the Constitution in certain respects, when looked at in conjunction with his rights under section 35, it cannot render those rights sacrosanct or inviolable or incapable of limitation in the interests of the "open and democratic society". Several obvious examples of the necessity for limitation even in those circumstances spring to mind. An accused person who is charged with counterfeiting may be suspected of having printing equipment or counterfeit material in his home. Depending on the reasonableness of the suspicion and the degree to which a search and seizure operation might jeopardise his rights as an accused person, it is inconceivable that a Court would hold that the provisions of section 29 could not be invoked for the purpose of seizing the equipment and/or the material.

Accordingly, in my view, there is no absolute statutory prohibition against the use of sections 28 and/or 29 simply because a person has been charged.

The Case for Search and Seizure

Section 29(4) puts what may be called the “judicial filter” in place, through which the request for the warrant must pass before it can be validly executed. If section 29(5) was intended to set out the circumstances to which the judicial officer must have regard in deciding whether to authorise the issue of a warrant, it has done so in a disconcertingly obscure manner. On its ordinary grammatical construction, it says that if the matters referred to in items (a), (b) and (c) are stated on oath and if it appears from those statements that there are reasonable grounds for believing that anything connected with the investigation is on the relevant premises, then, and only then, may the judicial officer issue the warrant. The grammatical emphasis is on the existence of “reasonable grounds for believing”. But construing the statute in its context and, particularly against the background of the common law and the Constitution, I think it is clear that the legislature intended the judicial officer to take into account the aspects mentioned in (a), (b) and (c) as well as the “reasonable grounds for believing”, for the purpose of deciding whether the issue of the warrant is appropriate. If this were not so, then the requirements that matters (a), (b) and (c) are to be stated on oath would seem to have no practical purpose.

It is apparent that the Constitutional Court construed the section as meaning that the judicial officer must consider the matters referred to in (a), (b) and (c) in

the course of exercising his judicial discretion as to whether a warrant should be authorised. Thus at paragraph 37 of the ***Hyundai*** case, **Langa DP** (as he then was) said:-

> [37] It is implicit in the section that the judicial officer will apply his or her mind to the question whether the suspicion which led to the preparatory investigation, and the need for the search and seizure to be sanctioned, are sufficient to justify the invasion of privacy that is to take place. On the basis of that information, the judicial officer has to make an independent evaluation and determine whether or not there are reasonable grounds to suspect that an object that might have a bearing on a preparatory investigation is on the targeted premises.
>
> [38] It is also implicit in the legislation that the judicial officer should have regard to the provisions of the Constitution in making the decision. The Act quite clearly exhibits a concern for the constitutional rights of persons subjected to search and seizure provisions. That is the apparent reason for the requirement in s 29(4) and (5) that a search and seizure may only be carried out if sanctioned by a warrant issued by a judicial officer. The Act repeals and takes the place of the Investigation of Serious Economic Offences Act, which was the subject of the litigation in *Park-Ross and Another v Director: Office for Serious Economic Offences.* In that case, a provision authorising searches to be carried out without the sanction of a judicial officer was declared to be unconstitutional by Tebbutt J who, during the course of his judgment stated:
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> > 'It would, I feel, accord with the spirit and purport of the Constitution if it was provided that, before any search or seizure pursuant to s 6 of the Act, prior authorisation be obtained from a magistrate or from a Judge of the Supreme Court in Chambers for such search and seizure. Any application for such authorisation should set out, at the very least, under oath or affirmed declaration, information as to the nature of the inquiry in terms of s 5, the suspicion having given rise to that inquiry, and the need, in regard to that inquiry, for a search and seizure in terms of s 6.'

> [39] In enacting s 29(5) the Legislature clearly intended to give effect to the *Park-Ross* judgment and to ensure that the search and seizure of property will be carried out in accordance with the provisions of the Constitution. The Act uses the very language which Tebbutt J suggested was necessary to give effect to the 'spirit and purport' of the Constitution."

It needs, perhaps, to be stressed that the matters referred to in items (a), (b) and (c) of section 29(5) and the belief that evidence may be on the relevant premises are, by no means, to be taken as exhaustive of the requirements for the valid issue of a warrant. In the case of ***Park-Ross v Director: Office for Serious Economic Offences*** 1995 (2) SA 148 (C) at page 170, **Tebbutt J** quoted the words of **Dickson J** in the Canadian case of ***Hunter et al v Southam Inc*** (1985) 14 CCC (3rd) 97 SCC at 110 where the learned Judge spoke about the need for an informed judicial discretion to be exercised in relation to a request to issue a search and seizure warrant. **Dickson J** said the following:-

> "The purpose of a requirement of prior authorization is to provide the opportunity, before the event, for the conflicting interests of the State and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the State are thus demonstrably superior."

It is trite that where a judicial discretion is conferred, it is undesirable to fetter that discretion by the imposition of a list of prescripts. But there can be no doubt that as time passes and decisions have to be made as to whether it was

appropriate to issue warrants in various given circumstances, a basic "body of practice" will develop. This type of development can easily be traced, for instance, in the gradual modifications which Courts have made to the "*Anton Piller*" cases. See ***Universal City Studios Inc & Others v Network Video (Pty) Ltd*** 1986 (2) SA 734 (A) at page 755; ***Sun World International Inc v Unifruco Ltd*** 1998 (3) SA 151; ***Eiser & Another v Vuna Health Care (Pty) Ltd*** 1998 (3) SA 139.) The result of this gradual development by precedent is that what is now regarded as the "typical form" of an Anton Piller order is a far more complicated document that its progenitor of the 1980's. There is obviously considerable assistance to be gained by looking at the manner in which Courts have dealt with "search and seizure" provisions in other legislation, such as, for instance, section 74D of the Income Tax Act, Act No 58 of 1962, and section 46 of the Competition Act, Act No 89 of 1998. As is apparent from the bundle of authorities referred to by counsel in the course of argument of this matter, such a body of rules has already started to develop. (See also: ***Cheadle v Minister of Law and Order*** 1986 (2) SA 279 (W) at page 283 and the authorities there referred to.)

Need

The emphasis, in the argument addressed to me by counsel for the Applicants, could fairly be said to have been on whether the request for the issue of a warrant satisfactorily established the "need requirement" set out in item (c) of

section 29(5). Mr *Kemp* (who appeared with Messrs *Smithers* and *Bedderson* for the Applicants and who addressed argument to me on this aspect of the matter) stressed that item (c) does not relate, in general, to "a need for a search and seizure" but to "*the* need, in regard to the investigation, for a search and seizure *in terms of this section*". He contrasted the word "need" in this context with the concept of "desirability". What the person requesting the warrant must establish, he said, is that it is necessary to invoke the provisions of section 29 in order to obtain evidence to fulfill the purposes of the investigation. Since the "search and seizure" procedure involves incursions (some of them drastic) into the rights in sections 10, 14, 25, 34 and (where applicable) 35 of the Constitution, the person requesting a warrant must satisfy the judicial officer that there is no reasonable prospect of obtaining the evidence by less disruptive and incursive means. In this regard, he pointed out that section 28 gives the Second Respondent fairly far-reaching powers of subpoena and interrogation. Where the Second Respondent intends, then, to resort to section 29, there should be evidence on oath before the judicial officer to whom the request for a warrant is addressed to satisfy him that the powers under section 28 would probably not result in the evidence being obtained. I consider that these submissions are sound. It is common to all of the reported authorities which I have read in relation to search and seizure operations that the Court has placed emphasis on the drastic nature of the remedy. It should not be sanctioned by judicial authorisation unless the judicial officer is satisfied that the investigating authority's resort to it is reasonable in all the circumstances. And it cannot be

reasonable if there are other, less drastic means available to the investigating authority which may succeed. (See: ***Ferucci***'s case *supra* at page 235.) The upshot of these considerations is that the affidavit evidence placed before the judicial officer in terms of section 29(5) must contain a persuasive explanation as to why the provisions of section 29 have to be invoked for the purpose of obtaining the evidence concerned. In assessing whether to authorise the warrant, the judicial officer concerned must plainly weigh up the strength of the case made out for the "need" to invoke section 29 against the degree to which the rights of the person whose premises are to be searched and whose possession are to be seized will be affected. A pressing need will justify a more extensive infringement of the relevant rights.

In considering the case made out by the Second Respondent for the need to invoke section 29, it will be convenient to summarise, briefly, the contentions put up by Mr du Plooy in the affidavit placed before **Ngoepe JP**. The first part of that affidavit is made up of a fairly detailed analysis of the evidence presented in the trial of Mr Shaik. Mr du Plooy expresses the view that the State presented positive, unambiguous evidence to the trial Court which established beyond doubt that Mr Shaik was guilty of corrupt conduct in his relationship with the First Applicant in contravention of section 1(1)(a) and 1(1)(a)(i) of the Corruption Act, Act No 94 of 1992. Indeed, Mr du Plooy is in the happy position of being able to cite passages from the judgment of **Squires J** in support of these contentions. Mr du Plooy also refers to passages in the judgment which, on the

facts found proved by **Squires J**, lead to a very strong inference of corrupt conduct on the part of the First Applicant in relation both to Mr Shaik and to members of the Thompson/Thales group of companies. He also records that, during the investigation and prosecution of Mr Shaik, data were obtained which enabled the State to present to the trial Court a "comprehensive forensic analysis" of the First Applicant's finances and financial situation. In regard to the decision to prosecute the First Applicant, Mr du Plooy (in paragraph 20 on page 10 of his affidavit) says:-

> "The National Director decided on 20th June 2005 to prosecute Jacob Zuma on at least two counts of corruption in contravention of section 1(1)(b) of the Corruption Act, Act No 94 of 1992. These counts relate to the same facts on which the convictions of Shaik and his companies were based."

In paragraph 26 he says:-

> "Some of the Court's findings strongly support the conclusion that there are reasonable grounds to believe that Zuma and Thompson/Thales were complicit in the commission of the offences in respect of which Shaik and the other accused were convicted on Counts 1 and 3 (the corruption charges and the alternative money laundering charge). "

I think it is fair to say that on Mr du Plooy's analysis of the evidence presented to the trial Court in the prosecution of Mr Shaik, together with the factual findings arrived at by that Court, the Second Respondent has a *prima facie* case against the First Applicant on the charges arising from the Corruption Act. Neverthe-

less, Mr du Plooy states that the investigation in terms of section 28(1) has, of necessity, been continued because (paragraph 23):-

> "The continuation of the investigation during a criminal trial is a common feature of criminal proceedings, particularly in complex commercial matters such as the present. As the State case unfolds, numerous aspects arise requiring investigation, including those aspects that emerge from the accused's defence as it is revealed, often for the first time, during the State case. Similarly, aspects that are raised during the defence case require continuing investigation."

It is not clear precisely what additional evidence was gathered under the provisions of section 28 during the trial of Mr Shaik, but Mr du Plooy mentions, for instance, that a Mr Vivian Reddy, who has already been summonsed to furnish evidence in terms of section 28, has informed one of the prosecutors that they may direct any request for further information from him to his attorney. Mr du Plooy, however, expresses the view that "there can be no guarantee of the completeness or veracity of information in documents provided pursuant to a section 28 summons". In several passages in his affidavit, Mr du Plooy expresses the view that the provisions of section 28 are inadequate to enable the Second Respondent to investigate, properly, the suspected offence of corruption on the part of the First Applicant. But he goes further, and states that he suspects that there is a possibility that bribery and corruption occurred after October 2002, and even during the period when Mr Shaik was being prosecuted. He adds the suspected offences of fraudulent nondisclosure of benefits to Parliament and of income to the Receiver of Revenue (incorporated

into the section 28 investigation four days before he made his affidavit) as a further basis for conducting the search and seizure in terms of section 29. No factual statement is made in support of the contention that the First Applicant and Mr Shaik may have been guilty of corrupt conduct during the period after 2002. As to the fraudulent nondisclosure of benefits and income, I have been unable to imagine what sort of "evidence" Mr du Plooy might have in mind. If the State has a *prima facie* case to establish that benefits were received (i.e. in the charges based on corruption) there can surely be no difficulty in establishing the absence of any declaration to Parliament or to the Receiver of Revenue, of those receipts. Nor am I persuaded that the fraudulent nondisclosure of benefits or of income in such a narrow compass could be described as "complicated offences" in the sense contemplated in the proclamation defining the "specified offences" which may be the subject of investigation in terms of sections 28 and/or 29.

Finally Mr du Plooy has stressed the difficulty which the State encounters in relation to equipping itself to deal with defences which the accused may raise during the course of the trial. No doubt this *is* a problem, more especially in complicated offences such a corruption or large-scale commercial fraud. But that problem exists in every prosecution for this type of offence. It is inconceivable that a prosecuting authority could justifiably invoke the "search and seizure" provisions against an accused for the avowed purpose of finding

out what defences he will raise during his trial. The concept is nothing short of ludicrous.

It will be apparent from what I have said above, that I consider that Mr du Plooy's affidavit did not make out a proper case for resorting to the provisions of section 29 for the purpose of the investigation. Mr du Plooy's evidence and contentions do not make out a case that the additional evidence to which he refers (even if it is necessary, which is open to considerable doubt) cannot be obtained by invoking the provisions of section 28. On that basis I consider that the procurement by the Second Respondent of the warrants with which I am concerned in this judgment, was unjustified and that the execution of the warrants must be regarded as unlawful. For the purposes of dealing with the remaining arguments addressed to me, I will assume, in the Second Respondent's favour, that some "need" was established.

The Ambit of the Warrants

It is now authoritatively established that, for validity, a warrant must

(a) set out the "specified offences" suspected of having been committed or being committed; and

(b) convey intelligibly to both searcher and searched the ambit of the search it authorises. (See ***Powell N.O. and Others v van der Merwe N.O. and***

Others 2005 (5) SA 62 (SCA) at page 81 to 85 and the authorities there cited and analysed.)

In relation to the breadth of the authority conferred by a warrant, the position is that if the terms of the warrant go beyond those which the authorising statute permits, it will be held to be invalid. Nor is it a cure for a warrant which is excessively worded, "to say that the subject of the search knew or ought to have known what was being looked for; the warrant must itself specify its object, and must do so intelligibly and narrowly within the bounds of the empowering statute." (See ***Powell***'s case (*supra*) page 85 paragraph 59.)

In so far as the requirement that the warrant must define specified offences is concerned, all of the warrants with which I am concerned in this judgment are similarly worded, with the reference to the offences being in the first paragraph of the preamble. Those offences are described as "Corruption in contravention of Act 94 of 1992, Fraud, Money Laundering in contravention of Act 121 of 1998 and/or the commission of tax offences in contravention of Act 58 of 1962". No further particulars are given. Nor is it alleged that the First Applicant is suspected to have committed, or been involved in the commission of, any of the offences. Admittedly, in the ***Powell*** case, the warrants had made reference only to "irregularities" and there was doubt whether those irregularities might even amount to offences. But I consider that the precept in ***Powell***'s case, requiring the warrant to convey the ambit of the search "intelligibly", includes a

requirement that the person to be searched must be given information as to approximately when the suspected offences have been committed and who is suspected of having committed them. It should be noted, as I have indicated earlier, that the warrants in this case are in the form of a notification by the authorising judicial officer that it "appears to (him/her) from information on oath" that the reasonable suspicion exists. The information on oath which was submitted to obtain authorisation for these warrants was that the suspected corruption arose from conduct, up to 2002, between the First Applicant and Mr Shaik, that the suspected money laundering occurred over a similar period and that the fraud and tax offences related to nondisclosure in declarations required by statute. There was also, of course, the vague suggestion of a suspicion that corrupt activities may have continued beyond 2002. Without including those limits in the warrants, it would be impossible for the person on the receiving end of their execution to know what the searchers might reasonably be entitled to look for. I accordingly hold the view that the references to the suspected offences in the warrants are inappropriately vague and that the warrants are all invalid on that ground.

Each of the warrants contains what might be described as a "catch-all paragraph". In the warrants Annexures "JZ.2", "JZ.3", "JZ.4" and "JZ.5", it is clause 23. In the warrant, Annexure "JZ.7", served on the Second Applicant, it is clause 2. To adopt language from some of the previous decisions, this "catch-all" is of breathtaking proportions. It conflicts with the list of long-standing

authorities referred to by **Cameron JA** in ***Powell***'s case at pages 82 to 85. The deponents for the Respondents have insisted that it was not their intention to conduct a generalised search. But even if one accepts that there were such good intentions, at least on the part of the senior members of staff, one wonders why this elaborately and exhaustively worded paragraph was included. For ease of reference it reads:-

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

The fact that the first applicant had already been charged and was, accordingly, "an accused person" at the time when the authorisation for the warrants was sought, lent added importance to the requirement that the scope of the search be specified intelligibly and reasonably precisely. It must be borne in mind that the searchers, looking for something which "might have a bearing" on the investigation, would be able to invoke the authority of the warrant in the face of any objection by any occupant of the premises about to be searched. The Respondents knew very well that the First Applicant could not be present to deal personally with each of the warrants which were to be executed at premises

where he resided or worked, because part of the plan was to conduct all the searches simultaneously at 6.30am on the morning of 18th August. In the event of a dispute arising, at any of the premises, as to whether certain documents, records or articles fell within the ambit of the search, the searchers could merely point to clause 23 as their authority for wanting to inspect such items. The insistence by the deponents for the Respondents that they did not have an "open-end" search in mind is of no avail in their defence of the validity of the warrants. Once a warrant is issued with a clause like this, it threatens a drastic invasion of the rights of the person on whom it is to be executed. In this case the affected person's ordinary rights to privacy are accentuated by the addition of the right to silence and to a fair trial under the provisions of section 35. The request, by the Second Respondent, for a warrant with this catch-all paragraph in it is tantamount to a request for authority to search an accused person's premises "to find anything that will help me in the prosecution". If the request had been phrased in those blunt words, there is no doubt that it would have been rejected out of hand. Nor can the generalised and convoluted terminology of the clause save it from such a fate. I must say that this applies *a fortiori* to the situation with Annexure "JZ.7". It must be borne in mind that at the time when the searches commenced, none of the search parties was equipped with a copy of Mr du Plooy's affidavit. The Second Applicant specifically asked to examine a copy of the affidavit for the purpose of deciding whether to oppose the execution of the search warrants, but his request for time to consider this evidence was summarily refused. For all the people at the various premises

knew, they were obliged, in accordance with the law, to allow every article on the premises to be inspected for the purpose of ascertaining whether it “might have a bearing on the investigation”.

In my view each of the warrants is rendered invalid by the inclusion of this “catch-all paragraph” Argument was addressed to me on certain other aspects of the wording of the warrants but, in view of my conclusion in regard to this particular paragraph, I find it unnecessary to consider the further submissions. I will deal with the question of whether the warrants can be saved by severing the “catch-all paragraph” later in this judgment. It is desirable, first, to discuss the debate about privilege.

The Claim to Privilege

A substantial proportion of the argument was devoted to the question of privilege. Section 29(11) affords the person being searched a right to object to the inspection or removal of any item found on the premises on the ground that it is privileged. The section provides that, in the face of such a claim, the person executing the warrant must request the Registrar of the High Court to seize and remove the item and keep it until a Court has ruled on the issue of privilege.

There is a dispute of fact, on the affidavits, as to whether privilege was, in fact, asserted by the Second Applicant in relation to some of the material falling

within the ambit of Annexure “JZ.7”. I will, accordingly, rely only on the evidence given by the deponents for the Respondents in this regard. Mr van Loggerenberg (whose affidavit commences at page 434) arrived at the Second Applicant’s office with a team of seven searchers, before the Second Applicant. The Second Applicant arrived at about 7.30am and, having been informed of the contents of the warrant which was served on him, informed Mr van Loggerenberg that he would assist by pointing out the documents he had received from Mr Shaik’s attorney. Arrangements were made for copies of inventories and a receipt for seized items to be prepared. At an early stage of proceedings, the Second Applicant was telephoned by the First Applicant and informed that the First Applicant’s premises in Johannesburg and Nkandla were being searched. He was instructed by the First Applicant to fly to Johannesburg. The Second Applicant telephoned the deponent, Mr Steynberg, while he was on the way to the Durban airport. He told Mr Steynberg that he wanted to challenge the lawfulness of the searches and that, for that purpose, he needed a copy of the affidavit by Mr du Plooy, pursuant to which the warrants had been obtained. Mr Steynberg told the Second Applicant that he would check with his leader, Mr W J Downer SC, as to whether this would be in order. Mr Downer informed Mr Steynberg that the Second Applicant could obtain a copy of the affidavit from the Registrar of the Transvaal Provincial Division. (Elsewhere in the papers, it appears that the Second Respondent’s counsel had inadvertently left the Second Respondent’s copy of the affidavit in the chambers of **Ngoepe JP** and that it was only retrieved on 18th August.)

During his second conversation with Mr Steynberg, the Second Applicant asked whether all of the documents to be seized from his office could be sealed and lodged with the Registrar of the High Court until the lawfulness of the search had been determined. Mr Steynberg voiced the opinion that such an arrangement was unlikely but said that he would check with Mr Downer. The Second Applicant telephoned Mr Steynberg again, apparently from Johannesburg. Mr Steynberg confirmed that Mr Downer was not prepared to agree to lodge the documents with the Registrar and gave the Second Applicant Mr Downer's telephone number to enable the Second Applicant to communicate directly with Mr Downer. According to Mr Downer the Second Applicant asked him to stop the search until the Second Applicant had obtained a copy of Mr du Plooy's affidavit and had had an opportunity to apply to court for an order declaring the search of his offices to be unlawful. Mr Downer declined this request. He says (at paragraphs 7(b), (c) and (d) of his affidavit):-

> "(b) The second applicant made no other request of me. He certainly did not claim privilege in respect of any other documentation in his possession. All he did was to ask me what would happen if any documents were privileged and I said to him that he must decided which documents he considered to be privileged. I also said to him that it did not seem to me that any of them could be privileged because they had emanated from attorney Parsee and, according to attorney Parsee, consisted of financial records.
>
> (c) I deny the second and third sentences in this paragraph. I told the second applicant that we were not interested in privileged documents.

(d) I admit that I told the second applicant that we were acting in terms of a Court order and that I would not accede to his request, namely the required referred to by me in sub-paragraph (a) above."

On the day following the searches, 19th August, the Second Applicant addressed a letter to Mr Steynberg stating that "a certain privilege attaches to the entire body of documents" seized from his offices. He stated that "such documents ought to be lodged with the Registrar in these circumstances." The response to this letter was a refusal to agree to the documents being lodged with the Registrar. It was denied that privilege had been asserted in the manner contemplated in section 29(11) or, as a matter of law, that any of the documents concerned *were* privileged.

In argument before me, counsel for the Respondents have submitted that, to bring section 29(11) into play, a person whose premises are searched must do two things. He must object to the item being inspected and/or seized and he must assert a specific claim for privilege. In amplification of this argument, counsel stressed that, even to date, the Second Applicant has not pointed to a single document or other item taken from his office on 18th August which can be described as containing privileged information. I should record that counsel also contended that, to bring section 29(11) into play, an assertion of privilege must be made *bona fide*, but counsel found it difficult to answer the question of how the *bona fides* of such an assertion can be tested other than by the Court which is called upon to make the ruling referred to in section 29(11). I understand that counsel has a duty to present his client's case to the Court, but it was apparent

that counsel made these submissions about the way in which the suggestion of possible privilege was responded to, with a measure of unease. I am not surprised because it is plain that the submissions miss the point entirely and on two different scores, at that.

Firstly, there is the point of principle. The Second Respondent had asked for authority to take a drastic step – in fact a step which, as far as I am aware, at least, was without precedent in this country, namely to search the offices of an attorney to obtain evidence against his accused client. True it is that some care had been devoted to describing the documents referred to in paragraph 1 of the warrant with a measure of precision. But there had been no such attention to detail in framing paragraph 2. Clearly the Second Respondent's representatives should have been alerted to the possibility that attorney-client privilege might be jeopardised in the course of the search. And such a breach might not have operated only to the prejudice of the First or Second Applicants. It could have placed the First Applicant's hallowed right to a fair trial, in terms of section 35 of the Constitution, in jeopardy and thereby prevented the State from proceeding with the prosecution. In those circumstances, I consider that steps should have been taken to prevent a blunder that might have jeopardised the prosecution, let alone to avoid undue infringement of the applicants' right to confidential communication and to privacy. The safest way of doing this would be to include a specific reference to section 29(11) in the warrant or, at very least, to apprise the Second Applicant of the provisions of section 29(11) at the time when the

warrant was served on him. The Second Respondent could obviously have suffered no prejudice from either of those steps. The evidence that the Second Respondent wanted to preserve would have been preserved, but in the possession of the Registrar until any claim to privilege had been decided. The impression I have, though, especially from the evidence by Mr Downer, was that unless the Second Applicant made express reference to section 29(11) or brought himself squarely within its provisions, the search was going to proceed in terms of the warrant. This brings me to the second aspect in which the Second Respondent's case misses the point. It is that the Second Respondent's representatives appear to have operated on the hypothesis that the Second Applicant, being a practising attorney, should know the law and should therefore have invoked the protection given to him by section 29(11) explicitly and immediately. If my impression in this regard is accurate, it reflects an approach as unfortunate as it is artificial. The Respondents' primary object was to take the people in occupation of the various premises by surprise. The senior members of the search teams were obviously intimately acquainted with the terms of the stature under which they were operating. In fact a senior State Advocate, Mr W.P. Muller actually accompanied the team which searched the Second Applicant's premises. They had no reason to assume that the Second Applicant, even though he is a practising attorney, would have all the provisions of our legislation at his mental fingertips. Their failure, in the face, even, of a query as to whether documents should not be lodged with the Registrar until the Second Applicant had had an opportunity to consider the steps being taken

against him is unfortunate. It was plainly a common sense attempt to invoke protection similar to that afforded by section 29(11). I think it was unfortunate that, knowing that the warrant itself contained no reference to section 29(11) and that the Second Applicant was not being given an opportunity to ascertain what his position was, the Respondents' representatives did not direct his attention to the subsection. In the decision by the Supreme Court of Canada in the case of ***Lavallee, Rackel & Heintz v Canada (Attorney General)*** 2002 SCC 61 (CanLII) a provision in the criminal code which expressly provided for the situation where privilege is claimed in the course of search and seizure operations by police of the offices of attorneys, section 488.1 was considered. The submission was that section 488.1 was unconstitutional because it did not "minimally impair solicitor-client privilege". The section made provision for a procedure not dissimilar to that in section 29(11). The judgment is informative in many respects in the context of this case, particularly because it demonstrates the importance attributed to the rights of privacy and attorney-client communication by the Canadian Courts. Although the Court was split as to the main question, namely whether section 488.1 of itself guaranteed adequate protection in relation to attorney-client privilege, there was no debate about the paramount importance of preservation of this privilege. The following passage in the headnote, summarising the majority judgment underscores this approach:-

> "Where the interest at stake is solicitor-client privilege, which is a principle of fundamental justice and a civil right of supreme importance in

> Canadian law, the usual exercise of balancing privacy interests and the exigencies of law enforcement is not particularly helpful because the privilege is a positive feature of law enforcement, not an impediment to it. Given that solicitor-client privilege must remain as close to absolute as possible to retain its relevance, the Court must adopt stringent norms to ensure its protection. The procedure set out in s. 488.1 must minimally impair solicitor-client privilege to pass *Charter* scrutiny.
>
> Section 488.1 more than minimally impairs solicitor-client privilege and amounts to an unreasonable search and seizure contrary to s. 8 of the *Charter*. Its constitutional failings can result from: (1) the absence or inaction of the solicitor; (2) the naming of clients; (3) the fact that notice is not given to the client; (4) its strict time limits; (5) an absence of discretion on the part of the judge determining the existence of solicitor-client privilege; and (6) the possibility of the Attorney General's access prior to that judicial determination. The one principal, fatal feature shared by them is the potential breach of solicitor-client privilege without the client's knowledge, let alone consent. The fact that competent counsel will attempt to ascertain the whereabouts of their clients and will likely assert blanket privilege at the outset does not obviate the state's duty to ensure sufficient protection of the rights of the privilege holder. Privilege does not come into being by an assertion of a privilege claim; it exists independently. Section 488.1 provides that reasonable opportunity to ensure that the privileged information remains so must be given to the privilege keeper, but not to the privilege holder. It cannot be assumed that the lawyer is the *alter ego* of the client. Section 488.1(8), which provides that no examination may be carried out without affording a reasonable opportunity for a claim of solicitor-client privilege to be made, cannot raise this entire procedural scheme to a standard of constitutional reasonableness given this failure to address directly the client's entitlement to ensure the adequate protection of his or her rights."

This applies with equal force to the precepts of our law, particularly that the privilege is that of the client and not of the attorney and that the attorney must be properly instructed before he asserts such privilege. It seems to me that the

considerations set out in this passage could also very usefully be applied to circumscribing the ambit of execution of warrants issued before search and seizure of attorneys' offices. It is interesting (though disconcerting) to note from the judgment, that search and seizure operations have been conducted by the police in the search for evidence in Canada fairly regularly since the 1970's and section 488 contains statutory provisions which were specifically aimed at protection of privilege (but which, in this case, were held by the majority of the Court to have been constitutionally inadequate).

Much has been made, by the Respondents, of the circumstance that the Applicants have not demonstrated that a single document inspected or taken from the Second Applicant's offices is even likely to be a privileged document. Mr Downer, as indicated in the passage from his affidavit which I have quoted earlier, seems to have taken the view that financial records cannot be privileged. I must stress that it is not the function of this Court to embark on an investigation into the issue of privilege. The Respondents' attitude is over-simplistic. In a prosecution for an offence such as money laundering, for instance, "financial records" may well comprise, or contain, "privileged material". The contention that there was no potential for violation of privilege because the documents in paragraph 1 of the warrant in respect of the Second Applicant's premises "could not possibly be privileged" is unsound.

Severability

Counsel for the Respondents contended that the "catch-all paragraph" in paragraphs 23 of Annexure "JZ.2, 3, 4 and 5" and paragraph 2 of Annexure "JZ.7", was severable from the remainder of the items described in each warrant. It was submitted that there was no evidence in the Applicants' affidavits to establish that the very wide provisions of this paragraph had been resorted to in any particular case. The authorities relied upon in support of this contention were ***Cine Films (Pty) Ltd & Others v Commissioner of Police & Others*** 1972 (2) SA 254 (A) at page 268 (a judgment dealing with a search warrant under section 22 of the Copyright Act, Act No 63 of 1965); ***Divisional Commissioner of SA Police Witwatersrand Area & Others v SA Associated Newspapers Ltd & Another*** 1966 (2) SA 503 (A) at 513A-B (a matter involving search and seizure by the police of documents relating to conditions in prisons). These decisions pre-date the Constitution. Although the decisions were mentioned specifically in ***Powell***'s case (*supra*), paragraphs [56] and [57], the possibility of a warrant being treated as severable in this regard was not mentioned by **Cameron JA** in paragraph [59](e). He simply said:-

> "If a warrant is too general, or if its terms go beyond those the authorising statute permits, the Courts will refuse to recognise it as valid and it will be set aside."

I respectfully agree with what is said by **Oosthuizen AJ** in ***Ferucci***'s case (*supra*) at page 234, in which the learned Judge mentioned that constitutional

considerations have superseded the considerations which led the Appellate Division to hold that offending portions of a warrant could be severed from the acceptable portions, in the two cases to which I have referred. In the circumstances, the submission that the warrants in this case can be saved by pruning them down to acceptable limits *ex post facto* cannot be sustained.

General

The Applicants submitted that there were a number of formal defects in the procedure adopted by the Second Respondent relating to matters such as the designation of Mr du Plooy, the authority of Mr Mngwengwe and the formal steps taken to extend the investigation in August 2005. By the time the matter was argued, evidence had been put up, largely by way of supplementary affidavits, which disposed of these issues. I have proceeded on the assumption, in this judgment, that the formal steps required to be following by the Respondents for the purpose of obtaining and, subsequently, executing the warrants complied with the statutory requirements. Although there are certain minor disputes on the affidavits, relating to the execution of the warrants, no point was made, in argument before me, of any alleged abuse of powers in this regard and, again, I have proceeded on the assumption that the warrants were properly executed, save for those aspects which I have specifically dealt with in relation to the warrant, Annexure “JZ.7”, executed at the offices of the Second Applicant.

To sum up, I consider that each of the warrants with which I have dealt in this judgment is invalid for the reasons which I have set out.

Costs

Very little argument was addressed to me on the question of costs. The Applicants are the successful parties, so it follows that they should be entitled to their costs. The only question at issue is whether they are entitled to the costs of three counsel. The Respondents, at the conclusion of their heads of argument, made the submission that a costs order in their favour should include those consequent upon the employment of three counsel. What is sauce for the goose should ordinarily be sauce for the gander. However, in case the matter should require further argument, the costs order which I intend to make will be provisional at this stage.

I make the following order:-

1. It is declared that the warrants, Annexures “JZ.2”, “JZ.3”, “JZ.4”, “JZ.5” and “JZ.7” to the notice of motion herein are invalid and that the searches and seizures carried out in execution of the said warrants were unlawful.

2. The Respondents are ordered to return, forthwith, all items seized and removed from the respective premises in terms of the aforesaid warrants together with all copies of such items which the Respondents, or their agents, may have made while the items have been in their possession, irrespective of the means by which such copies have been made or taken.

3. The Respondents are ordered to pay the Applicants' costs in this application, such costs to include the costs occasioned by the employment of three counsel.

4. The order for costs in paragraph 3 above will be provisional for the period until 28th February 2006 and, up to that date, the parties have leave to set the matter down, on not less than five days' notice to the other parties, for further argument on the question of costs. Failing such set-down the order for costs will become final on 1st March 2006.

DATES OF HEARING:	6 and 7 February 2006
DATE OF JUDGMENT:	15 February 2006
FOR THE APPLICANTS:	Mr K J Kemp SC Mr M D C Smithers Mr B S M Bedderson
INSTRUCTED BY:	Abbas Latib and Company 77 Innes Road MORNINGSIDE DURBAN
FOR THE RESPONDENTS:	Mr M T K Moerane SC Mr P J Olsen SC Mr R Salmon CS
INSTRUCTED BY:	The State Attorney (KwaZulu-Natal) 3rd Floor, Sangro House 417 Smith Street DURBAN