THE CONSTITUTIONAL COURT
OF SOUTH AFRICA

CCT NO:
SCA CASE NO: 671/06

In the matter between:

THINT (PROPRIETARY) LIMITED Applicant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS First Respondent

THE INVESTIGATING DIRECTOR: DIRECTORATE OF SPECIAL OPERATIONS Second Respondent

JOHAN DU PLOOY Third Respondent

FOUNDING AFFIDAVIT: PIERRE JEAN-MARIE ROBERT MOYNOT

I, the undersigned,

PIERRE JEAN-MARIE ROBERT MOYNOT

do hereby make oath and state that:

INTRODUCTION

1. The Applicant in this application is **THINT (PROPRIETARY) LIMITED,** a company duly incorporated in terms of the company laws of South Africa, carrying on business at Brooklyn Place, 1st Floor, 266 Bronkhorst Street, cnr Dey and Bronkhorst Streets, New Muckleneuk, Brooklyn, Pretoria.

2. I am an adult male and the managing director of the Applicant. I am duly authorized to depose to this affidavit on its behalf.

3. The facts herein contained are within my personal knowledge, unless otherwise stated or indicated by the context, and are to the best of my knowledge both true and correct. Legal submissions made herein are based on the advice furnished by the Applicant's legal representatives.

4. The Applicant has appointed **Shamin Rampersad and Associates** of 1201 Durdoc Centre, 460 Smith Street, Durban (Ref: Mr A Sooklal) care of **Deneys Reitz Inc,** 82 Maude Street, Sandton (Ref: Mr. R.F. Driman) as its attorneys of record for the purposes of this application.

5. The Applicant seeks leave to appeal to this Court against the majority decision of the Supreme Court of Appeal *("the SCA")* handed down on 8 November 2007 in the matter of THINT (PROPRIETARY) LIMITED v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND TWO OTHERS *("the Thint judgment")* under SCA case number 671/06. A copy of the Thint

judgment is attached hereto, marked **"PJM1".** The Thint judgment consists of two judgments, a majority judgment written by Nugent JA (with Ponnan and Mlambo JJA concurring) (*"the majority decision ")* and a minority (dissenting) judgment written by Farlam JA (with Cloete JA concurring) *("the minority decision").* The SCA dismissed the Applicant's appeal against the dismissal of its application to the Transvaal Provincial Division of the High Court (*"the Pretoria High **Court*),** inter alia,* to set aside a search warrant. A copy of the judgment of Du Plessis J in the Pretoria High Court is annexed hereto, marked **"PJM2"**

6. In order for this Court to consider and evaluate this application, and an appeal consequent thereupon, it is necessary to have regard to two other judgments of the SCA, which were also handed down on 8 November 2007.

7. The first is that of NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND ANOTHER v JULEKA MAHOMED under SCA case number 596/05, *("the Mahomed judgment"),* a copy of which is annexed hereto, marked **"PJM3".** It should be noted that there are three separate decisions constituting the Mahomed judgment, *viz* the majority judgment of Nugent JA (with Mlambo JA concurring), a dissenting judgment by Ponnan JA, and a judgment by Farlam JA (with Cloete JA concurring), which concurred in part with the judgment of Nugent JA.

8. The second is that of THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND FOUR OTHERS v JACOB GEDLEYIHLEKISA ZUMA AND ANOTHER under SCA case number 639/06, ***("the** Zuma judgment"),* a copy of which is annexed hereto, marked **"PJM4".** There are two separate decisions constituting the Zuma judgment. Nugent JA wrote the majority judgment (with Ponnan and Mlambo JJA concurring) and Farlam JA (with Cloete JA concurring) delivered a dissenting minority decision.

THE RESPONDENTS

9. The First Respondent is **THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS,** cited in terms of section 179 of the Constitution of the Republic of South Africa, 1996, who is the head of the National Prosecuting Authority and who has his offices at VGM Building, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria.

10. The Second Respondent is the **INVESTIGATING DIRECTOR: DIRECTORATE OF SPECIAL OPERATIONS,** established in terms of section 7(1) of the National Prosecuting Authority Act, 32 of 1998 *("the Act"),* who has his offices at the address referred to in the preceding paragraph hereof.

11. The Third Respondent is **JOHAN DU PLOOY,** a Senior Special Investigator in the employ of the Second Respondent, who at all times material hereto has

acted in the course and scope of such employment, and who has offices at the same address as the First and Second Respondents.

12. Service on the Respondents will be effected via the State Attorney at 8th Floor, Old Mutual Centre, 167 Andries Street, Pretoria (reference Mr I. Chowe), who represented them in the Pretoria High Court in the application to which the instant application relates.

THIS APPLICATION

13. This application concerns the constitutional issues raised in the three SCA judgments referred to above in regard to what the Applicant contends was an unlawful and unconstitutional search and seizure operation conducted against it at its abovementioned place of business on 18 August 2005. The Applicant contends that this search was unlawful and unconstitutional, *inter alia,* because it was based on an invalid search warrant.

14. In this application, brought in terms of Rule 19 of this Court's Rules, the Applicant seeks leave to appeal to this Court against the Thint judgment in the form of the majority decision. (The Applicant also contends that the minority decision is also incorrect to the extent that Farlam JA stated that, if the search warrant were set aside, he would have issued a *"preservation order",* to which reference is made below.)

15. The Applicant has been advised that to succeed in this application it must satisfy two requirements:

15.1. First, the application must raise one or more constitutional matters or issues connected with decisions in a constitutional matter; and

15.2. Secondly, that it is in the interests of justice for this Court to grant leave to appeal.

16. The Applicant submits that this application does raise constitutional issues and that it is in the interests of justice for leave to appeal to be granted.

17. Whether it is in the interests of justice depends on a weighing up of all relevant factors, including the importance of the constitutional issues raised and the Applicant's prospects of success.

18. For the reasons contained herein, it is submitted that:

18.1. the constitutional matters raised in this application are of substance on which a ruling by this Court is desirable; indeed the matters raised are of significant public importance;

18.2. there is a reasonable prospect that this Court will reverse or materially alter the Thint judgment if leave to appeal is granted, in this regard it is clearly significant, I respectfully submit, that two of the SCA judges

would have upheld the Applicant's appeal as to the validity of the search warrant;

18.3. the evidence adduced before the Courts below is sufficient to enable this Court to deal with and dispose of the matter without having to refer the case back to the Courts below for further evidence;

18.4. the appeal is ripe, it is not yet moot and the hearing of the appeal will not result in the fragmentation of the case or involve the issues being determined in a piecemeal fashion;

18.5. the constitutional issues raised in this application were raised in the Courts below and this Court is accordingly not deprived of the benefit of the judgments by other Courts on the questions it is asked to decide.

FACTUAL BACKGROUND

19. On 11 August 2005, the Third Respondent deposed to an affidavit in support of an application for the issue of 21 search warrants in terms of sections 29(5) and 29(6) of the Act.

20. On 12 August 2005 an application was made in chambers in terms of sections 29(4) of the Act to Ngoepe JP in the Pretoria High Court for the issue of the search warrants sought in the Third Respondent's affidavit.

21. As appears from paragraph [7] of the Zuma judgment, on the same day the Judge President authorised the issue of the majority of the search warrants sought, after requiring a modification to the wording of the drafts submitted to him so that the offences which were the subject of the investigation were stated.

22. On the morning of 18 August 2005 the search warrants authorised by the Judge President were executed simultaneously at premises throughout South Africa by some 250 members of the Directorate of Special Operations of the National Prosecuting Authority and approximately 93 000 documents were seized.

23. The purpose of the searches was to obtain further evidence for use by the prosecution in the criminal proceedings on charges of corruption then pending against Mr Jacob Zuma and for use in possible criminal proceedings against the Applicant.

24. During November 2005 the Applicant, together with Thint Holdings (Southern Africa) (Proprietary) Limited, were indicted to stand trial on 31 July 2006 as co-accused with Mr Zuma in the Pietermaritzburg High Court.

25. 25.1. On 26 August 2005, proceedings were instituted in the Witwatersrand Local Division of the High Court *{"the Johannesburg High Court")* by Ms Juleka Mahomed, an attorney practising in Gauteng, who had acted as a legal advisor and representative of Mr Zuma, for an order setting

aside two of the search warrants authorised by the Judge President, declaring the searches and seizures carried out in execution of those search warrants to be unlawful and directing, *inter alia,* that all her property seized under the search warrants be returned.

25.2. On 9 September 2005 Hussain J in the Johannesburg High Court granted Ms Mahomed the relief she sought. His judgment, which has been reported as *Mahomed v National Director of Public Prosecutions and Others* 2006 (1) SACR 495 (W), was dealt with on appeal in the Mahomed judgment. Hussain J set aside the impugned search warrants and ordered the return of the seized items and copies made thereof.

25.3. On 6 October 2005 Mr. Zuma, and his attorney, Mr Michael Hulley, brought an application in the Durban and Coast Local Division of the High Court *{"the Durban High Court")* seeking relief in respect of seven of the search warrants authorised by the Judge President. The attacks on two of these search warrants became moot.

25.4. The Durban High Court (per Hurt J) declared five of the search warrants invalid and the searches pursuant thereto unlawful and ordered the Respondents in that matter to return all items seized together with all copies that had been made. Hurt J's judgment is reported as *Zuma and Another* v *National Director of Public*

Prosecutions and Others 2006 (1) SACR 468 (D) and was the subject of the appeal culminating in the Zuma judgment referred to above.

26. 26.1. On 5 January 2006, the Applicant and my wife and I brought an application in the Pretoria High Court for similar relief in respect of search warrants issued by the Judge President authorising searches and seizures at the Applicant's office and at the residence of my wife and myself.

26.2. The Respondents conceded the relief sought in respect of the search warrant issued authorising the searches and seizures at our residence, but opposed the application in respect of the searches and seizures effected at the office of the Applicant. The application failed.

26.3. Du Plessis J held that the search warrant was valid and the searches and seizures effected under it were also valid.

26.4. The Applicant appealed against the judgment of Du Plessis J, resulting in the Thint judgment.

THE IMPUGNED WARRANTS

27. Significantly, save for the annexures thereto, the search warrants authorised by Ngoepe JP which are relevant in the present case were, except for the particulars relating to the premises to be searched, in identical terms. I annex

hereto, marked "PJM5", a copy of the search warrant relating to the search and seizure of the Applicant's offices. Without annexures, it reads 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 inspection, searching and seizing computer-related objects in the manner authorized in Annexure B) and to remain on the said premises and to complete the abovementioned inspection, search, enquiries, examination and seizure during the nighttime if necessary."

[Underlining addedj

28. The two annexures to the search warrant, in the Applicant's submission, did not serve to make the warrant any more intelligible. They did, however, so it is contended, result in an impermissible catch-all warrant, which purported to permit a general ransacking. (See *Powell N. O. and Others* v *Van der Merwe N.O. and Others* 2005 (5) SA 62 (SCA) *("Powell")* at para [62].)

29. It is significant that there are certain crimes and offences mentioned in the search warrant which have no bearing on the Applicant at all. Indeed, nowhere in his detailed affidavit did the Third Respondent suggest that there is an investigation into the Applicant in relation to fraud or any of the multifarious possible tax offences. At no time during argument before Du Plessis J in the Pretoria High Court or before the SCA was it ever suggested that there is an investigation into the Applicant in respect of fraud or tax offences,

30. Quite apart from this contention, the Applicant submits that the description of *"fraud"* and the *"commission of tax offences in contravention of Act 58 of 1962"* contained in the search warrant is so wide that the search warrant is rendered invalid for this reason alone.

31. Accordingly, it is contended that for this reason alone this application for leave to appeal should be granted and that the appeal consequent thereupon should succeed.

MAHOMED, ZUMA AND THINT JUDGMENTS

32. As has already been mentioned, there were majority and dissenting minority judgments in the three SCA appeals pertaining to the search and seizure operations. There were also concurring judgments which differed in their reasoning from the majority judgments.

33. Two principal issues effectively arise from the three judgments for purposes of this application:

33.1. First, is the search warrant as it relates to the Applicant valid?

33.2. Secondly, if the search warrant is not valid, is it appropriate, bearing in mind, *inter alia,* the provisions of the Constitution, for any order to be made other than for the immediate return of all the articles seized under the search carried out pursuant to the invalid search warrant?

34. The effect of the three judgments is that even if the search warrant, which authorized the search of the Applicant's offices, were invalid, the seized articles or copies thereof would remain available for the Respondents to use and attempt to utilize as evidence in any possible subsequent criminal trial. This is the result of what is referred to by the SCA as a preservation order.

35. The Applicant submits that, as found by Ponnan JA in his dissenting judgment in the Mahomed appeal, it is inappropriate, and inconsistent with the Constitution for a preservation order to be made in circumstances where a

search warrant, leading to a seizure of articles, is found to be invalid. This is dealt with more fully below, as is the finding to similar effect by Nugent JA in paragraphs [18] to [20] of his judgment in the Mahomed appeal.

36. The majority of the SCA in the Thint judgment held the search warrant to be valid, while the minority found, for reasons set out by them as the minority in the Zuma judgment, that the search warrant should have been set aside, but that a preservation order should have been made.

37. The Applicant contends that the approach of the majority is fundamentally flawed and that the minority's approach (relating to the validity of the search warrant) is consistent with the Constitution and, for that matter, the common law.

THE MAJORITY JUDGMENT AND A CRITIQUE THEREOF

38. **It** is contended that the majority in the Thint judgment failed to distinguish between the search warrant in respect of the Applicant, on the one hand, and that in respect of Mr. Zuma and Mr. Hulley, on the other.

39. There are material differences between the instant case and that of Messrs Zuma and Hulley, principally the fact that certain of the crimes and offences referred to - albeit most perfunctorily in the search warrant have no application at all to the Applicant and there is no suggestion in the Third Respondent's affidavit that there is any investigation in process in respect of

any fraud or tax offences possibly committed by the Applicant. These differences called for a different approach to the Applicant's appeal and indeed they were most germane to the argument advanced before the SCA on behalf of **the** Applicant.

40. Despite this fact, the majority simply found (at para [13]) that *"the warrants that are now in issue are not materially different to the warrants that were considered in National Director of Public Prosecutions and Others* v *Zuma and Another...[1]"* and *"For the reasons given in my judgment in that matter I am of the view that the warrants in this case were similarly valid...".*

The majority, it is contended, did not in the circumstances consider the Applicant's arguments properly. Accordingly to analyze the Thint judgment this Court must have regard to the findings in the Zuma judgment.

INTELLIGIBILITY OF THE SEARCH WARRANT

41. **The** majority decision effectively found that a search warrant in terms of section 29(9)(a) of the Act does not need to be reasonably intelligible to the person to whom it is presented.

42. Indeed, the majority effectively, and it is submitted wrongly, rejected the ratio in paragraphs 59(d) - (e) of *Powell* that:

> "A **warrant must convey intelligibly to both searcher and searched the ambit of the search it authorizes."**
>
> **[Underlining added]**

and

> "It is no cure for an overbroad warrant to say that the subject of the search knew or ought to have known what was being looked for: the warrant must itself specify its object, and must do so intelligibly and narrowly within the bounds of the empowering statute."

43. The majority rejected, wrongly it is contended, the notion that the "searched" person or entity is required to be provided with sufficient information to enable him or her to know the "metes and bounds of the search contemplated." In this regard we refer to paragraphs [46], [48] and [49] of the minority decision in the Zuma judgment read with, and in contradistinction to, paragraphs [90] - [95] of the majority in the Zuma judgment.

44. The majority justifies their reasoning, *inter alia,* by reference to section 29(10) of the Act, which allows for an investigator to enter upon premises and conduct a search of those premises without a warrant. This, so it is reasoned, is indicative of the fact that the searched need not be informed of what is capable of being seized.

45. It is submitted that this reasoning is flawed as it loses sight, *inter alia,* of the requirements of section 29(10)(a)(ii)(aa) of the Act, which only allows such a warrantless search, *inter alia,* if the investigator has reasonable grounds to believe, importantly, that a search warrant would be issued to him if he were to apply for such. It does not relieve the State from the common law requirements for the conduct of searches nor does it entitle the State to conduct a search or to

seize items outside the scope of the investigation. It is further submitted that the search warrant issued by the Judge President did exactly this in that it permitted the officers of the First and Second Respondents to search for and seize items falling outside the scope of the investigation into the Applicant, particularly items relating to alleged fraud and tax offences in all their possible guises (for which the Applicant was not being investigated).

46. A fundamental purpose of section 29(9)(a), which requires a copy of the warrants to be handed to the person in control of the premises or affixed to a prominent place if such person is not present, is rendered superfluous and/or redundant if the searched need not be informed of what is capable of being seized. This is the effect of the majority judgment. It is contended that this is clearly wrong.

47. Such a construction would defeat a fundamental purpose of section 29(9)(a) and could very well lead to invasions of privacy which are unacceptable, unlawful and contrary to the spirit, purport and objects of the Bill of Rights.

48. It cannot be gainsaid that the interpretation to be given to the Act must promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution.

49. The approach of the majority is: whether or not a warrant is defective depends upon whether it meets the requirements of the empowering statute and that is in turn solely a matter for construction of the statute.

50. The Act determines the jurisdictional facts which must be present in order to satisfy the granting of a search warrant. It does not expressly deal with what a search warrant must contain. The absence of provisions to that effect does not mean that requirements to be found in the Constitution and the common law and laid down in decisions of Courts have no force. In particular, the absence in the Act of a requirement that a search warrant contains a reference to the offences under investigation does not mean that they do not have to appear at all in a search warrant issued under the Act.

5.1. It is submitted that, in the light of the requirements of the Constitution, the common law and previously decided case, it is incorrect to require of the empowering statute, as did the majority, that it alone delineate the validity of the search warrant. This much was the effect of the judgment of this Court in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors fPty) Ltd and others: in re Hyundai Motor Distributors fPty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at [39] *("Hyundai").*

52. The Constitution also prescribes that all conduct of the State must accord with the provisions of the Bill of Rights. For this reason a judicial officer is required

to exercise a discretion to issue a search warrant, and the Act sets up an objective standard to be met prior to the issue of a search warrant and consequent violation of the right to privacy. *(Hyundai* at para [55].)

53. It is submitted that inherent in this objective standard is the requirement that the search warrant itself conveys intelligibly its ambit to both searcher and searched.

54. The majority (at paragraph [99]) found that there is nothing in the express language of section 29 that suggests that a person in charge of premises be furnished with any information relating to the investigation at all. While this may be correct, it overlooks the fact that the Act must be interpreted through the prism of the Constitution. The violation of the right to privacy is not limited by knowledge of the details of the investigation, but rather by a clear description in the search warrant of its ambit and what may or may not be searched for and seized.

55. It is submitted that the reasoning of Lord Denning MRV in *Regina* v *Inland Revenue Commissioners, Ex Parte Rossminster Ltd* 1980 AC 952, as referred to in paragraphs [41] - [45] of the minority decision, should have been adopted by the majority of the SCA.

56. Indeed, as Lord Denning MR put it at 973-974F:

> **"(T)he vice of a general warrant** of **this kind - which does not specify any particular offence - is two-fold. It gives** no **help to the officers when they**

have to exercise it. It means also that they can roam wide and large, seizing and taking pretty well all a man's documents and papers.

There is some assistance to be found in the cases. I refer to the law about arrest - when a man is arrested under a warrant for an offence. It is then established by a decision of the House of Lords that the warrant has to specify the particular offence with which the man is charged: see *Christie v Leachinskv* [1947] A.C. 573. I will read what Viscount Simon said, at p 585:

> 'if the arrest was authorised by magisterial warrant, or if proceedings were instituted by the issue of a summons, it is clear law that the warrant or summons must specify the offence . . . it is a principle involved in our ancient jurisprudence. Moreover, the warrant must be founded on information in writing and on oath and, except where a particular statute provides otherwise, the information and the warrant must particularise the offence charged.'

Lord Simonds put it more graphically when he said, at p. 592:

> 'Arrested with or without a warrant the subject is entitled to know why he is deprived of his freedom, if only in order that he may, without a moment's delay, take such steps as will enable him to regain it.'

So here. When the officers of the Inland Revenue come armed with a warrant to search a man's home or his office, it seems to me that he is entitled to say: "Of what offence do you suspect me? You are claiming to enter my house and to seize my papers." And when they look at the papers and seize them, he should be able to say: "Why are you seizing these papers? Of what offence do you suspect me? What have these to do with your case?" Unless he knows the particular offence charged, he cannot take steps to secure himself or his property. So it seems to me, as a matter of construction of the statute and therefore of the warrant - in pursuance of our traditional role to protect the liberty of the individual - it is our duty to say that the warrant must particularise the specific offence which is charged as being fraud on the revenue.

If this be right, it follows necessarily that this warrant is bad. It should have specified the particular offence of which the man is suspected. On this ground I would hold that certiorari should go to quash the warrant."

57. Sight should not be lost of the fact that, in coming to this conclusion, Lord Denning was not relying on the express wording of any statute and that he was not subject to any constitutional imperatives, as was the SCA.

58. Quite apart from Lord Denning's comments, the minority of the SCA referred- at paragraphs [36]-[40] and [45]-[46] - to South African decisions *(Pullen NO* v *Waia* 1929 TPD 838; *Minister of Justice* v *Desai NO* 1948 (3) SA 395 (A) and *Minister of Law and Order* v *Kader* 1991 (1) SA 41 (A)), New Zealand authority *{Rosenberg* v *Jaine* [1983] NZLR 1, *Auckland Medical Aid Trust* v *Taylor* [1975] 1 NZLR 728 (CA) and *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA)), and Australian cases *(Finance Corporation Ltd v Commissioner of Australia Federal Police* (1991) 103 ALR 167 (Fed C of A) and *Quartermaine v Netto** unreported decision of Toohey J of 14 December 1984), to be satisfied that paragraph [59] of Cameron JA's decision in *Powell* correctly states the position in South African law.

59. The minority appropriately, it is submitted, found that Hurt J was correct in holding in the Zuma matter that all the relevant search warrants were invalid because they did not intelligibly convey the ambit of the search.

60. Because the minority found that the search warrants were unlawful by reason of their over-breadth, they were not required to, and did not, deal with the other arguments advanced as to why the search warrants were invalid.

61. The view adopted by the majority, in effect, reduces the objective standard to a subjective one. It also removes one of the key safeguards available to a party subject to a search which constitutes an unlawful invasion of privacy, namely

urgent proceedings prohibiting the searchers from searching for and removing more than they are in law entitled to.

62. If only the searchers are to know what the search warrant actually intended to authorize them to search for, then the right to privacy may be violated without the searched being able to address it at the most appropriate time - during execution of the search warrant, or even before, should the target of the search become aware of the issuing of the search warrant in question prior to its execution. Such an approach amounts to an invitation for the unlawful execution of a search warrant.

63. Of course, how a warrant can *per se* be intelligible to the searcher, while at the same time not being intelligible to the searched, is not understood. In this regard it should be pointed out that the Act contains no provision requiring the searcher(s) to have read (or have available) the affidavit(s) placed before the judicial officer who authorized the issuing of the search warrant.

64. The Applicant contends that the Thint search warrant was also invalid because the evidence required before a search warrant could be issued under the Act was not present when Ngoepe JP issued the search warrants.

THE NEED FOR A SEARCH

65. **In** *Hyundai*, Langa DP stated at para [55] that:

> "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, s 29(5) provides sufficient safeguards against an unwarranted invasion of the right to privacy."

66. The Third Respondent justified to Ngoepe JP the need to obtain further evidence relating to further payments or other evidence regarding the bribe agreement or payments that may have arisen after the period previously investigated in the most general of terms.

67. Significantly, he did not inform Ngoepe JP of the fact that documentation had been obtained from the Applicant prior to 2001 by way of a summons in terms of section 28 of the Act, and with the co-operation of the Applicant through its attorneys.

68. Quite apart from this material non-disclosure, the Applicant contends that the Third Respondent did not make out a case for the objective need for a search of the Applicant's offices.

68. In attempting to justify the need for a search of the Applicant's premises the Third Respondent stated that it was not surprising that certain documents which he regarded as crucial were not found amongst the Applicant's documentation when the documents were perused at the Applicant's offices.

69. However, the fact that these documents were not found amongst the documents examined by the Respondents in May, June and July 2001 did not of itself establish any factual basis to believe that those documents were on the Applicant's premises on 12 August 2005, some four years later. Even if this was sufficient to show there were reasonable grounds to believe or suspect that the intended search might uncover copies of these documents, this was no justification for the broad search that was authorised, and which was not even confined to these specific documents.

70. The Third Respondent referred, in the same paragraph, to the fact that Alain Thetard ("Thetard") (an employee of the Applicant at the time) was not willing to produce his diary for 2000 pursuant to a section 28 summons and that the diary was indeed later found and seized during searches conducted at the Thales office in Mauritius in October 2001, but failed to inform Ngoepe JP that Thetard had relocated to the office of Thales, the holding company of the Applicant, in Port Louis, Mauritius in the second quarter of 2000. This was known to him as Adv Gerda Ferreira of the Second Respondent's office had deposed to an affidavit on 8 September 2001 wherein she recorded this fact.

71. He stated that "other crucial evidence" was found amongst the Applicant's documentation and that Thetard had not produced this pursuant to the section 28 summons.

71.1. First, it is common cause that the Applicant's documentation was made available to the Second Respondent pursuant to Thetard's section 28 summons.

71.2. Secondly, there is no disclosure of what the so-called "other crucial evidence" consisted of or that these documents were found as a direct result of the co-operation of the Applicant which allowed the investigators untrammelled access to its documentation.

71.3. Thirdly, there was no evidence placed before Ngoepe JP that the Applicant knew that the alleged evidence was crucial and that it was deliberately not disclosed. The assertion by the Third Respondent was also consistent with the inference that the Applicant was unaware of the relevance of the alleged evidence to the investigation.

THE DUTY TO MAKE FULL DISCLOSURE

69. In *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) at para [21] Nugent AJA stated:

> "Where an order is sought *ex parte* it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not willful or *mala fide (Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E - 349B)."

70. In *Powell*, Cameron JA stated at para [42] that:

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

See too the concurring judgment of Southwood AJA in *Powell* at paras [75] and [76].

71. The Third Respondent failed to disclose adequately to the Judge President all the material facts which might have influenced him in authorising the issue of the search warrant or in determining the contents of any search warrant that he may have been minded to authorise.

72. Such material non-disclosure should have resulted in Du Plessis J and the SCA setting aside the search warrant for that reason alone.

THE PRESERVATION ORDER

73. I turn now to the preservation order, which would have been made ■ impermissibly, I submit - if the search warrant were held to be invalid and set aside.

74. Ordinarily, if the seizure of articles is unlawful, so is their consequent retention (see *Ndabeni* v *Minister of Law and Order* 1984 (3) SA 500 (D) at 503G; *Pullen NO. Bartman NO & Orr NO v Waja* 1929 TPD 838 at 852; *Hertzfelder* v *Attorney General* 1907 TS 403 at 406).

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75. The person to whom the articles must be returned is the person from whom they were seized, provided that he, she or it may lawfully possess them (see *Minister van Wet en Orde v Datnis Motors (Midlands) (Edms) Bpk* 1989 (1) SA 926 (A); *Minister van Wet en Orde* v *Erasmus* 1992 (3) SA 819 (A); *Pullen NO. Bartman NO & OrrNO* v *Waja supra* at 852).

16. The right of search and seizure is a right created by statute, without which all searches and seizures are illegal.

77. The right to enter premises, search those premises and remove articles therefrom is a significant invasion of rights and must therefore be exercised within certain clearly defined limits so as to interfere as little as possible with the rights and liberties concerned.

78. The constitutional rights in question in this case are the right not to be subjected to unreasonable intrusions into one's privacy and the right to property.

79. Seizures are executed principally to procure evidence. The evidence-gathering role of the investigation is thus directly linked as a precursor to the evidence-admitting function of the courts.

80. The State, in applying for a preservation order, sought to maintain some right to avail itself of knowledge obtained by unlawful means, which knowledge it

otherwise would not have had. It thus sought to derive for itself an advantage from acting unlawfully that it would not have secured had it not acted at all.

81. The right to be free from the initial invasion of privacy, the right to property and the right to return of articles so seized are interlinked components of the core right to be free from unlawful searches and seizures.

82. The Applicant submits that if the documents unlawfully seized can be held in the manner found by the majority of the SCA in the Mahomed judgment (read with the Zuma and Thint judgments), the protection afforded by the right to be secure from unlawful searches and seizures is of little, if any, value.

83. It is submitted that to hold otherwise is to recognise the right in theory, but in reality to withhold its protection and enjoyment, as was found by Ponnan JA, on whose judgment a goodly number of the following submissions are based.

84. Flowing from the invalid search warrant, and consequent impermissible search and seizure, the Applicant thus has a right entrenched in the Constitution to the return of the articles seized (unlawfully).

85. The rule that the parties be restored to the *status ante quo* is designed both to redress violations of the Constitution and to prevent them from occurring in the future. Its purpose is to compel respect for the guarantees enshrined therein in the only effectively available way, namely by removing the incentive to disregard it. For, as stated by Justice Jackson, '*uncontrolled search and seizure*

is one of the first and most effective weapons in the arsenal of every arbitrary government' (dissenting in *Brinesar* v *United States* 338 US 160 (1949) at 180, quoted with approval by Ponnan JA at paragraph [38] of the Mahomed judgment.)

86. If the courts were simply to escape their responsibility for redressing constitutional violations, people will be secure only in the discretion of the police and the judicial protections of the relevant rights would evaporate.

87. The entire point of the police conduct in this case, that violated constitutional guarantees, was to obtain evidence for use at a possible subsequent criminal trial, against, *inter alia,* the Applicant.

88. The Bill of Rights must not be reduced to a code that the State may abide in its discretion. The Constitution requires more; it demands a remedy for a violation. That principle is well settled. *(Gory v Kolver N.O. and Others (Starke and Others intervening)* 2007 (3) BCLR 249 (CC) at para [40].)

89. It is submitted that, like their common law counterparts, constitutional rights and remedies are complementary. *Ubi ius ubi remedium.*

90. The nature of a constitutional remedy, however, is determined by its object. The harm caused by violating constitutional rights is not merely harm to an individual, but harm to society as a whole.

91. The violation impedes the realisation of the constitutional scheme of creating a just and democratic society.

92. The object, it is submitted, in awarding a remedy should be, at least, to vindicate the Constitution and deter future infringements.

93. Vindication, so it is argued by Currie and De Waal in the Bill of Rights Handbook (5th Ed) at 196, is necessary because harm to constitutional rights, if not addressed, will diminish the public's faith in the Constitution.

94. In the final analysis, a Court order, when there has been a constitutional breach, must afford effective relief to a successful litigant.

95. It is submitted that Ponnan JA was correct (dissenting in the Mahomed judgment) when he referred to the fallacy of the State's argument in seeking to justify a constitutional injunction to fashion a remedy for itself where it had violated the constitutional rights of Ms. Mahomed. It is not the wrongdoer which is to be assisted in this way but rather the victim of the unlawful conduct.

96. It is contended that a *"preservation order"* made together with an order setting aside a search warrant does not constitute effective constitutional relief to the victim of the violation. The making of a preservation order permits the further infringement of the rights secured by the Constitution.

97. As Ponnan JA put it at para [40] of the Mahomed judgment:

> "If the search and seizure in this case are unlawful as invading personal rights secured by the Constitution, those rights would be infringed yet further if the evidence were allowed to be used even to the limited extent postulated by the State."

98. In order to restore both parties to the position they would have occupied had the unconstitutional search not have occurred, it is necessary that the seized items and copies thereof be restored forthwith to the possession of the Applicant, without any preservation order being made.

99. However, as the Applicant, and for that matter the majority of the SCA (see para [17] of Nugent JA's judgment forming part of the Mahomed judgment) understand it, the Respondents want the material to be available to them, if they are able to obtain lawful access to it (whether by a fresh warrant authorizing its seizure, or by the authority of a court order) for the purpose of establishing whether Mr. Zuma or the Applicant have committed offences, or for proving to a court in due course that they have committed offences.

100. It is submitted that no court has the power in law to make a preservation order for that purpose.

101. The retention of the seized material, or copies of the material, even if that material is not read, will be a continuing violation of the Applicant's rights to

privacy, which is protected against violation by section 14 of the Constitution, and to property, which is protected against violation under section 25 thereof.

102. That privacy is violated not only when private communications are read by or exposed to viewing by another, but it is violated just as much merely by dispossessing a person of control over material that he or she is entitled to hold in private. It has been held that *"'The right to privacy encompasses the competence of a person to determine the destiny of his or her private facts.."* *(National Media Ltd and Another* v *Jooste* 1996 (3) SA 262 (A) at 271G.) (See paras [18] and [19] of the judgment of Nugent JA in *Mahomed.')*

103. As found by Nugent JA in para [19] of his judgment in Mahomed, the power of a Court to authorize a continuing violation of protected rights must be found within the four corners of the Constitution if it is to be found at all, for a court has no reservoir of power outside the Constitution in this regard.

104. Section 36 of the Constitution allows for the limitation of rights (which would be the effect of the granting of a preservation order) only if that is permitted by law of general application (and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society that is based on human dignity, equality and freedom, taking into account the factors listed in the section).

105. There are numerous statutory instruments that authorize an intrusion upon rights of privacy and property for the purpose of investigating and prosecuting crime, but it is contended that there is none - whether it be the common law or a statute or a provision of the Constitution itself - that confers a general discretion upon a court to do the same.

106. In ***Mahomed***, Nugent JA commented at para [21] (correctly, it is submitted):

> "It seems to me that the power to fashion remedies for constitutional infringements is given to courts to enable them to vindicate rights rather than to deny them. As Ackerman J said in Fose v Minister of Safety and Security [1997 (3) SA 786 (CC) at para [19]]:
>
> > 'Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.'"
>
> At para [69] *of* ***Fose***, Ackermann J said:
>
> "[I]t is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."

107. The Applicant contends that the power to fashion remedies to redress constitutional violations are not capable of being used to deny such redress so as to serve some other purpose, which was the effect of the judgment of Nugent JA (concurred in by Mlambo JA) in ***Mahomed***.

108. This is particularly so if the purpose that is to be served by denying redress is one that would not have been capable of being achieved by a court had the violation not occurred. That is the consequence of the reasoning of Nugent JA in Mahomed, where despite having found that where there is a violation of constitutional rights that falls to be redressed, he nevertheless concluded at para [27] to [33] that a preservation order may issue in order to determine whether or not - as asserted by Ms Mahomed - the seized documents contained privileged material. That, so it is contended, can never be a reason for permitting a continued violation of Applicant's rights to privacy and property.

109. For while it may be so, as observed by Farlam JA (with whom Cloete JA concurred) in para [56] of the Zuma judgment, that the effective prosecution of crime is an important constitutional objective, that by itself does not confer a general discretion upon a court to supplement the panoply of tools that are available to the State to achieve that objective.

110. And if a court has no general or inherent jurisdiction grounded in a law of general application, to make an order that impinges upon a person's privacy solely because it is useful to do so in the interests of prosecuting crime, then it cannot be so that the contended violation by the State of that privacy somehow creates an authority that does not otherwise exist.

111. It is contended that in paras [27] to [33], and particularly paras [32] and [33], Nugent JA mistakenly relied in ***Mahomed*** on section 36 of the Constitution as a basis for limiting Ms Mahomed's rights to privacy and property in circumstances in which no law of general application existed or could be the foundation for such a limitation. (Cf. ***Hoffmann v South African Airways*** 2001 (1) SA 1 (CC) at para [41], where Ngcobo J made it clear that - as here:

> "The third enquiry, namely whether this violation was justified, does not arise. We are not dealing with a law of general application."
>
> (See too: Currie & de Waal, *op cit,* at 172 - 173.)

112. These separate judgments were delivered in ***Mahomed,*** all of which are germane to a consideration of this appeal. Apart from the significant dissenting judgment by Ponnan JA, there was no majority *ratio* on the constitutional or legal foundation for the grant of the preservation order in ***Mahomed.*** While Farlam and Cloete JJA found no constitutional impediment to the preservation order handed down by the SCA, Nugent and Mlambo JJA on the other hand concluded that the continued infringement of the Applicant's right to privacy was saved by a reliance on the limitations provision in section 36 of the Constitution. That being so, for this reason alone it is submitted that it is clearly in the interests of justice for this Court to pronounce finally on these important issues of constitutional and public significance.

CONCLUSION

113. For all the reasons contained herein the Applicant avers that this application raises constitutional issues and that and it is in the interests of justice that leave to appeal to this Court be granted.

114. As appears from what is set forth above, there are important issues of constitutional and public importance involved in this application and there are reasonable prospects that this Court will reverse or materially alter the order of the SCA. That there are reasonable prospects of success is borne out by the fact that there were two judges in the SCA in Thint who would have found for the Applicant on the validity of the search warrant, and that there was no unanimity in the Zuma and Mahomed judgments.

115. In the circumstances, the Applicant requests this Court to grant it leave to appeal against the dismissal by the majority of the SCA of its appeal against the dismissal by the Pretoria High Court (per Du Plessis J) of its application, *inter alia,* to set aside the search warrant (annexure **"PJM5")** issued by Ngoepe JP on 12 August 2005 and to order the return of all articles seized pursuant thereto.

116. In the event of the application for leave to appeal being granted, and the appeal succeeding, the Applicant seeks a costs order, in this Court, the SCA and the Pretoria High Court, including the costs of the application for leave to appeal

before Du Plessis J. It is contended that it would be appropriate for such costs order to include the costs of three counsel where engaged and, in **all** other instances, the costs of two counsel.

PIERRE JEAN **MARIE ROBERT** MOYNOT

I certify that:

1. the deponent has acknowledged that:

   1.1 he knows and understands the contents of this declaration;

   1.2 he has no objection to taking the prescribed oath;

   1.3 he considers the prescribed oath to be binding on his conscience.

2. The deponent thereafter uttered the words *"I swear that the contents of this declaration are true, so help me God".*

3. The deponent signed this declaration in my presence at the address set out hereunder on this 'Z.^o \V day of NOVEMBER 2007.

COMMISSIONER OF OATHS

WILNA MARAIS
Kommlssarls van Ede/Commisslonar of Oaths
Appointed as such on 13/01/2003 In terms of
section 5{1) of the Justices of the Peace and
Commissioners of Oaths Act, 1963 {Act 16 of 1963)
Cnr/Hv Bronkhorst & Dey Streets / -strate
Brooklyn ref:
9/1/8/2 PRETORIA