IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

In the matters between:

Case No. **CCT89/07**

THINT (PTY) LTD Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND TWO OTHERS Respondents

Case No. **CCT90/07**

THINT HOLDING (SOUTHERN AFRICA) (PTY) LTD AND ANOTHER Applicants

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Respondent

Case No. **CCT91/07**

JACOB GEDLEYIHLEKISA ZUMA AND ANOTHER Applicants

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND TWO OTHERS Respondents

Case No. **CCT92/07**

JACOB GEDLEYIHLEKISA ZUMA Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Respondent

RESPONDENTS' ANSWERING AFFIDAVIT

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I, the undersigned:

JOHAN DU PLOOY

do hereby make oath and say:

1. I am a Senior Special Investigator employed at the Directorate of Special Operations, Promat Building, c/o Cresswell & Moreleta Streets, Silverton, Pretoria, Gauteng.

2. I am duly authorized to make this affidavit on behalf of the respondents.

3. The facts deposed to below are true and correct and, unless the context indicates the contrary or I expressly state otherwise, fall within my personal knowledge or appear from documents under my control or from documents or copies of documents I have seen.

4. Where I make legal submissions, I do so on the basis of advice received from the respondent's legal representatives which I believe to be correct.

INTRODUCTION

CCT89/07 and CCT 91/07 – the search warrant appeals

5. On 12, 15, 18 and 26 August 2005 respectively the Judge President of the Transvaal Provincial Division of the High Court, Ngoepe JP, issued over 20 search warrants ("the August 2005 warrants") in terms of s 29 of the National Prosecuting Authority Act 32 of 1998 ("the NPA Act").

6. On 18 August 2005, pursuant to most of the warrants the Directorate of Special Operations of the National Prosecuting Authority ("the DSO" and "the NPA") undertook searches of premises countrywide. Some 250 members of the DSO participated in the operation. They seized some 93 000 documents.

7. The aim of the searches was to obtain further evidence for criminal proceedings against Mr Jacob Zuma (which were then pending) and for possible criminal proceedings against Thint (Pty) Limited ("Thint") and its associated company Thint Holding (Southern Africa) (Pty) Ltd ("Thint Holding"). (In what follows I refer to Thint and Thint Holding together as "the Thint companies". Previously the Thint group and its companies were variously known as "Thomson-CSF" and "Thales".) Shortly after the searches, the Thint companies were summonsed to stand trial together with Mr Zuma on charges of corruption in the Natal Provincial Division of the High Court (NPD Case No. 358/2005).

8. Case No. CCT89/07 concerns the validity of the search on 18 August 2005 at the offices of Thint in Pretoria done in terms of one of these warrants issued on 12 August 2005. A copy of this warrant is attached marked "**JDP1**". The warrant and the search itself were attacked by Thint in the High Court. In a judgment handed down on 4 July 2006 Du Plessis J rejected the attack and upheld the validity of the warrant and the lawfulness of the search. (Du Plessis J's judgment is unreported. A copy is annexure "**PJM2**" to the Thint companies' founding affidavit in case number CCT89/07.) On 23 November 2006 Du Plessis J granted Thint leave to appeal to the SCA. Pursuant to an agreement and to directions issued by the President of the SCA, the Thint appeal and two appeals against orders by High Courts in Johannesburg and Durban upholding attacks on three other search warrants and searches forming part of the countrywide operation in August 2005 were heard on consecutive days between 27 and 29 August 2007 by the same justices of the SCA.

9. Case CCT91/07 relates to the second search-warrant appeal (The NDPP & 4 Others / J G Zuma & Another, SCA Case No. 639/06).

9.1. In October 2005 Mr Zuma and his attorney Mr Hulley launched an application in the Durban High Court for seven of the search warrants to be declared invalid, for the searches pursuant to them to be declared unlawful and for all the evidence seized

under them to be returned. The matter came before Hurt J in February 2006. He handed down judgment on 15 February 2006 (Zuma and Another v National Director of Public Prosecutions and Others 2006 (1) SACR 468 (D)). He declared five of the search warrants invalid and the searches pursuant to them unlawful and ordered the appellants to return all the evidence seized under them to the respondents.

9.2. The five warrants declared invalid were for searches of the following premises of Mr Zuma and Mr Hulley:

- Mr Zuma's flat in Killarney, Johannesburg. Mr Zuma is the beneficial owner of the flat and previously lived there but he moved to another house and the flat was occupied at the time by two of his sons, his daughter and the wife of one of his sons. A copy of this warrant is attached marked "**JDP2**".
- Mr Zuma's residence complex at the Nkandla Traditional Village in the district of Nkandla in KwaZulu-Natal. A copy of this warrant is attached marked "**JDP3**".
- Mr Zuma's former office at the Union Buildings in Pretoria. A copy of this warrant is attached marked "**JDP4**".
- The offices of the KwaZulu-Natal Department of Economic Development and Tourism in Durban. Mr Zuma had been

the KZN MEC for Economic Development and Tourism. A copy of this warrant is attached marked "**JDP5**".

- Mr Hulley's offices in Durban. A copy of this warrant is attached marked "**JDP6**".

(As stated, Mr Zuma and Mr Hulley also attacked two further warrants but the attacks on them became moot and the High Court accordingly did not make any orders in relation to them.)

10. The last search warrant appeal (The NDPP & Another / J. Mahomed, SCA Case No. 596/05) was against the judgment and order of Hussain J in Mahomed v National Director of Public Prosecutions and Others 2006 (1) SACR 495 (W).

10.1. Two of the search warrants obtained by the DSO in August 2005 authorised searches of the business premises and residence of Mr Zuma's former attorney Ms Julekha Mahomed ("Mahomed"). (I do not attach copies because they are not directly relevant to any of the present applications to this Court.) Pursuant to the searches on 18 August 2005 and after Ms Mahomed had claimed that certain material was privileged, documentary and computer evidence was seized, sealed and lodged with the Registrar of Witwatersrand Local Division of the High Court in

Johannesburg ("the Johannesburg High Court") in accordance with the procedure prescribed in section 29(11) of the NPA Act. Aside from a perfunctory inspection of the material by the persons conducting the search to determine whether on the face of things each item was relevant and to record it on a list of seized items, the material was not inspected by the DSO. The prosecutors and the persons conducting the investigation which gave rise to the search therefore do not know what the seized items contain.

10.2. Ms Mahomed subsequently successfully challenged the validity of the search warrants in the Johannesburgh High Court before Hussain J, who gave judgment on 9 September 2005.

10.3. Although the NDPP appealed to the SCA, prior to the hearing of the appeal by the SCA the NDPP conceded that the relevant search warrants were overbroad and that the consequent searches of Ms Mohamed's premises were unlawful since, due to an inadvertent mistake, the list of documents and items in the annexures to the warrants included a wide range of documents and items which, though relevant to related searches of other persons' premises during August 2005, were not believed or suspected to be in or on Ms Mahomed's premises. Consequently, the affidavit in support of the application for the

warrant did not mention the wider class of documents and items. It was limited to the document and related material described by me in this affidavit below. In the August 2005 warrants the relevant items were described in paragraph 1 of annexure A to the warrants and annexure B thereto.

10.4. The NDPP's submissions to the SCA were therefore confined to motivating an order under section 172(1)(b) of the Constitution aimed at, first, preserving for the ongoing investigation into Mr Zuma and the Thint companies and any possible future proceedings against them, those of the things seized which are covered by paragraph 1 of annexure A to the warrants or by annexure B thereto and, secondly, preserving a reliable record of everything seized because such a record may be necessary if ever it should be contended in any future proceedings that the searches entailed or resulted in an unlawful invasion of legal professional privilege.

11. On 8 November 2007 the SCA handed down its judgments and orders in all three search warrant appeals.

12. It dismissed the appeal brought by the NDPP against the order of Hussain J in favour of Ms Mahomed, but varied the order granted by Hussain J by ordering that copies of material seized under the warrants

which were set aside should be preserved by the Registrar of the Johannesburg High Court for the purpose of establishing the identity of the material seized if in subsequent criminal proceedings before a court the identity of that material was in issue. The preservation order made by the SCA is contained in a judgment prepared by Nugent JA, with whom Mlambo JA concurred. Ponnan JA dissented, holding that in order to restore the parties to the position they would have occupied if the unconstitutional search had not occurred it was necessary that the seized items be restored to the possession of Ms Mahomed. Farlam and Cloete JJA agreed with the order proposed by Nugent JA but said they would not have limited the purpose of preservation to establishing the identity of the material seized. There is no appeal to this Court against the order made by the SCA on 8 November 2007 in the Mahomed appeal. (A copy of the SCA's judgments in this case is annexure "**PJM3**" to the Thint companies' founding affidavit in case number CCT89/07.)

13. The SCA upheld the appeal brought by the State against the order made by Hurt J in the Durban High Court setting aside the five search warrants issued by Ngoepe JP mentioned above, authorising the search of premises occupied or formerly occupied by Mr Zuma and his attorney Mr Hulley. In his judgment which was concurred in by Ponnan and Mlambo JJA, Nugent JA held that the warrants under consideration expressed "*intelligibly and with certainty the scope of the authority that they confer*" and that the statute under which they were issued (the NPA Act) required

no more. In a minority judgment concurred in by Cloete JA, Farlam JA stated that he agreed with Hurt J in the Durban High Court that the warrants were invalid because they did not intelligibly convey the ambit of the search. As stated, Mr Zuma and Mr Hulley now apply to this Court under Case No. CCT91/07 for leave to appeal to this Court against the order made by the SCA. (A copy of the SCA's judgments in this case is annexure "**PJM4**" to the Thint companies' founding affidavit in case number CCT89/07.)

14. The SCA dismissed the appeal brought by Thint against the order made by Du Plessis J in favour of the State. Nugent JA, with whom Ponnan and Mlambo JJA agreed, stated that for the reasons he had given in the appeal brought by the State against the order made in favour of Mr Zuma and Mr Hulley by Hurt J, Thint's appeal had to fail. In a minority judgment with which Cloete JA concurred, Farlam JA said that Thint's appeal should succeed for the reasons he had given in his minority judgment in the appeal against Hurt J's judgment. As stated, Thint now applies to this Court under Case No. CCT89/07 for leave to appeal to this Court against the order made by the SCA. (A copy of the SCA's judgments in this case is annexure "**PJM1**" to the Thint companies' founding affidavit in case number CCT89/07.)

CCT90/07 and CCT 92/07 – the Mauritius MLA appeals

15. In December 2006 the NDPP applied for an order in the Durban and Coast Local Division of the High Court ("the Durban High Court") in terms of section 2(2) of the International Co-operation in Criminal Matters Act 75 of 1976 ("the ICCM Act") issuing a Letter of Request to the Republic of Mauritius. Due to prior undertakings, the NDPP notified Mr Zuma and the Thint companies of the application. They opposed it. The matter was heard by Levinsohn DJP on 22 and 23 March 2007 and on 2 April 2007 he gave judgment granting the application and issuing the Letter of Request substantially in the form sought by the NDPP. (Copies of Levinsohn DJP's order and the Letter of Request form part of annexure "**B**" to Mr Zuma's founding affidavit in case number CCT92/07. A copy of Levinsohn DJP's judgment, which was also attached to and formed part of the Letter of Request, is attached hereto marked "**JDP7**".)

16. The application was the sequel to an earlier Letter of Request issued in 2001. In consequence of this Letter of Request, the Mauritian authorities conducted searches of certain premises belonging to companies and individuals connected with Thint and seized 14 documents relevant to the NPA's investigation into alleged corruption in the arms acquisition process (discussed below). Copies of the documents seized were provided to officials of the NPA and the originals kept by the Mauritian authorities subject to certain restrictions imposed by the Supreme Court of Mauritius.

The 2 April 2007 Letter of Request is aimed at obtaining the originals of those documents, which are required to complete the investigation and for use as evidence against Mr Zuma and the Thint companies should they be tried in the future. It is also aimed at obtaining affidavits of a formal nature from the officials of the Mauritian authorities who uplifted and preserved the documents. This is entirely new information which has not previously been in the possession of the NPA.

17. Mr Zuma and the Thint companies applied for leave to appeal against the judgment and order of Levinsohn DJP. This application was opposed by the NDPP, who in turn gave notice of his intention to bring an application for execution pending appeal. In order to expedite the process the NDPP eventually consented to the granting of leave to appeal – otherwise the application could not be heard for about four months as Levinsohn DJP was away on long leave. Following argument about the application for leave to execute, on 5 June 2007 Hugo J granted leave to execute subject to certain conditions. (A copy of Hugo J's judgment is attached hereto marked "**JDP8**".)

18. The appeal was argued in the SCA on 21 September 2007 before the same panel of judges which had heard the three search warrant appeals between 27 and 29 August 2007.

19. On 8 November 2007 the SCA dismissed the appeal. Nugent JA, with whom all of the other Judges of Appeal agreed, held that the Letter of Request had been properly issued and, in addition, that Mr Zuma and the Thint companies had no standing in law to contest the actions of Levinsohn DJP. (A copy of the SCA's judgment in this case is annexure "**PJM1**" to the Thint companies' founding affidavit in case number CCT90/07.)

20. The Thint companies and Mr Zuma now apply to this Court under Case Nos. CCT90/07 and CCT92/07 respectively for leave to appeal to this Court against the order made by the SCA.

The status of the criminal prosecution

21. As explained more fully below, on 20 September 2006 Msimang J refused an application by the State for a postponement of the criminal trial in the Pietermaritzburg High Court (NPD Case No. 358/2005). (A copy of this judgment is attached marked "**JDP9**".) As a result of the refusal, the proceedings against Mr Zuma and Thint were struck from the roll. Msimang J held that until the appeals in relation to the August 2005 searches had been determined, the status of the evidence gathered by those searches would remain unclear and, because the State had not put up evidence of its prospects of success in the appeals, it had failed to

show that, if the trial was postponed, the contested documents would be available at the trial.

22. In the light of Msimang J's judgment the NPA decided not to take a decision on whether to charge Mr Zuma and the Thint companies again, until after the SCA had determined the status of the evidence seized in August 2005. Currently, the matter is under consideration.

The structure of the rest of this affidavit; outline of the respondents' submissions

23. In the next chapter I outline the course of events to date, starting with the investigation into the arms deal and culminating with an explanation of the importance of the documents sought from Mauritius and obtained in the August 2005 search and seizure operations in South Africa, for the ongoing investigation into Mr Zuma and the Thint companies and for any future prosecution. Briefly stated, their importance arises from the following: during 2006 KPMG prepared a forensic report based on some of the contested documents, amongst others; in September 2006 the State gave the applicants copies of the forensic report and the documents on which it was based (this report, which is very bulky, is not annexed to my affidavit but the respondents tender its delivery if this Court asks for that); many of the seized documents are important to KPMG's analysis of what occurred; the prosecution team has prepared a new draft indictment

based on the forensic report and the relevant contested documents, amongst other things. If, before the current applications for leave to appeal or any resulting appeals are determined, the NPA brings a prosecution of Mr Zuma and the Thint companies, the respondents will seek leave to place the indictment before this Court.

24. There are then chapters setting out the respondents' reasons for contending that the applicants do not have reasonable prospects of success on appeal.

25. The first of these chapters comprises responses to the attacks in the applications for leave to appeal on my affidavit in support of the application for the search warrants, the contents of the search warrants and the conduct of the searches.

26. The second of the chapters on the applicants' prospects of success on appeal outlines the respondents' reasons for contending that even if this Court were to hold that the search warrants or searches were deficient it can and should make an order preserving the evidence obtained so that it is available for a future prosecution. Those reasons include the following: throughout, the State has acted in good faith; the State's transgressions, if any, were legal-technical (e.g. obtaining search warrants which are found to be vague or overbroad in some respects); the applicants can sue for damages if they have suffered an actionable intrusion upon their

privacy; the applicants have had copies of the relevant documents seized from them since September 2006; and the respondents will hand back the originals if there is to be no prosecution.

27. The third of the chapters on the applicants' prospects of success on appeal comprises a response to the attacks on the issuing of the Letter of Request.

28. The last chapter is one setting out the respondents' reasons for contending that the granting of leave to appeal would not be in the interests of justice.

29. Section 167(3)(b) of the Constitution provides that this Court may decide only constitutional matters and issues connected with decisions on constitutional matters.

    29.1. The respondents accept that the applications for leave to appeal against the SCA's decisions in the search warrant appeals (CCT89/07 and CCT91/07) raise constitutional issues. However, essentially for the reasons to be elaborated in the chapters dealing with the applicants' poor prospects of success on appeal and with the appeals not being in the interests of justice, the respondents dispute that the constitutional issues regarding the "merits" (as distinct from the appropriate remedy if any of the

intended appeals is upheld) are issues of substance. The respondents accept that the preservation order issue is a constitutional issue of substance.

29.2. The respondents do not accept that the applications for leave to appeal against the SCA's decision in the Mauritius MLA appeal (CCT90/07 and CCT92/07) raise constitutional issues. In the alternative, for the same basic reasons as those applicable to the "merits" of the search warrant appeals, the respondents dispute that any constitutional issues which might be raised are issues of substance.

30. I shall not deal *ad seriatim* with the contents of the affidavits in support of the applications for leave to appeal to this Court because I do not want to burden this affidavit with what (in many instances) will be repetition of the points made in the chapters outlined above. If leave to appeal is granted or if this Court calls for written argument on the applications for leave to appeal, the respondents will deal in argument (and with reference to the appeal record) with any factual inaccuracies or incorrect submissions in the applicants' affidavits to the extent that it is necessary to do so.

THE RELEVANT EVENTS TO DATE

31. In this chapter I begin by giving a brief history of the investigation into what came to be known as the arms deal. I then describe briefly the prosecution of Mr Schabir Shaik and his companies and their subsequent appeals to the SCA and Constitutional Court. Next I shall explain how the investigation against Mr Zuma and Thint remains current despite the conclusion of the prosecution against Mr Shaik. I shall give a broad outline of the history of the previous criminal proceedings against Mr Zuma and the Thint companies, the nature of the evidence against them and the importance of the contested documents for the investigation.

The investigation into the arms deal

32. On 6 November 2000 the Director of the then Investigating Directorate: Serious Economic Offences instituted a preparatory investigation in terms of section 28(13) of the NPA Act. Section 28(13) empowers the Investigating Director to hear evidence in order to enable him to determine if there are reasonable grounds to conduct an investigation in terms of section 28(1)(a) of the Act. The preparatory investigation, in summary, related to allegations of corruption and/or fraud in connection with the acquisition of armaments at the Department of Defence in respect of negotiations and or contracts concluded with regard to the purchase of

corvettes, submarines, light utility helicopters, maritime helicopters, lead in fighter trainers and advanced light fighter aircraft.

33. On 24 August 2001 the Investigating Director instituted an investigation contemplated in terms of section 28(1)(a) of the Act. The terms of the investigation included the suspected commission of offences of fraud and/or corruption in contravention of the Corruption Act, 94 of 1992, or the attempted commission of these offences, arising out of the armaments acquisition for the Department of Defence, involving the prime bidders/contractors in terms of which certain contracts and/or sub-contractors for the supply of armaments were concluded and more specifically in respect of the following contracts and sub-contracts :

34. The German Frigate Consortium (between African Defence Systems (Pty) Ltd, Thyssen Rheinstahl Technik GmbH, Blohm & Voss GmbH, Howaldtswerke Deutsche Weft AG and Thomson-CSF NCS France) as prime bidder/contractor for the supply of corvettes for the Corvette programme.

35. African Defence Systems (Pty) Ltd as sub-contractor for the German Frigate Consortium for the supply of the corvette combat suite for the Corvette Programme, including the undue payment to Futuristic Business Solutions (Pty) Ltd for the supply of Integrated Logistic Support Services and/or the solicitation/payment/agreement of undue payments involving

entities directly or indirectly linked to African Defence Systems (Pty) Ltd, Futuristic Business Solutions (Pty) Ltd and/or Thomson-CSF (The further specified contracts which are mentioned in my designation are not strictly relevant to this affidavit.)

36. I was duly designated by the Investigating Director to conduct such investigation on his behalf in terms of section 28(2)(a) of the Act. On 22 October 2002 the investigation was extended to include:

"The suspected commission of fraud and/or corruption in contravention of the Corruption Act, No. 94 of 1992, or the attempted commission of these offences, arising out of:

i. payments to or on behalf of or for the benefit of Jacob Zuma by Schabir Shaik and/or the Nkobi group of companies and/or the Thomson/Thales group of companies; and

ii. the protection of, and/or wielding of influence for, and/or using public office to unduly benefit the private business interests of Schabir Shaik and/or the Nkobi group of companies and/or the Thomson/Thales group of companies by Jacob Zuma."

and

"The suspected commission of offences of

i. theft of company funds by Schabir Shaik from the Nkobi group of companies;

ii. tax evasion by Schabir Shaik and/or the Nkobi group of companies in contravention of the Income Tax Act, No. 58 of 1962;

iii. making false entries in the books and records of the Nkobi group of companies and/or failing to keep proper books and records in respect of the Nkobi group of companies in contravention of the Companies Act, No. 61 of 1973;

iv. fraud against the shareholders of the Nkobi group of companies."

37. I was also duly designated by the Investigating Director to conduct such extended investigation on his behalf in terms of section 28(2)(a) of the Act.

38. On 8 August 2005, the investigation was extended to include:

"The suspected commission or attempted commission of the following offences:

(a) Fraud pertaining to declarations made by Jacob Gedleyihlekisa Mr 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.

(b) Contraventions of the Income Tax Act, No 58 of 1962, in respect of the declarations referred to above by Jacob Gedleyihlekisa Mr Zuma."

As is apparent, the essence of the additional offences was that Mr Zuma had fraudulently failed to disclose the payments he had received from Mr Shaik and his companies to Parliament, the Cabinet and SARS.

39. On 1 December 2006 the investigation was further extended to include racketeering and money laundering in contravention of the Prevention of Organised Crime Act, No. 121 of 1998 ("POCA"), committed by Mr Zuma, Thint and persons associated with Nkobi.

40. I am the lead investigator in the investigation, as part of a larger team of investigators and prosecutors headed by Adv W J Downer SC and including Adv A L J Steynberg and Adv G D Baloyi.

The trial of Mr Shaik and his Nkobi group of companies

41. The investigations mentioned above that were declared up to 22 October 2002, led to the successful prosecution of Mr Shaik and several of his companies in the Durban High Court on charges of corruption, fraud and money laundering. (The judgment of the trial court is reported as S v Shaik and others 2007 (1) SACR 142 (D).) The trial commenced on

11 October 2004 and it was concluded when sentence was pronounced on 8 June 2005. As this Court knows from its consideration earlier this year of the ultimate application for leave to appeal by Mr Shaik and his companies, the essence of the convictions is as follows:

41.1. Count 1:

The accused were convicted of corruption in contravention of section 1(1)(a) of the Corruption Act 94 of 1992 (the "Corruption Act"), in that they had made regular payments to Mr Zuma that extended over a period of some 7 years between 1995 and 2002. It was found that there were various instances where Mr Zuma had used his official positions to assist Mr Shaik's businesses over the years when he was receiving payments. Mr Zuma was at various times during the period under investigation a member of the provincial cabinet in KwaZulu-Natal, a member of Parliament, the Deputy President of the African National Congress ("ANC") and the Deputy President of the Republic.

41.2. Count 2:

The accused were convicted of fraud, in that they had been party to the falsification of certain accounting records, partly to conceal some of the payments that had been made to Mr Zuma.

41.3. Count 3:

Mr Shaik was convicted of corruption in contravention of section 1(1)(a) of the Corruption Act, in that he had been party to a request that Thint should pay an annual bribe to Mr Zuma in order to secure Mr Zuma's protection against the then current official investigations concerning the arms deal and to secure Mr Zuma's support for future Thint's projects in South Africa.

Two of the Nkobi companies were convicted on the alternative count of money laundering in contravention of sections 4(a) and 4(b) of POCA. These companies were used to channel funds that Thint had paid in pursuance of the agreement to pay the annual bribe to Mr Zuma.

42. After hearing evidence and argument on the appropriate sentences, the trial court pronounced an effective sentence of 15 years imprisonment upon Mr Shaik on 8 June 2005. The corporate accused were sentenced to heavy fines.

43. I should explain at this juncture, the following:

43.1. In August 2003 the NPA decided not to prosecute Mr Zuma. The NDPP announced that that whilst there was a *prima facie* case of corruption against Mr Zuma, the NPA had decided not to prosecute him because it was not sure that its prospects of

success were strong enough for a winnable case. Further, the decision would be reviewed should any further evidence come to light. He announced then the decision would be reviewed should any further evidence come to light.

43.2. Thint (Pty) Ltd had been indicted, together with Mr Shaik and the Nkobi companies. The charges against it were, however, withdrawn on 11 October 2004 before the trial commenced, for reasons that were not related to the strength of the case against it. In other words, there was always and remains a *prima facie* case with a reasonable prospect of a successful prosecution against both Thint Holding (Pty) Ltd and Thint (Pty) Ltd. The withdrawal against Thint (Pty) Ltd followed an earlier agreement between the NPA and Thint (Pty) Ltd to withdraw the matter against Thint (Pty) Ltd in exchange for a certain affidavit that Mr Thétard provided. The factual issues in this respect have been extensively traversed in extremely voluminous papers that were filed in support of Thint's application for a permanent stay of prosecution and the NPA's opposition to such application. As explained below, applications for a permanent stay of prosecution by Thint (and Mr Zuma) were not decided, because the trial was struck from the roll. I am firmly of the view that there exists no legal bar to the reinstitution of the prosecution against Thint (Pty) Ltd or any of the other erstwhile accused.

The unsuccessful appeals against the verdict in the Shaik trial

44. On 6 November 2006 the Supreme Court of Appeal comprehensively confirmed the findings of the trial court (S v Shaik and Others 2007 (1) SA 240 (SCA)). The issues and the evidence on which the convictions were based are comprehensively summarized in the judgment. Suffice it to say that the SCA confirmed the trial court's evaluation of all the evidence and found the State case to be correct in virtually every respect.

45. On 2 October 2007 this Court dismissed a further application by Mr Shaik his Nkobi companies for leave to appeal against their convictions and sentences (Shaik and Others v S 2007 (12) BCLR 1360 (CC)). It found that there were no reasonable prospects of success on any of the points raised, many of which had in fact been abandoned in argument before it and none of which related directly to the evidence led at the trial.

The evidence against Mr Zuma and the Thint companies accepted in the Shaik criminal proceedings

46. The State led the evidence of 43 witnesses in the prosecution against Mr Shaik and his companies. Furthermore, thousands of pages of documentary evidence were presented. It is impossible, for the purposes of this affidavit, to attempt to present the detail of the witness and

documentary evidence. Suffice it to say, for present purposes, that the trial court found that the evidence supported the convictions on each of the charges. Some of the court's findings strongly support the conclusion Mr Zuma and the Thint companies were complicit in the commission of the offences in respect of which Mr Shaik and the other accused were convicted on Counts 1 and 3 (the corruption charges and the alternative money-laundering charge).

47. The Shaik trial court's judgment is very long and it would be an impossible task to summarise all the aspects which it covers. The following are examples taken from the judgment that fairly illustrate how the evidence points to Mr Zuma's and Thint's complicity (the references are to the SACR report cited above – S v Shaik and others 2007 (1) SACR 142 (D)):

47.1. Count 1:

"*These four episodes show in our view that Zuma did in fact intervene to try and assist Shaik's business interests*." (186b-c)

"*Shaik's assumption of control of Zuma's income and expenditure, was indeed one thing that a friend could reasonably and properly do, but this went much further. Instead of just stabilising the situation and managing Zuma's chaotic finances thereafter, so that the debts could be paid off and financial stability restored, Shaik then made it possible for Zuma to*

continue living beyond his means by the payments which constitute the factual matrix of Count 1, without anyone else knowing the quid pro quo that he would ask for and which the evidence establishes." (190b-c)

"*It would be flying in the face of common sense and ordinary human nature to think that he did not realise the advantages to him of continuing to enjoy Zuma's goodwill to an even greater extent than before 1997; and even if nothing was ever said between them to establish the mutually beneficial symbiosis that the evidence shows existed, the circumstances of the commencement and the sustained continuation thereafter of these payments, can only have generated a sense of obligation in the recipient. If Zuma could not repay money, how else could he do so than by providing the help of his name and political office as and when it was asked, particularly in the field of government contracted work, which is what Shaik was hoping to benefit from. And Shaik must have foreseen and, by inference, did foresee that if he made these payments, Zuma would respond in that way. The conclusion that he realised this, even if only after he started the dependency of Zuma upon his contributions, seems to us to be irresistible*." (190f -191a)

"*Accepting then the evidence of these witnesses as the truth of the matters they described, makes the case on Count 1 not just convincing in total, it is really overwhelming.*" (201f)

47.2. Count 3:

"*The evidential foundation of the main charge is the handwritten draft with the encrypted fax or, for practical purposes, the agreed translation into English, which are Exhibits E25 to 26 and E30, respectively. It is not disputed that Exhibit E25/26* ["the fax"] *was written by Thétard, nor that he and Shaik were both directors at the time of Thomson-CSF (Pty) Limited, as accused No 11 was then called. Nor was it disputed that the plain and obvious meaning of the fax is that a proposed arrangement discussed at two previous meetings by Shaik and Thétard on 30 September 1999 in Durban and by Thétard and Perrier on 10 November 1999 in Paris, respectively, was confirmed with a third meeting in Durban on 11 March 2000 of Shaik, Thétard and Jacob Zuma, and agreement reached about that proposal. Nor is it disputed that the document was composed, as the draft indicates, to be sent by encrypted fax to Thétard's two superiors in Paris, including Perrier*.

It was received in evidence, after objection was raised, as being a declaration by Thétard made as a co-conspirator with the present accused No 1 of an act in furtherance of a common

purpose, the common purpose alleged being that the arrangement suggested at the two earlier meetings and confirmed at the third was the offering of a payment of money to Zuma to use his authority and influence, first, to protect and, thereafter, promote the interests of the Thomson-CSF companies, and Zuma's acceptance thereof. It was an executive declaration in the carrying out of an unlawful conspiracy which was no less an executive statement because it mentioned the two historical earlier meetings that led to the third meeting. Those references were an integral part of the executive statement and explained the basis on which the final agreement was made.

On that basis it was held to be one of the accepted vicarious liability statements that are received as exceptions to the hearsay rule when the charge is brought against a co-conspirator or in support of a conspiracy to commit an offence." (213 c-f)

"*The State's case was that the draft fax spoke for itself. The arrangement discussed between Shaik and Thétard on 30 September 1999 was the payment of a sum of money to Jacob Zuma in return for his help in the possible difficulties that they were facing; that this was put by Thétard to Perrier on his visit to Paris on 30 November and that thereafter at the meeting of 11 March of Thétard and Shaik with Zuma this was either put*

to and accepted by Zuma or to confirm to Thétard his acceptance of the suggestion already made to Shaik. In return for the sum of money offered he agreed to protect Thomson's interests in any official investigation of irregularities into the Sitron programme which, it is common cause, was a reference to the armaments suite of the corvettes, and thereafter to promote Thomson's interests in its bids for more Government-driven public works in the future.

This, says the State, is all clearly established by the fax." (214a-c)

"We have no doubt eventually, for these reasons, that the explanation advanced by the accused that the agreement described in the fax was for a donation is not only not reasonably possible, it is nothing short of ridiculous and we reject it as false." (230d)

"*We have no doubt at the end of it all that this document reports the conclusion of an agreement reached by Shaik and Thétard that Thomson would pay Jacob Zuma R500 000 a year until the ADS dividends became available, in order to secure the two benefits for Thomson, namely that he would provide a present protection from the corvette acquisition investigation and*

hereafter help in securing Government contracts in the future." (231j - 232a)

"*On that basis it was clear from his evidence that whatever took place at the meeting between himself and Thétard with Zuma, he was there to make sure that Zuma understood Thétard and Thétard understood Zuma. His previous experience of the French had left him wary of their behaviour in some circumstances and he wanted to ensure there was clarity about the result*.

If that is the case, it is not possible to accept that the only evidence connecting Zuma with the fax is the code that is mentioned in the document. Whatever that code was, Shaik's evidence made it clear that all the parties knew what was discussed and what was concluded." (233d-f)

"*Secondly, it overlooks the fact that, whether fraudulently induced or not, both the deceived parties would be expecting a performance and a counter-performance from each other once the agreement was concluded, and if either failed to deliver thereafter the reaction of the disappointed party would very likely be to complain to the other. The complaint might not achieve any satisfaction but it could well reveal the deception. The mere fact that a code was the form of communicating acceptance*

would not prevent a party aggrieved by non-performance from later taxing the non-performer. Whether in code or not, it is the parties' understanding of the agreement that would be affected and explanation likely sought if no result occurred, and there could be no guarantee on Shaik's part that such a development might never come to pass."

Thirdly, the argument pays no regard to the probabilities of the agreement. If accused No 1 was acting as a sort of dishonest broker, he would not arrange the actual end agreement in the presence of the two parties for there is no way he could ensure that neither of the two intended victims of his false representation would not ask a question or make an answer or a remark that would expose his plan. It is the sort of risk no person bent on such a subterfuge would run." (233 f-i)

"*In the result, we are amply satisfied that the cumulative effect of the evidence establishes to the necessary degree and beyond a reasonable doubt that this was the means whereby money was to come from Thomson for the benefit of Zuma, as arranged in the meeting that is recorded in the encrypted fax.*" (237h)

48. The encrypted fax, which was in French, reads as follows (the English translation is the one used by the SCA in S v Shaik and Others 2007 (1) SA 240 (SCA) para 166):

"AT

J de J A

C R JP Perrier

Encrypted fax

re: J Z/S Shaik

Dear Yan,

Following our interview held on 30/9/00 with S Shaik in Durban and my conversation held on 10/11/1999 with Mr JP Perrier in Paris, I have been able (at last) to meet JZ in Durban on 11th of this month, during a private interview, in the presence of SS.

I had asked SS to obtain from JZ a clear confirmation or failing which an encoded declaration (the code had been defined by me), in order to validate the request by SS at the end of September 1999. Which was done by JZ (in an encoded form).

May I remind you that the two main objectives of the "effort" requested of Thomson are:

• Protection of Thomson CSF during the current investigations (Sitron)

• Permanent support of JZ for the future projects

Amount: 500k ZAR per annum (until the first payment of dividends by ADS). Yours truly,"

49. In the Shaik proceedings it was common cause that:

- "*AT*", "*J de J*", "*JZ*" and "*SS*" are the initials of Mr Alain Thétard, Mr Yan de Jomaron, Mr Jacob Zuma and Mr Schabir Shaik, respectively;
- Mr Thétard was the chief executive officer of Thomson-CSF Holding (Southern Africa) (Pty) Ltd and a director of Thomson-CSF (Pty) Ltd;
- Mr De Jomaron was the chief executive officer of Thomson (Africa) Ltd;
- "*C R*" is the French abbreviation for "copy to";
- "*Sitron*" refers to the corvette-acquisition programme; and
- "500k ZAR" stands for R500 000.

50. Most of the facts, considerations and findings mentioned above apply to both Mr Zuma's and Thint's complicity in the offences. In addition, the following apply particularly to Thint's complicity.

50.1. <u>Count 3</u>:

The evidence against Thint in all its relevant local and international forms and against the relevant officers locally and internationally is clear and unambiguous. It is also obvious from the trial court's judgment that the agreement concerning the request for a bribe and its payment in accordance with the false service provider agreement included the complicity of at least Mr Thétard and his superiors in France and Mauritius, namely

Mr Perrier and Mr De Jomaron. Mr Thétard was, at the relevant time, a director of both Thomson-CSF (now Thint) Holdings (Pty) Ltd and Thomson-CSF (now Thint) (Pty) Ltd respectively. In terms of section 332(1) of Act 51 of 1977, criminal liability for his actions may accordingly be ascribed to these companies.

50.2. Count 1:

50.2.1. There is no direct evidence that Thint participated in or associated itself with the payments to Mr Zuma that emanated from Mr Shaik and the Nkobi companies. Nevertheless, there are reasonable grounds to infer its complicity, on the bases set out in the following subparagraphs.

50.2.2. Documentary evidence that was obtained from the Thint offices suggests that Thint saw Mr Zuma as a rising force of influence in government well before he became Deputy President in mid 1999.

50.2.3. It is also obvious from the documentation that Thint regarded it as useful to its prospects of success in obtaining government contracts to cultivate the informal approval of those with influence at the pinnacle of government. This was confirmed under oath by the

defence witness Mr Moynot, who was the local Thint director prior to Mr Thétard.

50.2.4. One of the Thint projects that Thint sought to pursue from a very early stage in South Africa was to sell to the S A Navy combat suites for corvette vessels that the government was to purchase from foreign manufacturers. To this end, Thint targeted for acquisition the local company that was later called African Defence Systems (Pty) Ltd ("ADS") which had good prospects of being chosen to provide the combat suites. Thint chose Mr Shaik and his Nkobi group to be its intended local partner in the ADS acquisition. It is a reasonable inference that one of the factors which made Nkobi an attractive partner was that Mr Shaik had the correct connections with government, including with Mr Zuma, which Thint considered so important in improving its chances of obtaining government work. It is a further reasonable inference that Thint was aware that one of the factors securing Mr Shaik's influence with Mr Zuma was that Mr Shaik was funding Mr Zuma. Not surprisingly Mr Moynot specifically denied this. The inference remains nevertheless.

50.2.5. Furthermore, Thint later came to learn that its choice of Mr Shaik and Nkobi as its partner in the ADS acquisition did not apparently carry the approval of the South African government and that this might affect its prospects of successfully obtaining the combat suites contract. Thint immediately excluded Nkobi from the ADS acquisition. The documentation indicates that Thint sought a meeting with Mr Zuma to discuss this difficulty. Moynot testified that this was at least partially because Thint knew that Mr Zuma was Mr Shaik's friend. The inference remains nevertheless that Thint knew that his influence was also secured by payments of money.

50.2.6. When Mr Shaik learned at a later stage that he had been excluded from the ADS acquisition, he also sought Mr Zuma's assistance. Eventually, Mr Zuma and Mr Shaik met Mr Perrier of Thint in London. As a result of the meeting (confirmed by a later meeting between Mr Zuma, Mr Perrier and Mr Shaik in Durban), Thint reversed its decision to exclude Mr Shaik and Nkobi from the ADS acquisition.

50.2.7. Mr Zuma's assistance benefited both Mr Shaik and Thint, which now had the assurance of government approval for its choice of local partner in the ADS acquisition that it considered so important in seeking to sell the combat suites to the government. As it happened, ADS became the successful provider of the combat suites to the government. The Shaik trial court found that this was one instance in which Mr Shaik sought and obtained Mr Zuma's assistance and that could be linked to the ongoing corrupt payments. It should be mentioned for the sake of completeness, however, that the court found that this instance by itself was not technically an instance of a contravention of the Corruption Act, although it illustrated the intention of the parties.

50.2.8. Finally, the unambiguous evidence in respect of Count 3 suggests that Mr Zuma agreed to provide protection to Thint concerning the impending official investigations concerning the arms deal. This presupposes that there was some preceding irregularity in respect of which Thint considered that it needed protection. It is a reasonable inference that one of the irregularities that Thint did not wish to have exposed by the investigation

was Mr Zuma's informal intervention that secured both Nkobi's participation in the ADS acquisition and, eventually, ADS' success in securing the combat suites contract. Thint sought to frustrate the ordinary course of the official investigations and so prevent the true extent of the corruption in respect of Count 1 being exposed. In this sense it is reasonable to infer that it is at least an accessory after the fact to the corruption on Count 1.

The defences of Mr Shaik, Mr Zuma and Thint

51. As appears from some of the extracts from the judgment quoted above, the Shaik trial court considered and rejected the defences put up by the accused in respect of each charge. It would unduly burden this affidavit to present the detail of such defences. In summary, Mr Shaik's defences were as follows:

51.1. Count 1:

The accused contended that the series of payments made to or on behalf of Mr Zuma over the period 1995 to 2002 constituted either loans to Mr Zuma or donations to the ANC. They were not given corruptly and the instances in which Mr Zuma assisted Mr Shaik or his businesses were not related to the payments.

51.2. Count 2:

Mr Shaik admitted that his and two related company loan accounts that were written off in the group records in the 1999 financial year, were irregularly written off under false descriptions. These loan accounts included some of the moneys that had been paid to Mr Zuma. Mr Shaik contended that this was done without his knowledge at the instance of his auditors.

51.3. Count 3:

Mr Shaik admitted that a meeting between him, Mr Zuma and Mr Thétard took place, as reflected in the encrypted fax (although on 10 March 2000 and not 11 March 2000) and that the other meetings mentioned in the fax had occurred. Mr Shaik contended, however, that the subject of the meetings was a request that Thint make an innocent donation to the Jacob Zuma Education Trust.

In respect of Thint's payment to Mr Shaik's company in February 2001, the accused contended that this was an ordinary business transaction between Thint and Nkobi arising from an innocent service provider agreement between Thint and Nkobi that had nothing to do with the preceding request for a donation, and also nothing to do with any request for a bribe, as there had been no

such request.

52. During the investigation which preceded the Shaik trial, Mr Zuma agreed to provide written answers to written questions concerning the allegations of corruption against him. I do not wish to burden this affidavit with a copy of the questions and answers, i.e. Mr Zuma's version. In summary, Mr Zuma denies any wrongdoing. Regarding the facts on which the two charges of corruption on which the Shaik trial accused were eventually convicted, are based, the gravamen of Mr Zuma's response was as follows:

52.1. Count 1:

Mr Zuma denied that he received any payments (as opposed to loans) from Mr Shaik or the Nkobi companies over the period 1995 to 2002. He said that he was a party to a loan agreement with Mr Shaik, under which he received loans for personal expenses.

52.2. Count 3:

Mr Zuma said that he did not meet Mr Thétard and Mr Shaik on 11 March 2000 as stated in the encrypted fax. He denied that the contents of the fax are true. (Mr Zuma makes no mention of a meeting between himself, Mr Shaik and Mr Thétard the previous day during which a request for a donation to the Jacob

Zuma Education Trust was discussed, in accordance with Mr Shaik's testimony at his trial.) Mr Zuma concedes that he might have met representatives of the Thint group in Paris and/or in South Africa from 1997 onwards, but contends that only general matters relating to his official portfolios would have been discussed. (As the request for a donation to the Jacob Zuma Education Trust is not a matter relating to Mr Zuma's official portfolios, Mr Zuma thus in effect denied that he met Mr Shaik and Mr Thétard and discussed a donation to the Trust.)

53. Questions concerning Mr Zuma's involvement in the matter under investigation were directed to him in Parliament on 14 February 2003. In his reply on 12 March 2003, he denied any wrongdoing. (I do not wish to burden this affidavit with a copy of the questions and answers.) In particular, Mr Zuma denied attending a meeting with Mr Thétard and Mr Shaik in Durban on 11 March 2000; and his reply makes no mention of any meeting with Mr Thétard and Mr Shaik in Durban on 10 March 2000, in accordance with Mr Shaik's version, or on any date at all to discuss the request for a donation to the Jacob Zuma Education Trust.

54. Thint's version of events is largely that of Mr Thétard. He was questioned at an early stage of the investigation when the State was not yet in possession of a copy of the encrypted fax. His answers concerning allegations of corruption differed in the informal interview session from

those he gave formally under oath, although both versions amounted to a denial that he had ever been approached for a bribe. After a copy of the encrypted fax was obtained, Mr Thétard refused to return to South Africa to answer further questions concerning it. Thint subsequently provided the State with an affidavit by Mr Thétard in which he admits that he is the author of the fax. In a further (unsolicited) affidavit which Mr Thétard provided, he claims that he crumpled the fax and disposed of it in a waste-paper basket and that the contents are merely his loose thoughts. During the Shaik trial the prosecution witness Ms Sue Delique, who was Mr Thétard's secretary, testified to the contrary that Mr Thétard had asked her to type the fax and fax it to the Thint headquarters in Paris, which she did. She did not retrieve it from a waste-paper basket. She provided the State with a stiffy disk that contained the typed version of the fax that was proved to have been typed on 17 March 2000, which was 6 days after the meeting on 11 March 2000. Expert evidence proved that the fax was not crumpled as Mr Thétard claims.

55. In summary, as matters stood at the end of the Shaik trial there was no credible evidence that reasonably detracted from the State's evidence against Mr Zuma or Thint on both charges of corruption.

The indictment of Mr Zuma and Thint in 2005

56. On 20 June 2005, following the conviction and sentencing of Mr Shaik and his companies in the Durban High Court earlier that month, the NDPP announced the NPA's decision to indict Mr Zuma on at least two counts of corruption in terms of the Corruption Act. Shortly before this, Mr Zuma had been relieved of his position of Deputy President of the Republic of South Africa by the President because of Mr Shaik's conviction and the acceptance by the trial court of evidence implicating Mr Zuma in corruption.

57. Mr Zuma subsequently appeared in a magistrate's court on 29 June 2005. During the proceedings at a later appearance, an indictment and summary of substantial facts were served on Mr Zuma. The State regarded these as provisional, as it was envisaged that they would in due course be amended before the trial commenced to encompass the results of a new investigation that had been conducted since the Shaik trial. As explained more fully below, this new investigation was (and still is) continuing.

58. On 4 November 2005 the provisional indictment was served on Thint Holding and Thint, joining them as accused numbers 2 and 3 and summonsing them for trial in the Pietermaritzburg High Court on 31 July 2006 (NPD Case No. 358/2006). I will not burden this affidavit by attaching the provisional indictment and summary of facts. For present

purposes suffice it to say that it is based on the evidence that was presented and accepted at the Shaik trial.

The further investigation into Mr Zuma and Thint

59. After the conclusion of the Shaik trial on 8 June 2005, it was envisaged that Mr Zuma and the Thint companies should be prosecuted on at least two counts of corruption. As explained above, there was evidence arising from the Shaik trial supporting Mr Zuma's and Thint's prosecution on charges that mirrored the two corruption charges on which Shaik was convicted. However, it was also clear that a significant number of aspects required further investigation before the new charges could be settled and their trial commenced. The question arose whether their first appearance in court should be delayed until the completion of the further investigation. The most important part of the further investigation considered necessary was the search and seizure operation that was then being planned. (As explained, it subsequently took place on 18 August 2005.)

60. From the outset it was foreseen that the evidence that would be available to the State to indict the applicants would differ significantly from the evidence available for Mr Shaik's indictment ("the Shaik indictment"), for the following main reasons:

60.1. The State's investigation of the payments made by Mr Shaik and his companies to Mr Zuma, only extended to payments made up to 30 September 2002. As this was the date up to which a comprehensive set of bank statements had been obtained, it was selected as the cut-off date for the investigation. The Shaik indictment accordingly only reflected payments that the State had uncovered up to that date. The Shaik indictment was also based on the forensic report which in turn was also limited in the main to facts discovered up to the end of 2002. The decision to prosecute Mr Zuma and the Thint companies was taken during the latter half of 2005, some two and a half years later.

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

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

60.4. The evidence led during the Shaik trial, including the defence evidence, cast a new light on the nature of the offences and the structure of the relationships between the various role-players. Furthermore, evidence emerged relating to certain declarations made by Mr Zuma to Parliament and Cabinet which appeared to be in conflict with the proven facts.

60.5. It was envisaged overall that a number of aspects relating to the possible charges against Mr Zuma and Thint required further investigation, the results of which would inevitably affect the charges. It was consequently likely that the new forensic report, for all the above reasons and others that would probably be discovered by the forensic auditors as their new investigation unfolded, would differ substantially from the old. Once again, this would inevitably mean a substantially different set of charges.

60.6. Finally, looking back on the Shaik trial it appeared to the prosecution that the manner in which Mr Shaik had conducted himself and his Nkobi group in relation to Mr Zuma, the Thint group and others amounted to institutionalized corruption on an ongoing basis constituting the crime of racketeering. Since Mr Zuma and the Thint companies were all *prima facie*

associates with Shaik and his enterprise, this provided further reason to contemplate additional charges.

61. However, for various reasons the NDPP decided that it was inadvisable to delay taking the decision to allow the further investigation to be completed. Consequently, as explained above, the decision to prosecute Mr Zuma was made shortly after Mr Shaik had been sentenced in June 2005. Mr Zuma was arraigned in a magistrates' court with a view to an eventual trial in the High Court. The first postponement (to 12 October 2005) was for further investigation. This accorded with the State's intention to complete the further investigation before the trial commenced in the High Court.

62. Different considerations applied to the Thint companies: further attention had to be devoted to the legality of recharging Thint in the light of the earlier agreement to withdraw charges against it in the Shaik case. In the result, it was decided only after the searches in August 2005 that the two Thint companies should be indicted.

63. On 26 July 2005 KPMG was mandated to conduct a thorough, independent forensic investigation in this matter.

64. On 11 August 2005 I made the main affidavit in support of the application for the search warrants which gave rise to the searches on 18 August

2005. In that affidavit, a copy of which is attached marked "**JDP10**" (without the annexures thereto), I made it clear that the prosecution of Mr Zuma may extend beyond the two counts of corruption on which Mr Shaik had been convicted. In addition to explaining the investigation into the arms deal, the trial of Mr Shaik and his Nkobi group of companies and their unsuccessful appeals, the evidence against Mr Zuma and the Thint companies which was accepted in the Shaik trial and the defences of Mr Shaik, Mr Zuma and Thint, my affidavit gave a detailed explanation of the investigators' new lines of enquiry. Amongst other things, I explained the following further matters:

64.1. In the course of the investigation which culminated in Mr Shaik's conviction, the State undertook search and seizure operations on 9 October 2001 at various premises of Mr Shaik and his companies in Durban and of the Thint group of companies in Mauritius and France. These searches did not include Mr Zuma's premises and those of his associates. It made sense to search them as well now that the investigation was focused on the crimes of which he was suspected.

64.2. As the State's case unfolded in the Shaik trial, numerous aspects had come to light which required further investigation. Mr Shaik for instance for the first time suggested in his evidence in his trial, that the payments to Mr Zuma had been made under a

"*revolving loan agreement*" between him and Mr Zuma. Mr Zuma's former attorney Ms Mohamed was called in support of this defence. She testified that she was the author of the agreement and that she had witnessed Mr Zuma and Mr Shaik signing it. She said that the original document should have been kept in her office file but that, despite diligent search, she was unable to find it. She was unable to give a satisfactory explanation of the fate of the document. The High Court in essence found that the loan agreement was a sham. This defence obviously justified and called for further investigation to determine whether it was true.

64.3. The State adduced the evidence of a forensic auditor in its prosecution of Mr Shaik to demonstrate that the payments to Mr Zuma were made with a corrupt purpose *inter alia* because they were made at a time when Mr Shaik and his companies could ill-afford them. Now that the focus was on Mr Zuma, it was similarly important for the State to gather as much evidence as possible of all the sources of funds available to him to determine whether he could ever reasonably have expected to be able to repay the money he received from Mr Shaik and his companies. The need to do so was heightened by the fact that the investigation had revealed that Mr Zuma had received significant funding from sources other than Mr Shaik, his companies and

Thint, including what appeared to be suspect funding from a Mr Kögl and his company Cay Nominees (Pty) Limited, a Ms Fakude-Nkuna and her company Bohlabela Wheels (Pty) Limited and a Mr Vivian Reddy.

65. On 18 August 2005 the State conducted most of the search-and-seizure operations authorised by Ngoepe JP.

66. Before Mr Zuma appeared in the Magistrate's Court on 11 October 2005, the State indicated that it intended to apply for a postponement for further investigation and the preparation of the indictment. The main reason for this was that a large volume of documents seized during the searches of 18 August 2005 still needed to be analysed. The State proposed to supply the final indictment by the end of March 2006, as part of a broader proposal to postpone the matter. Mr Zuma however rejected the proposal.

67. The State accordingly applied for the matter to be transferred to the High Court in terms of section 75 of the Criminal Procedure Act 51 of 1977 ("the CPA") prior to serving an indictment. Mr Zuma opposed the transfer. The matter was eventually resolved by agreement. A critical condition of this agreement was that the indictment to be served before the next appearance on 12 November 2005 was to be "*provisional*", a fact recorded by the presiding magistrate. What this meant was that the State would be entitled to continue with its investigations and would in due course furnish

a "*final*" indictment. The State indicated that it would endeavour to provide the "*final*" indictment by the end of March 2006, which (in the circumstances that prevailed at the time of the agreement) was estimated to be a reasonable period for the completion of the outstanding investigations.

68. It was on this basis that the State agreed to a trial date of 31 July 2006, and the Judge President was approached for his approval of the trial date. On 12 October 2005 the parties met with the Judge President and arranged the trial date of 31 July 2006.

69. Thereafter, further applications were brought to impugn the search-and-seizure operations that had been conducted on 18 August 2005. Cumulatively, these applications severely disrupted the State in its preparation for the trial date of 31 July 2006. Aside from the protracted and time-consuming process of opposing each of the applications, until late May 2006, when substantial progress was made in the settlement discussions with some of the applicants in the search warrant applications (the discussions ultimately proved fruitless), the forensic auditors were unable to finalise their report and the State was therefore unable to finalise the indictment.

70. The barrage of applications brought by various parties to have declared unlawful the searches conducted on 18 August 2005, were the following:

70.1. On 26 August 2005 Ms Mahomed, an attorney who had acted for the first accused, applied to set aside the search warrants relating to her practice. As explained in paragraph 10 above, Hussain J of the Johannesburg High Court set aside the search warrants on 9 September 2005. Leave to appeal to the SCA was however granted.

70.2. On 10 October 2005 Mr Zuma and his attorney Mr Hulley applied to set aside some of the search warrants. As explained in paragraph 7 above, Hurt J of the Durban High Court set aside some of the search warrants on 15 February 2006. The State ultimately applied for leave to appeal and it was granted pursuant to an overall agreement to expedite the hearing of the search-warrant related appeals by the SCA.

70.3. These applications were the only ones which had been brought before 12 October 2005 when the parties agreed to go to trial on 31 July 2006.

70.4. Subsequently on 14 October 2005 Mr Shaik and two of the companies in the Nkobi group applied to the Durban High Court to set aside the search warrants for the searches of their

premises. As stated earlier, that matter has never been set down for hearing.

70.5. On 17 November 2005 Mr Jurgen Kögl and his company Cay Nominees (Pty) Ltd applied to set aside some of the search warrants in the Pretoria High Court. As stated earlier, that matter too has never been set down for hearing.

70.6. On 5 January 2006 Thint and Thint Holding and others, applied to set aside some of the search warrants. As explained in paragraph 6 above, on 4 July 2006 Du Plessis J of the Pretoria High Court dismissed Thint's application. It then applied for leave to appeal which was granted pursuant to the overall agreement to expedite the hearing of the search-warrant related appeals by the SCA referred to earlier.

71. When the bulk of the evidence the State had gathered in the searches of 18 August 2005 came under attack, it became impossible for KPMG to prepare its report because the attacks created uncertainty about the status of the evidence and whether the State could make use of it or not. The delay in the completion of the KPMG report in turn delayed the finalisation of the indictment because the one is the cornerstone of the other.

72. As explained, the State entered into settlement discussions with the accused and their associates with a view to settlement of their attacks on the searches of 18 August 2005. By May 2006 those discussions with legal representatives of Mr Zuma and Mr Hulley had reached a point where the State felt with a tolerable degree of confidence that its preparation could proceed on the bulk of the documents in its possession on the basis that the remaining disputes about their admissibility would be submitted to the trial court for determination. (The forensic auditors had access to the documents in issue in the application by Mr Zuma and Mr Hulley, because the delivery of the State's application for leave to appeal had suspended the operation of Hurt J's judgment and Mr Zuma and Mr Hulley had not applied for any relief under Uniform Rule 49(11).)

73. The forensic accountants accordingly only commenced finalizing the report from late May 2006. Consequently, the report could never be ready far enough in advance of the trial date of 31 July 2006 to enable the parties to prepare for trial. Without the report, the State was not in a position to finalize the indictment, much less to provide the further particulars that the accused had requested. The forensic report was however completed in time for the proceedings in the Pietermaritzburg High Court on 5 September 2006, where it was handed to the legal representatives of the accused together with copies of all the documents referred to in it.

74. In the meantime, on the trial date of 31 July 2006 the State had applied for a postponement to allow it to complete the final indictment on the basis of the new evidence and report. Mr Zuma and the Thint companies opposed the State's application, applied to have the matter struck off the roll and launched a counter application for a permanent stay of prosecution. The trial was adjourned to 5 September 2006 for the hearing of those applications and a timetable was fixed for the exchange of papers in the counter-application for a permanent stay.

75. On 5 September 2006 Msimang J ruled that he would deal with the State's application for an adjournment before the accused's counter-application for a permanent stay. As he reserved judgment in the postponement application immediately after the conclusion of the argument about it, he did not hear argument on the permanent stay application. As stated above, on 20 September 2006 Msimang J delivered a judgment refusing the State's application for a postponement. As the State then indicated that it was not ready to proceed to trial, he struck the matter from the roll.

76. In his judgment refusing the postponement, Msimang J was very critical of the State's decision to embark upon the prosecution precipitously and in circumstances in which (so he held) the State ought to have realized that the outstanding investigations would not be concluded within a reasonable time. In the light of this, the NPA decided to complete all outstanding investigations and resolve the interlocutory (search-warrant) appeals

before any decision was to be taken on whether or not to re-charge Mr Zuma and the Thint companies.

77. The further investigations included applying to the High Court to issue letters of request to Mauritius and the United Kingdom to obtain outstanding documentation. This in turn led to two new bouts of litigation in respect of both requests by Mr Zuma and the Thint companies, both of which were resolved in favour of the State in the High Court. As explained, the appeal to the SCA in respect of the Mauritian MLA request was unanimously dismissed on 8 November 2007. It is the subject of one of the present applications for leave to appeal to this Court. As regards the United Kingdom MLA request (which was determined by Van der Merwe J in the Pretoria High Court on 14 September 2007), I submit that the terms of the judgment and the merits of the matter are such that leave to appeal is unlikely to be granted. (A copy of Van der Merwe J's judgment is attached hereto marked "**JDP11**".)

78. The Mauritian authorities have already agreed to execute the request directed to it pursuant to Levinsohn DJP's judgment and Hugo J's order permitting execution despite the (then pending) appeal. This is being opposed by Thint in Mauritius and the matter is presently before the courts there. Mr Zuma has also made representations to the Attorney-General of Mauritius. The South African prosecution team is assisting the Mauritian authorities in this matter.

79. Immediately upon the delivery of the SCA's judgments in favour of the State on 8 November 2007, the prosecuting team commenced a process aimed at finalizing a draft indictment based on all the available evidence, both old and new, in the light of the SCA judgments. This process of drafting, consultation and assessment was completed by 11 December 2007 and the NPA is currently considering the matter as a whole with a view to taking a decision on prosecution.

The importance of the contested documents for the investigation and any future criminal proceedings

80. The new evidence obtained during and after the Shaik trial, though as yet untested in a trial (unlike the old evidence), is substantial and affects the essence of any future prosecution. The extent and gravity of the charges has grown when compared to the two charges of corruption and the fraud charge (with alternatives) on which Mr Shaik was convicted.

81. Some of the more significant aspects of the new evidence that the State will put up in any future criminal proceedings against Mr Zuma and the Thint companies are the following:

81.1. On the count of "general" corruption in the Shaik trial, Mr Shaik and the Nkobi companies were convicted for making corrupt

payments to Mr Zuma up to September 2002 in the amount of R1 249 224.91. The new documents have revealed that the alleged corrupt payments continued to at least June 2005 in the aggregate amount of R4 072 499.85 for the whole period of 1995 to June 2005. The payments based on the old and the new evidence are therefore more than three times greater than those based on the old evidence alone.

81.2. The 229 payments discovered for the period 1995 to 30 September 2002 and presented in evidence in the Shaik trial totalled R1 249 224.91. With the new documents, there are 354 payments for the same period in the aggregate of R2 081 676.66. In other words, further substantial payments totalling more than R800 000.00 had not been discovered on the basis of the old documents.

81.3. Mr Zuma fraudulently failed to declare to SARS and to Parliament and the Secretary of the Cabinet (to all of whom he owed duties of disclosure) the gross income which he received by way of the payments, as described above. The evidence currently available to the State suggests that Mr Zuma did not declare taxable income of some R2 779 514.20 and evaded taxation of some R1 167 971.00 over the period 1995 to

February 2004 (the end of the 2004 tax year). This aspect of the investigation is continuing.

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

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

81.6. The new documents also identify new sources of income (new projects) for the Nkobi group about which investigations were necessary to determine if and the extent to which Mr Shaik relied on his "political connectivity" and in particular his relationship with Mr Zuma. Those investigations and the analysis of the new documents together with the old, have revealed Mr Zuma's involvement, or Mr Shaik's use of his name, in a significantly

greater number of instances than originally discovered and proved at the Shaik trial. The trial court dealt with some four such instances which tended to show that Mr Zuma corruptly provided assistance to Mr Shaik, the Nkobi group and (in one instance) Thint. There are now some 28 instances which tend to show such assistance.

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

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

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

82.2. The financial position of Mr Zuma, including his reliance on third-party financial assistance to maintain his lifestyle.

82.3. Nkobi's and Mr Shaik's links to other political office bearers as part of the conduct of the business of Nkobi.

82.4. The financial position of Mr Shaik, the financial position and performance of the Nkobi group and the effect on the Nkobi group of the payments to Mr Zuma.

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

84. The new documents referenced in the new forensic report include those seized from the following premises during August 2005 relevant to the present applications:

84.1. Mr Hulley's offices in Durban, 235 references relating to payments and 35 relating to the narrative;

84.2. Mr Zuma's former office at the Union Buildings in Pretoria, 2 references relating to payments and 33 relating to the narrative;

84.3. Mr Zuma's former offices at the KwaZulu-Natal Department of Economic Development and Tourism in Durban, 2 references relating to the narrative; and

84.4. Thint's offices in Pretoria, 22 references relating to the narrative.

85. The new documents referenced in the new forensic report include the following further documents seized during August 2005 from the following further premises:

85.1. the Nkobi premises, 862 references relating to payments and 44 relating to the narrative;

85.2. the premises of Cay Nominees, 12 references relating to the narrative;

85.3. the premises of Mr Kögl, 3 references relating to the narrative;

85.4. the premises of Ms Fakude-Nkuna, 10 references relating to the narrative;

85.5. the premises of Mr Reddy, 1 reference relating to the narrative.

86. The accumulation of all the new evidence obtained as a result of the 2005 searches and the further investigation pursuant to the new documents and perspectives, together with the consequent re-analysis of the old documents and evidence, provides a firm basis for the institution of a prosecution.

THE SEARCH WARRANT APPEALS

Thint's attacks on the application for the search warrants

87. In its application for leave to appeal to this Court Thint seeks to impugn the search warrant under which its offices were searched on the basis that the *ex parte* application for the search warrants that came before the Judge President failed to disclose material facts which ought to have been disclosed. I will address each of the facts which Thint says should have been disclosed. I will submit that its complaints are unfounded and based on a misconception of the duty of disclosure in a case such as this one. I will accordingly first deal generally with the duty to make full disclosure in *ex parte* applications and the operation of that duty in a case such as this one before I deal with Thint's complaints one by one.

88. The duty to make disclosure of all material facts in an *ex parte* application is settled and well known. It was by virtue of this duty that the SCA held in Powell that an applicant for a search warrant was "*under a duty to be ultra-scrupulous in disclosing any material facts that might influence the court in coming to its decision"* (Powell NO and Others v Van der Merwe NO and Others 2005 (5) SA 62 (SCA) ("Powell") para 42).

89. The basis of the duty of disclosure is a duty of utmost good faith owed to the court when a litigant comes before it without notice to its opponent (Schlesinger v Schlesinger 1979 (4) SA 342 (W) 348G to H; National

Director of Public Prosecutions v Basson 2002 (1) SA 419 (SCA) para 21). It is important to bear in mind that it is utmost good faith that the law requires, no more and no less. The law requires scrupulous candour and anything less is not good enough. At the same time however it does not demand more. It does not require any greater vigilance than utmost good faith. In other words, the duty to display utmost good faith requires disclosure of all the material facts within the applicant's knowledge. A litigant who made full disclosure in utmost good faith cannot be faulted simply because there was a material fact of which he or she was unaware. The duty is limited to the disclosure of facts known to the applicant.

90. The duty is also limited to the disclosure of material facts. A fact is material if it is one "*which might influence a court in coming to its decision"* (National Director of Public Prosecutions v Basson 2002 (1) SA 419 (SCA) para 21). It is not limited to facts that will alter the court's decision. It includes all facts which might do so. By the same token, the duty does not extend to all the facts that are relevant to the application for the warrant as Thint seems to suggest. It is only those facts that might influence a court in its decision that need be disclosed. This requires that a value judgment be made because there is no bright line between the facts which might influence a court in its decision on the one hand, and those that are relevant but not sufficiently significant to make a difference on the other.

91. Where an applicant fails to disclose material facts, the failure is not necessarily fatal to the application. The court retains a discretion to dismiss the application for want of disclosure or to condone it if there are "*very cogent practical reasons"* to do so (Schlesinger v Schlesinger 1979 (4) SA 342 (W) 350B; The Reclamation Group (Pty) Ltd v Smit & Others 2004 (1) SA 215 (SECLD) at 223D to E; Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Ed at 367 to 368).

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

93. I submit that in these circumstances the application for the warrants which was made in August 2005, required me to exercise a value judgment as to what to put into the application and what to leave out. It was not an everyday case where an applicant for a warrant can simply err on the side

of caution by putting in all the information that might conceivably be of some relevance. It would not only have been logistically impossible for me to garner, record and disclose all the relevant information but the sheer mass of it would have submerged the Judge President who would have needed months to read, absorb and digest it. It would have defeated the purpose of the exercise which was merely to determine whether the DSO should be permitted to search the premises concerned. It was an important decision because it involved rights of privacy but it was at the same time not a judgment which finally determined the rights and obligations of the parties involved.

94. As indicated in paragraph 64 above, a copy of my 11 August 2005 affidavit in support of the application for the search warrants is attached marked "**JDP10**".

95. I accept that there will always be room for debate about the things that I could have added or left out, but submit that my affidavit in the warrant application was clearly a carefully considered, balanced and fair piece of work. I highlight the following features (where necessary referring to the relevant paragraphs in my affidavit in the warrant application (annexure "**JDP10**")):

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

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

95.2. I set out what I considered to be the basic facts in what I submit was a lucid, clear and careful manner. I told the background story in broad brushstrokes for instance in my description of the prosecution of Mr Shaik (paragraphs 10 to 18) and the ongoing investigation before then (paragraphs 3 to 9) and since then (paragraphs 19 to 23), but gave considerably more detail when I dealt with the evidence against Mr Zuma and the Thint companies (paragraphs 24 to 35) and the basis upon which there was reason to believe that further matters required investigation (paragraphs 36 to 37.3.12.4 and 37.3.13 to 37.3.19).

95.3. I submit that it is clear from my affidavit that I went out of my way to give the court a balanced picture and not only the prosecution's perspective of the case. I disclosed for instance that although the investigation had included search and seizure operations on 9 October 2001 at various premises of Mr Shaik and his companies in Durban and at various premises in France and Mauritius related to the Thint grouping and its officers

(paragraph 37.3.1), documentation was obtained from the Thint corporate premises in Midrand before the searches in 2001 by summons and with the co-operation of Thint through its attorneys (paragraph 37.3.2). I disclosed that Thint had previously been charged together with Mr Shaik and his companies but that the charges against Thint had been withdrawn at the commencement of the trial in terms of an agreement between the NDPP and Thint's legal representatives (paragraph 12). I disclosed that at that stage (August 2005) Mr Shaik had obtained leave to appeal against aspects of his conviction and sentence (paragraph 16) and intended to seek further leave from the SCA to appeal against the remaining aspects (paragraph 17). I also dealt not only with the incriminating evidence against the suspects, but also with the exculpatory evidence which tended to point the other way (paragraphs 30 to 35).

96. I consequently submit that a reading of my affidavit in support of the application for the search warrants reveals that I made frank disclosures, where necessary, and that I did not withhold any material facts.

97. I accordingly dispute Thint's general allegation that I "*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 might have been*

minded to authorise" (paragraph 71 of Thint's affidavit in case number CCT89/07; see also paragraph 68 thereof).

98. Moving from the general to the specific, Thint argues, first, that I failed to inform "*Ngoepe JP of the fact that documentation had been obtained from [Thint] prior to 2001 by way of a summons in terms of section 28 of the Act, and with the co-operation of [Thint] through its attorneys"* (paragraph 67 of Thint's affidavit in case number CCT89/07).

99. In response, I submit that this complaint is unjustified. I did in fact disclose Thint's previous co-operation. I described the questioning of Thétard at an early stage of the investigation (paragraph 34 of my affidavit in the warrant application), the search and seizure operations undertaken in 2001 at the premises of the Thint group of companies in France and in Mauritius (paragraph 37.3.1 of my affidavit in the warrant application) and the fact that documentation had been obtained from Thint's erstwhile premises in Midrand both by way of subpoena and with the co-operation of Thint acting through its attorneys (paragraphs 37.3.2 and 37.3.11.3 of my affidavit in the warrant application). I deny that there was any duty on me to make more detailed disclosure of these earlier investigations.

100. Secondly, Thint accepts the correctness of the assertions in my affidavit in the warrant application that Mr Thétard was not willing to produce his diary for 2000 pursuant to a summons under section 28 of the NPA Act and that

the diary was later found and seized during searches conducted at the Thint office in Mauritius in October 2001, but complains that I failed to inform the Judge President that Thétard had relocated to Mauritius in the second quarter of 2000 (paragraph 70 of Thint's affidavit in case number CCT89/07).

101. In response, I submit that this complaint is typical of the kind of complaint which I have submitted is illegitimate. It is an armchair complaint made after the event by picking out some aspect which was disclosed, and by arguing that it should have been described in greater detail. There will always be matters of that kind and if such complaints were allowed, then no application for a search warrant in a substantial case will ever be upheld.

102. Thirdly, Thint apparently accepts the correctness of the assertion in my affidavit in the warrant application that certain crucial documents were not found amongst the documents examined between May and June 2001, but complains that that does not "*establish any factual basis to believe that those documents were on [Thint's] premises on 12 August 2005, some four years later*" (paragraphs 68 and 69 of Thint's affidavit in case number CCT89/07) or justify a warrant for a "*broad*" search, i.e. one not "*confined to these specific documents*" (paragraph 69 of Thint's affidavit in case number CCT89/07).

103. In response I point out that one of the requirements for a search warrant in terms of s 29(5) is that "*there are reasonable grounds for believing that [relevant evidence] is on or in [the premises sought to be searched] or suspected to be on or in such premises"*. In Hyundai this Court held that what the section requires is that the judicial officer "*make an independent evaluation and determine whether or not there are reasonable grounds to suspect that an object that might have a bearing on a preparatory investigation is on the targeted premises*" (my emphasis) (Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) ("Hyundai") para 37; see also para 49).

104. I dealt with the facts relevant to this issue in the warrant application at some length:

104.1. I described the suspicious activities of Mr Kögl. He paid amounts totalling R656 000 through his company Cay Nominees (Pty) Limited to or for the benefit of Mr Zuma. He gave contradictory explanations for these payments and has never given a satisfactory account of the source of the money. A document obtained at the Thint offices dated 17 May 1999, indicated that Mr Kögl was at that time an authorised

representative of Thint (paragraphs 37.3.11.1 to 37.3.11.4 of my affidavit in the warrant application).

104.2. By far the largest payment Mr Kögl made to or for the benefit of Mr Zuma, was an amount of R600 000 paid on 23 August 2001. On the same day, Mr Shaik met Mr Thétard and Mr De Jomaron at the Thint offices in Mauritius. They created two documents which the High Court found in the Shaik case to have been false transactions designed to disguise payments made by the Thint group to one of Mr Shaik's companies for the benefit of Mr Zuma. In my affidavit I said that it was once again a reasonable inference "*that the Kögl payment is related to (Thint)"* (paragraphs 37.3.11.5 and 37.3.11.6 of my affidavit in the warrant application).

104.3. The evidence concerning the activities of Mr Vivian Reddy indicated that payments he made to Mr Zuma's builder may have been reimbursed from moneys received from the Thint group. As I pointed out in my affidavit, the High Court had indeed made such a finding in the Shaik case (paragraphs 37.3.13 to 37.3.15 of my affidavit in the warrant application).

104.4. I accordingly contended that it was necessary to obtain further evidence including, "*evidence relating to any further payments by*

Thompson/Thales/Thint or any other evidence regarding the bribe agreement or payments that may have arisen, after the period previously investigated, and including any relevant evidence relating to the charges of corruption that may not have been discovered previously because the relevant premises were not searched, or because the relevant evidence was not, at the time of the searches, at the relevant premises" (paragraph 37.3.15.3 of my affidavit in the warrant application; see also 37.3.17).

104.5. Lastly, I said that it was in my experience reasonable to expect that such evidence would be available at Thint's offices (paragraph 37.3.16 to 37.3.16.4 of my affidavit in the warrant application).

105. Finally in this regard, I submit that even if this Court should hold that I ought to have disclosed all or some of the matters about which Thint complains, it would not follow that it should set aside the warrant. It has a discretion whether to do so or not. I submit that there are compelling reasons to exercise its discretion in favour of the State:

105.1. The first is that I acted in good faith all along. If I was guilty of any non-disclosure, then it was inadvertent.

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

105.3. The third is that it is in any event unlikely that it would have made any difference to the outcome of the application even if I had made the disclosures for which Thint contends. As Du Plessis J pointed out in his judgment in the Pretoria High Court: "*[Thint] is presumed to be innocent. There is a reasonable possibility however that it might not be. Common sense dictates that the persons investigating [Thint's] possible guilt must bear in mind the possibility that it might not be willing to furnish to the investigators all the relevant evidence. In this context the search was necessary*" (annexure "**PJM2**" to the Thint companies' founding affidavit in case number CCT89/07).

105.4. The fourth is that, what is in issue in this case, is not merely the private interests of the parties, but also the public interest. Thint was being investigated for the commission of very serious crimes and it may yet be charged again. It is in the public interest that the truth be found so that Thint can be charged and convicted if it is guilty and acquitted if it is innocent. The evidence gathered under the warrant will contribute to that cause. There is accordingly compelling reason not to set aside the warrant.

Thint has not offered any cogent reason why the court should do so.

Mr Zuma's and Mr Hulley's attacks on the application for the search warrants

106. In their application for leave to appeal to this Court Mr Zuma and Mr Hulley seek to impugn the search warrants relating to their premises on the ground that my affidavit in support of the application for the search warrant "*failed to establish the necessary jurisdictional pre-requisite under Section 29(5)(c) of the NPA Act, which requires that the need, in regard to the investigation, for a search and seizure in terms of Section 29 of the NPA Act must be established to the judicial officer issuing the warrant*" (paragraph 51 of Mr Hulley's affidavit in case number CCT91/07 (his emphasis); see also paragraphs 107 to 113 thereof). More specifically, they contend that I had to justify the need "*to conduct the search and seizure operation under Section 29, rather than under the less invasive powers of the Criminal Procedure Act*" (paragraph 111 of Mr Hulley's affidavit in case number CCT91/07) or under section 28 of the NPA Act (paragraph 113 of Mr Hulley's affidavit in case number CCT91/07 quoting extensively from Hurt J in Zuma and Another v National Director of Public Prosecutions and Others 2006 (1) SACR 468 (D) 483H to 486E).

107. I accept that in terms of s 29(5) read with s 29(1) of the NPA Act, a judicial officer may only issue a warrant if there are reasonable grounds for believing that there is or is suspected to be relevant evidence in or on the premises concerned. In considering this question, the judicial officer must in terms of s 29(5)(c) have regard to "*the need … for a search and seizure in terms of this section"*.

108. In the Durban High Court Hurt J held that a search warrant was justified only if its use was "*reasonable in all the circumstances"* (Zuma and Another v National Director of Public Prosecutions and Others 2006 (1) SACR 468 (D) 484D). I submit with respect that this is the correct test. In coming to this conclusion however, Hurt J also accepted submissions which pitched the test much higher. He accepted the submissions of counsel for Mr Zuma and Mr Hulley that an applicant for a search warrant must satisfy the judicial officer "*that there is no reasonable prospect of obtaining the evidence by less disruptive and incursive means"* (484B) and "*that the powers under s 28 would probably not result in the evidence being obtained"* (484C).

109. The latter test makes s 29 of the NPA Act unworkable. The DSO can never prove that there is no reasonable prospect of getting the evidence from the suspect by asking him for it or by issuing a subpoena against him to produce it. At most it will be able to show that there is a real risk that, if it were to follow any of these lesser routes, the suspect might destroy the

evidence or dispose of it. If there is such a risk, then it is reasonable to follow the search and seizure route rather than risk losing the evidence altogether. This approach is consistent with the test set out in Hyundai:

"*It is implicit in this section that the judicial officer will apply his or her mind to the question whether the suspicion which led to the preparatory investigation, and the need for the search and seizure to be sanctioned, are sufficient to justify the invasion of privacy that is to take place. On the basis of that information, the judicial officer has to make an independent evaluation and determine whether or not there are reasonable grounds to suspect that an object that might have a bearing on a preparatory investigation is on the targeted premises.*" (Hyundai para 37. See also para 52 of the proper interpretation of Section 29(5))

110. An assessment of what is "*reasonable in all the circumstances*" must take into account that, as explained in paragraph 92 above, this is not a run of the mill case. It is vast. Consequently, as explained in paragraph 93 above, the application for the warrants which was made in August 2005 required me to exercise a value judgment as to what to put into the application and what to leave out.

111. I submit that a search warrant such as the ones in issue in these applications is a tool the legislature has put at the disposal of the DSO. It must be used with caution and subject to scrupulous judicial supervision.

But the standard for its use must also not be set at a level so strict and so high that the tool becomes impossible to employ in a case such as this one. For this reason, the majority in the SCA found (at paragraph 104 of the judgment) that "*the court below set the bar far too high in requiring that the material could not be obtained by invoking the provisions of section 28*".

112. This is an important point of principle because, although this case is much bigger than the run of the mill criminal case, it is precisely for purposes of cases of this kind that the legislature has designed the tool of search and seizure under s 29 of the NPA Act. This Court made the point in Hyundai that it is a tool that the legislature put at the disposal of the DSO for "*the investigation of certain serious offences detrimentally affecting our communities"* (Hyundai para 53). It is designed to combat serious crime. It is meant to be used in bigger cases. It is important not to set the requirements for a warrant under s 29 at a level which is so strict that the tool is placed beyond the reach of the state in the combat of serious crime as the legislature intended.

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

114. In my affidavit in support of the application for the warrants, I went to some lengths to explain why further investigation was necessary and why it was necessary to do so by search warrant.

115. As regards the investigators' new lines of enquiry, some of these are explained in paragraphs 60 and 64 above. In addition:

115.1. As explained in paragraph 104 above, in my affidavit in support of the application for the warrants I described at some length and in some detail the evidence available to the prosecution which indicated that Mr Jurgen Kögl and his company Cay Nominees (Pty) Limited made substantial payments to or for the benefit of Mr Zuma. The evidence also suggested that they may have done so as intermediaries and that the funds may have emanated from Thint. I identified a number of questions arising from this evidence which had to be investigated (paragraph 37.3.11.7 of my affidavit in the warrant application).

115.2. In my affidavit in support of the application for the warrants I also said that Ms Nora Fakude-Nkuna and her company Bohlabela Wheels (Pty) Limited had made four payments to Mr Zuma's builder for his account. She was unable to provide any satisfactory explanation or documentary justification for these

payments (paragraphs 37.3.12.1 to 37.3.12.4 of my affidavit in the warrant application).

115.3. In my affidavit in support of the application for the warrants I also said that Mr Vivian Reddy and his corporate vehicles Edison Corporation (Pty) Limited, Edison Health (Pty) Limited and Development Africa Trust had made substantial payments to or for the benefit of Mr Zuma. In the Shaik trial the Durban High Court had found that one of the Thint bribes in an amount of R250 000 which was destined for Mr Zuma, was channelled to Mr Shaik who in turn paid it to Development Africa Trust. Mr Reddy in turn provided very substantial financial assistance to Mr Zuma for which he has failed to give any satisfactory explanation (paragraphs 37.3.13 to 37.3.13.5 of my affidavit in the warrant application). I identified a number of questions arising from this evidence which called for further investigation (paragraph 37.3.13.6 of my affidavit in the warrant application).

115.4. In my affidavit in support of the application for the warrants I also said that Mr Shaik had acted as Mr Zuma's financial adviser for years. After his conviction in the criminal trial however, he resigned as Mr Zuma's financial adviser in July 2005. Pursuant to his resignation, his attorney sent all the documents Mr Shaik had held as Mr Zuma's financial adviser to Mr Zuma's new

attorney Mr Hulley. These documents had a direct bearing on the financial affairs of Mr Zuma and were an obvious source of valuable evidence of payments made to him or for his benefit, not only by Mr Shaik but also by others (paragraph 39 of my affidavit in the warrant application).

116. I concluded that it was necessary to gather further evidence about these matters and summarised the evidence concerned in some detail (paragraphs 37.3.15.1 to 37.3.15.5 of my affidavit in the warrant application).

117. I turn now to Mr Zuma's and Mr Hulley's specific complaints that in my affidavit supporting the application for the search warrants I failed to show the need for search warrants under section 29 of the NPA Act rather than search warrants under section 20 of the CPA or that the additional evidence could not be obtained by issuing summons against the relevant witnesses to produce their documents and answer questions under s 28 of the NPA Act.

118. I note that in their application for leave to appeal to this Court Mr Zuma and Mr Hulley contend that the powers under Chapter 5 of the NPA Act are significantly more invasive than the powers of questioning and search and seizure powers under the CPA because the former do not "*recognise a right to silence, or a right against self-incrimination, the threshold of*

relevance is differently worded and the penalties are more severe than the penalties under the Criminal Procedure Act" (paragraph 110 of Mr Hulley's affidavit in case number CCT91/07). They do not explain why a search and seizure in terms of s 29 of the NPA Act violates the accused's rights to remain silent and not to be compelled to give incriminating evidence while a search and seizure in terms of s 20 of the Criminal Procedure Act does not. It is correct that s 29 of the NPA Act includes ancillary powers which s 20 of the Criminal Procedure Act does not. Sections 29(1)(a), (b) and (c) entitle anybody who executes a search warrant on any premises, to "*make such inquiries as he or she may deem necessary"* and to question people on the premises about the documents and other objects found there. Section 29(12)(b) obliges anybody who is asked for information or an explanation in terms of s 29(1), to give a truthful answer. Section 29(3) provides that such an answer may not be used in any subsequent criminal proceedings against the person who gave it. I accept that this Court's obiter finding in Shaik v Minister of Justice and Constitutional Development 2004 (3) SA 599 (CC) paras 17 to 19 that an accused person may not be questioned in terms of s 28 of the NPA Act on the offences with which he has been charged, may mean that these ancillary powers may not be used to question an accused on the crimes with which he has been charged. But they are not in issue in this case. They were not used to question Mr Zuma in the execution of the search warrants under attack. Their fate is irrelevant to the outcome of this case which

concerns the validity of search warrants and their execution under s 29 and not the ambit of the ancillary powers under s 29(1).

119. I have already submitted that in holding that the warrants were invalid because my evidence and contentions in the warrant application "*do not make out a case that the additional evidence … cannot be obtained by invoking the provisions of s 28*", Hurt J set the threshold too high. The question was whether it was reasonable for the prosecution to employ search warrants to gather the additional evidence and not whether it might have been possible for them to obtain the evidence by other means. The suspects in a criminal investigation and their associates who may have been complicit in their crimes, may of course respond honestly, frankly and fully to a summons under s 28 of the NPA Act by disclosing the incriminating evidence in their possession and by honestly answering all the incriminating questions put to them. It will almost never be possible for an investigator to exclude this possibility. But it is naïve to think that this is the likely response of suspects and their associates. It is far more likely that they will tend to withhold, conceal, remove and destroy the incriminating evidence in their possession and give false, misleading or incomplete answers to the questions put to them. It is accordingly wrong to say that a search warrant may not be issued unless the applicant demonstrates that the evidence cannot be obtained by other means.

120. In any event, I did try to demonstrate why I believed that it was unlikely that the additional evidence could be gathered by summons under s 28 and that it would in any event be counter-productive to attempt to do so because it would alert the suspects and their associates to the fact that the DSO was gathering further evidence and would identify the further evidence sought (paragraphs 37.3.16 to 61:37.3.19 of my affidavit in the warrant application). In addition, I refer to the following:

120.1. As I have done in this affidavit, in my affidavit in the warrant application I quoted at some length from the High Court judgment in the Shaik trial to demonstrate that it had made damning findings of the complicity of Mr Zuma and Thint in the crimes committed by Mr Shaik and his companies (paragraphs 26.1.1 to 26.2.6 of my affidavit in the warrant application). The encrypted fax in itself seemed to demonstrate the complicity of both of them (paragraph 27 of my affidavit in the warrant application).

120.2. As I have done in this affidavit, in my affidavit in the warrant application I dealt with Mr Zuma's version in his written answers to the written questions concerning the allegations of corruption against him (paragraphs 32 and 33 of my affidavit in the warrant application), with Thint's denial of any complicity in Mr Shaik's crimes (paragraph 34 of my affidavit in the warrant application)

and with the investigators' earlier attempts to obtain evidence from Thint by way of summons (paragraph 37.3.17 of my affidavit in the warrant application).

120.3. In my affidavit in the warrant application I also dealt with Mr Kögl's resistance to the investigators' attempts to obtain evidence from him under s 28 of the NPA Act. After protracted correspondence, he eventually provided us with an affidavit and later with another one but neither of them provided satisfactory explanations for his transactions involving Mr Zuma and Thint (paragraphs 37.3.11.1 to 37.3.11.2 of my affidavit in the warrant application). There is every reason to believe that Mr Kögl's explanations are false (paragraphs 37.3.11.3 to 37.3.11.7 of my affidavit in the warrant application).

120.4. In my affidavit in the warrant application I explained that Ms Fakude-Nkuna was also questioned in terms of s 28 of the NPA Act (paragraph 37.3.12.1 of my affidavit in the warrant application). She failed however to give any satisfactory explanation for her payments to or for the benefit of Mr Zuma and could not provide any documentary evidence of them (paragraph 37.3.12.3 of my affidavit in the warrant application). I concluded that this raised doubts about the completeness and veracity of the information she provided them and that a search

was necessary to establish the truth about her payments to or for the benefit of Mr Zuma (paragraph 37.3.12.4 of my affidavit in the warrant application).

120.5. In my affidavit in the warrant application I explained that Mr Reddy was also questioned under s 28 of the NPA Act but he too gave unsatisfactory explanations for his transactions involving Mr Zuma (paragraph 37.3.13 of my affidavit in the warrant application). His version that the funds he provided to Mr Zuma were loans, seems to be controverted by the evidence of those transactions (paragraphs 37.3.13.1 to 37.3.13.5 of my affidavit in the warrant application). I concluded that a search of Mr Reddy's premises was necessary because "*there can be no guarantee of the completeness or veracity of information in documents provided pursuant to a section 28 summons"* (paragraph 37.3.13.7 of my affidavit in the warrant application).

120.6. As I have done in this affidavit, in my affidavit in the warrant application I also explained that the High Court had held in the Shaik trial that the "*revolving loan agreement"* which Ms Mahomed said she had prepared, was a sham in that it was "*not reflective of a genuine obligation to borrow or repay these amounts"* (paragraph 37.3.14.3 of my affidavit in the warrant application). There was accordingly every reason to suspect that

she may have been complicit, if not in the crimes of Mr Shaik and Mr Zuma, then in an attempt to produce false evidence to conceal it. It would accordingly be naïve to think that she would be honest and frank in response to a s 28 summons.

120.7. This history was not unusual. The people in whose possession the evidence was sought, were the suspects themselves and their associates who seemed to have assisted them in the commission of their offences. The DSO could not with any confidence expect that these people would be frank, open and honest in their response to a summons under s 28. In my affidavit in the warrant application I also made the point that the evidence they sought comprised documents and electronic computer records. It is evidence which can very easily be concealed, removed, destroyed or altered. It was accordingly important to get to the evidence and seize it without forewarning the suspects and their associates (paragraphs 37.3.16.4 to 58:37.3.17 of my affidavit in the warrant application).

121. I submit in the circumstances that the prosecution did more than enough to demonstrate that it was reasonable for us to seek search warrants in an attempt to gather the outstanding evidence rather than to attempt to get it by summons.

122. Mr Zuma and Mr Hulley also argue that ought to have "*disclosed*" in my affidavit in support of the search warrants, especially the warrant for Mr Hulley's offices, that "*there was a grave risk, if not a substantial certainty, that privileged documents would be seen, examined or seized during the course of the search and seizure operations, and in particular that claims to privilege might be made*" (paragraph 87 of Mr Hulley's affidavit in case number CCT91/07). I submit for the reasons that follow that this complaint of non-disclosure is without substance. Mr Hulley is a lawyer who gives advice to his clients, including Mr Zuma, which is privileged and is likely to be in documents kept at his offices. It is not a rare possibility which calls for special disclosure. The fact that Mr Hulley is a lawyer and that Mr Zuma was legally represented (by Mr Hulley) renders it probable that they will seek legal advice when the warrant comes to their knowledge. A lawyer who is consulted about a warrant issued in terms of section 29 of the Act will probably immediately read at least that section of the Act and will be alerted to the provisions of s 29(11). In the circumstances, I submit that it was not necessary to mention in the application that Mr Hulley probably had legally privileged documents at his offices. There is no reason to think that the Judge President would then have ensured greater protection than that which Parliament deemed adequate when it enacted s 29(11). In other words, I was entitled to assume that the Judge President would approach the matter on the basis that such privileged material as might be the premises to be searched, would be protected

under s 29(11). There was accordingly no need for me to make any further disclosure.

The attacks on the contents of the search warrants

123. Thint associates itself with the minority judgment of the SCA and argues in effect that the warrant for the search of its premises was vague or overbroad because it did not describe the nature of the investigation for the purpose of which the search was authorised. It contends that the terms of the investigation were stated in such general terms that it was not possible to ascertain what it covered.

124. Mr Zuma and Mr Hulley make essentially the same point, e.g. complaining that the offences referred to in the warrants are not "*circumscribed by any time limits, geographical limits, summary or any other detail at all*" and do not "*mention any person against whom the investigation is directed*" (paragraph 56 of Mr Hulley's affidavit in support of their application to this Court). As a consequence, they imply (quoting something said by the team leader of the search at Mr Zuma's home in Forest Town, Johannesburg, that the resulting searches were unduly invasive (paragraph 58 thereof).

125. Mr Zuma and Mr Hulley make a range of further points, notably the following:

125.1. They contend that certain clauses of the annexure to the warrants specifying the documents sought "*suggest an attempt to establish details of [Mr Zuma's] version and his defence in the criminal proceedings to follow, and an attempt to gain material for cross-examination in that regard*" (paragraph 68(c) of Mr Hulley's affidavit in support of their application to this Court; see also paragraphs 101 to 106).

125.2. They contend that the annexure to the warrants specifying the computer-related objects that could be seized, if implemented in the search of Mr Hulley's offices, "*would necessarily have crippled [his] practice and exposed confidential and privileged information pertaining to [his] clients to the scrutiny of the prosecuting authorities*" (paragraph 73 of Mr Hulley's affidavit in support of their application to this Court).

125.3. They contend that the search warrants should have included a reference to s 29(11) of the NPA Act (or that Mr Hulley should have been alerted to its provisions by the persons carrying out the search at his offices).

126. It is trite that a warrant must be capable of being understood (i.e. it must be intelligible).

127. The State disagrees with the applicants that the warrants in this case are not intelligible and respectfully associates itself with the reasoning of the majority in the SCA (aspects of which are highlighted below). The warrants describe the documents that may be searched for and seized under them with sufficient particularity. They are not comparable to the warrants before this court in Powell's case at all (Powell NO and Others v Van der Merwe NO and Others 2005 (5) SA 62 (SCA)). They are more akin to and indeed more precise than the warrant upheld in Bogoshi's case (Bogoshi v Van Vuuren NO 1996 (1) SA 785 (A)).

128. The warrants other than the one for Mr Hulley's offices, identify the documents which may be searched for and seized under them as follows:

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

128.2. The preamble firstly describes the investigation as one into certain offences about which there is a reasonable suspicion that

they have been committed or that attempts have been made to commit them. The offences are :

- corruption in contravention of Act 94 of 1992,
- fraud,
- money laundering in contravention of Act 121 of 1998; and
- tax offences in contravention of Act 58 of 1962.

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

128.4. In other words, when the operative part of each warrant is read with its preamble and annexure A, it is clear that the warrants only authorised searches for and seizure of documents that meet two requirements. The first is that the document must be of a kind listed in annexure A. The second is that the document must

be one which has a bearing or might have a bearing on the investigation into the offences mentioned. Only documents which meet both these requirements may be seized under the warrants.

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

> "*Any records of whatever nature that Hulley and Associates received from Schabir Shaik and any of the Nkobi entities or any other source in approximately July 2005 concerning the affairs of Jacob Zuma, and specifically records kept or compiled by Schabir Shaik in his capacity as financial adviser to Jacob Zuma*".

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

130. The specific description in the Hulley warrant was also followed by a second (and last) paragraph, namely the standard "*catch-all*" clause in the last paragraph of annexure A of all the warrants.

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

132. As stated, each of the warrants in question refers to the investigation described in the preamble (with reference to types of offences) and then in many of the other paragraphs in annexure A describes who the persons and entities are who were allegedly involved in the offences and broadly what those parties are accused of having done. The warrant speaks of documents which have a bearing on an investigation into specified offences, which are then concretized to some extent in annexure A. In the case of a warrant like that – i.e. a warrant where a description of an offence is used to describe the documents it covers – the required degree of particularity of the description of the offence is inversely related to the degree of particularity of the description of the documents. The more general the latter, the more specific need be the former, and vice-versa. For this reason, I submit, all of the warrants in question here are capable of being understood in their own terms. In any event, as the majority in

the SCA pointed out (at paragraph 83 of the judgment), "*at the time an investigation commences … an investigator will have little or no knowledge of when or where or how or by whom the suspected offence was committed*". One of the purposes of a search and seizure in terms of section 29 may be to find out that very information. I accordingly submit that there is no legal requirement that a search warrant contain the specificity contended for by Mr Hulley.

133. Alternatively, and in any event, I submit that the majority of the SCA were correct when they said that there is no requirement that the acts set out in s 29(1) of the NPA Act may be performed only if permitted by a warrant which itself – i.e. when presented and without recourse to any outside sources of information – identifies to a person who might be in charge of the premises (there may be no-one) what may and what may not be seized (see the judgment at 99 and 100). The rule that a warrant must be capable of being understood does not mean that the warrant itself must necessarily contain all the information that is required to identify what may and what may not be searched for and seized without travelling outside the warrant (see the judgment at 77). If necessary, it is permissible to look outside the warrant to establish what it relates to in concrete terms and if the outside source establishes with certainty what the warrant means then it is capable of being understood (see the judgment at 94). What that investigation entails, and whether any material has or might have a bearing upon it, are objective facts that are capable of being ascertained

with reference to, amongst other things, my affidavit in support of the application for the search warrants.

134. Finally in this regard, I submit that the majority of the SCA were correct when they said that it is not a prerequisite for an application for a warrant that the investigators must know when or where or how or by whom the suspected offence was committed or what documents or books or objects exist that might have a bearing on the investigation (see the judgment at 83). In many cases, especially complex ones like those which the DSO is often tasked with investigating, that information is obtained by examining real evidence obtained during search and seizure operations.

135. In the present case however by August 2005 the investigators did know a lot about the commission of the offences under investigation (a fact evidenced by my affidavit in support of the search warrant application) and what documents or books or objects existed that might have a bearing on the investigation (a fact evidenced by the specificity of many of the clauses in annexure A to the warrants). A reading of my affidavit in support of the warrant application would have made it clear beyond any doubt that e.g. Mr Zuma, not Thint, is suspected of the alleged fraud and contraventions of the Income Tax Act referred to in the warrant (compare paragraphs 39 and 45 of Thint's affidavit in its application to this Court). Sticking with that example to illustrate the need for the search of Thint's premises to encompass documents related to the alleged fraud, I submit that there is

nothing wrong with a warrant to search the premises of person A and person B, both of whom are suspected of involvement in an offence (for instance where B is suspected of making corrupt payments to A who is suspected of knowingly receiving them) and one of whom is suspected of committing a related offence (A is for instance also suspected of falsely submitting income tax returns which do not disclose the corrupt payments), for all documents and information which have a bearing or might have a bearing on the investigation into those offences.

136. Turning to the remark by the team leader referred to in paragraph 124 above, Mr Hulley quotes the team leader of the search team as having said: *"Searches are of necessity invasive. We were obliged to search every room, cupboard and document."* This statement was made in denial of the averment by Mr Hulley that the search *"was extremely invasive in that members of the search party went through every room, cupboard and document, including personal letters written in manuscript which they had read."* I submit that it stands to reason that in any search properly conducted, whether it is for a murder weapon or a document, it is necessary for the searchers in the proper discharge of their obligations to search everywhere on the premises in question. It is common cause that searches are invasive; the issue is whether the invasion is authorised.

137. In support of the further contention by Mr Zuma and Mr Hulley that certain clauses of annexure A to the warrant suggest that the DSO was

attempting to establish details of Mr Zuma's version and his defence in the criminal proceedings to follow and to gain material for cross-examination in that regard, Mr Zuma and Mr Hulley quote a criticism by Hurt J of the explanation in my affidavit supporting the search warrant applications of the need for further search and seizure operations (paragraph 102 of Mr Hulley's affidavit in support of their application to this Court). Hurt J commented that it was "*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*". He branded the concept as "*nothing short of ludicrous*". I am not sure to which part of my affidavit in the warrant application this criticism was directed. I certainly never suggested that the warrants were needed to find out what defences the accused might put up at trial. I merely explained that the State's evidence left unanswered questions and gaps which needed to be filled. I also explained that as the State case unfolds during a trial 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's case (paragraph 23 of my affidavit). The contention by Mr Zuma and Mr Hulley that I sought to frame the warrants as a means, in advance, of finding out the thinking, plans or strategy of the defence, is equally unfair.

138. As regards the complaint by Mr Zuma and Mr Hulley that the annexure to the warrants specifying the computer-related objects that could be seized

(annexure B), if implemented, would have exposed "*confidential and privileged information*", I submit, firstly, that this complaint is moot because, as explained below, no such objects were seized. The search of Mr Hulley's offices was confined to the objects listed in the paragraph 1 of annexure A. Secondly, if any legally privileged materials were taken, Mr Hulley could have invoked the mechanism in s 29(11). Thirdly, as with annexure A, annexure B is limited to objects related to the investigation. The operative part of the warrant authorises the Investigating Director or anybody acting under his written authority, to seize and retain anything on the premises for further investigation "*including inspecting, searching and seizing computer-related objects in the manner authorised in Annexure B*".

Alternatively severance

139. If this Court should however hold that any part of the warrants is unduly vague or wide, then we submit that the appropriate remedy is to sever the vague or wide part from the remainder which is good rather than to invalidate the whole warrant. This has been held by the SCA to be the appropriate remedy where it is possible to sever the good from the bad (Divisional Commissioner of SA Police Witwatersrand Area v SA Associated Newspapers 1966 (2) SA 503 (A) 513A to B; Cine Films v Commissioner of Police 1972 (2) SA 254 (A) 268D; Powell paras 56 and 58).

140. There cannot be any constitutional objection to severance which strikes down a defective part of a warrant but upholds the remainder of it. This Court frequently deals in this way with legislation found to be unconstitutional and invalid in part only. It did so again in its recent judgment in SA Liquor Traders Association (South African Liquor Traders Association and Others v Chairperson, Gauteng Liquor Board and Others 2006 (8) BCLR 901 (CC) para 31). The Court reiterated that there are two important considerations in fashioning a remedy. They are "*the need to give appropriate and effective relief to the aggrieved litigant; and the principle of the separation of powers which requires a court to pay appropriate respect to the proper role of the legislative and executive arms of government*" (para 35). On this approach a court is obliged to sever the bad from the good rather than to strike down the whole where severance is possible.

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

when I deal with the attack on the conduct of the search of Mr Hulley's offices below.

Section 29(11)

142. As regards the contention by Mr Zuma and Mr Hulley that the search warrants should have included a reference to s 29(11) of the NPA Act or that Mr Hulley should have been alerted to its provisions, I respond as follows.

143. Privileged material is protected from disclosure in terms of s 29(11) of the NPA Act. The Judge President was entitled to assume that such privileged material as might be on the premises to be searched, would be protected under that provision. There was accordingly no need for the Judge President to make any further provision for the protection of privileged material, i.e. to build into the warrant any greater protection than that afforded by s 29(11).

144. It must be borne in mind that, like Thint, Mr Zuma and Mr Hulley accept the constitutional validity of s 29. I submit that they must not be allowed to impugn the mechanism for the protection of privileged material in s 29(11) through the back door, by suggesting that it is inadequate and that the Constitution demands more and greater protection.

145. As will appear from the discussion below of the attack on the conduct of the search of Mr Hulley's offices, the following two feature of s 29(11) are important.

145.1. The first is that the mechanism it contains for the protection of privilege, is triggered only when a claim of privilege is made. This accords with the common law. The SCA held in Bogoshi that "*privilege does not arise automatically. It must be claimed"* (Bogoshi v Van Vuuren NO 1996 (1) SA 785 (A) 793).

145.2. It is also not just any refusal or reluctance to surrender material that constitutes a claim which triggers the mechanism of s 29(11). It is only a claim that an item "*contains privileged information"* that triggers the section. A lay person obviously does not need to use those words. It is sufficient for instance if a lay person were to say that he or she does not want to disclose a document because it contains confidential advice from his or her attorney. But someone who is reluctant to disclose material only because it is confidential or personal, does not make a claim of privilege and does not trigger the section. A lay person who protests that his or her documents are confidential and personal, does not claim a "*privilege"* at all. It is only a claim of a privilege recognised by law that can possibly trigger the mechanism by

which the document is sealed and the claim ultimately determined.

The attack on the conduct of the searches

146. In the applications before the High Courts, Mr Zuma, Mr Hulley and Thint challenged the execution of the respective search warrants on the basis that there had been a breach of privilege or that, at the least, the respondents ought reasonably to have anticipated that there was a risk of such a breach and to have taken steps to guard against it.

147. They persisted in these contentions in the SCA. On behalf of Mr Zuma, it was also suggested that the searches of his premises were conducted in an overwhelming and unreasonable manner.

148. In the present applications, the only serious criticism of the execution of the search warrants appears to be in relation to the warrant executed at the offices of Mr Hulley. I shall consequently deal with that search in some detail in what follows.

149. At the outset I respectfully point out that Mr Hulley does not take issue with the facts of the search of his offices as recited by Farlam JA (paragraphs 20 to 23) or Nugent JA (paragraphs 105 and 107).

150. On 19 July 2005 Mr Shaik's attorney Mr Parsee sent a letter to the prosecutors informing them that Mr Shaik had resigned as Mr Zuma's financial adviser and that they had accordingly forwarded all Mr Zuma's documentation to his new attorney Mr Hulley. This is the "*consignment of documents*" referred to by Mr Hulley in paragraph 39(b)(i) (at page 24) of his affidavit in support of this application.

151. The letter did not say whether the documentation was in hard copy or in electronic form or both and did not specify by what means it had been delivered to Mr Hulley.

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

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

154. This background explains the formulation of the warrant and particularly annexure A which defined the documents to be sought and obtained.

155. The purpose of the search was also confined to these documents. The evidence was that Mr Van Loggerenberg, the leader of the team assigned to the search of Mr Hulley's office, was instructed that "*if the documentation could be readily identified as being from Reeves Parsee, he should seize only that documentation. He was instructed not to search the premises unless it was strictly necessary to locate this documentation."*

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

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

158. Mr Hulley was entirely co-operative and did not demur in any way. He never asserted or even suggested that any of the documents were or might be privileged. He could not have done so because the boxes were still sealed and he had never seen their contents.

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

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

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

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

163. Mr Hulley telephoned Adv Downer and asked him to stop the searches until he had obtained a copy of the affidavit used in support of the application for the search warrants and had had an opportunity to apply to court for an order declaring the search of his offices to be unlawful. Adv Downer declined his request. Mr Hulley asked him what would happen if any of the documents were privileged. Adv Downer said that he had to decide which documents he considered to be privileged. He also told him that it did not seem to him that any of the documents could be privileged because they had emanated from Mr Parsee who had said that they were the documents Mr Shaik had held in his capacity as Mr Zuma's financial adviser.

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

challenge of the warrants. He did not claim privilege in respect of any documents. Adv Baloyi and Mr Hulley agreed to meet the following morning which they did and Adv Baloyi handed Mr Hulley a copy of the warrant application.

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

> "*As per our telephonic consultation with your Messrs Downer and Baloyi we confirm that we are of the view that a certain privilege attaches to the entire body of documents seized from our offices."*

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

167. Adv Steynberg responded to this demand in a fax to Mr Hulley on 22 August 2005. He recorded that the only documents taken from Mr Hulley's office were those he had pointed out to the search team and

that neither he nor any of his staff had ever indicated that any of the documents were or might be privileged. He accordingly declined to agree to Mr Hulley's suggestion.

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

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

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

171. The search team could not expect Mr Hulley to be *au fait* with s 29(11) of the NPA Act but they could expect him to know, and he undoubtedly did know, that he could invoke legal-professional privilege at common law. But Mr Hulley and his staff never suggested that the documents they had received from Mr Shaik's attorney were or might be privileged. He did not

even avail himself of the opportunity to check them to determine whether any privilege might attach to them. He has never offered any explanation for his failure to take any steps whatever to protect such privilege as might have attached to the documents concerned. The only reasonable inference is that, like the search team, he had no reason at all to think that the documents might be privileged.

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

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

174. I accordingly respectfully submit that Nugent JA's conclusion that "*there was no reason for the appellants to have thought that the boxes might contain privileged information*" (paragraph 107 of the judgment) was justified and that the High Court's criticism of the State's conduct was unfair. Even if it was blemished in some way, it was in any event of no consequence because there is absolutely no reason to think that any privileged document was ever disclosed or at risk of disclosure to the State.

No reasonable prospects of success

175. I consequently submit that the applicants do not have reasonable prospects of success in the appeals for which leave is sought in case numbers CCT89/07 and CCT91/07.

ALTERNATIVELY, A PRESERVATION ORDER

176. If this Court were to uphold any of the causes of action attacking the granting or validity of the search warrants or the lawfulness of their execution, it will amount to a finding that the respondents unlawfully invaded the relevant applicant's constitutional rights of privacy.

A preservation order can be made

177. Upon such a finding, I submit, this Court will have a wide discretion to determine the appropriate remedy. The discretion is vested in it by s 38 of the Constitution which entitles the victim of a constitutional violation to "*appropriate relief*" and by s 172(1) which enjoins the court to declare any conduct inconsistent with the Constitution to be invalid to the extent of its inconsistency and to make "*any order that is just and equitable*" (compare Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) paras 19, 60 and 69; Minister of Health v Treatment Action Campaign 2002 (5) SA 721 (CC) paras 102 to 104; Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery 2004 (6) SA 40 (SCA) ("Modderklip") paras 18, 42 and 43; MEC, Department of Welfare, Eastern Cape v Kate 2006 (4) SA 478 (SCA) paras 23 to 25).

178. The Constitution is supreme. Any law of conduct inconsistent with it is invalid. A declaration of unconstitutionality states that but does not alter

the objective unconstitutionality of the law or conduct in question (Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) paras 26-28; Ex parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council 2001 (4) SA 1288 (CC) paras 11-13; Gory v Kolver No And Others (Starke and Others Intervening) 2007 (4) SA 97 (CC) paras 39-42).

179. But the declaration of unconstitutionality is subject to the court's power to make any order which is just and equitable, including an order limiting the retrospectivity of the order of invalidity or suspending its operation in the future (Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another 2005 (1) SA 580 (CC) paras 126 to 129).

180. This power has significant implications. When an order is made that an order will only operate prospectively it sanctions constitutional breaches of the past. Similarly where the court suspends the operation of the order it sanctions the continuation of the law or conduct which is unconstitutional. The powers to suspend or limit retrospectivity are however merely instances of the general power of the court to make just and equitable orders.

181. The Constitution expressly provides that just and equitable relief may include a delay in the coming into operation of a declaration of invalidity, which in certain circumstances means the continuing violation of a successful applicant's rights because the rights or interests of other people or the public interest would be adversely affected by the immediate operation of the declaration of invalidity.

182. The Constitution has introduced a new paradigm. The court can forge new remedies to give just and equitable relief. The Constitution mandates and requires not only that new remedies be created but also that old ones be considered. It is a constitutional injunction. A court must consider a range of values and interests, not just the enquiry under the old law whether there has been an unlawful search which led to an automatic remedy. The Constitution now requires the court to accommodate other values and gives the court the tools to do so. In other words, the Constitution has changed the paradigm from the axiomatic granting of a remedy if the requisites for it are established (the common law response), to requiring the court to consider whether the remedy is the appropriate one in the light of the different interests at stake.

183. The considerations to be taken into account are, first, that the victim of a constitutional violation is entitled to effective relief; but the court must also take into account other relevant circumstances, including the interests of others and the public interest (see Modderklip para 42).

184. In the case of an unlawful search and seizure the State accepts that effective relief would include the return of the items seized and in appropriate cases, damages. Section 42 of the NPA Act says however that there is no remedy of damages when someone acts in good faith. In this matter there is no evidence that the State acted in bad faith.

185. But as stated the court must also tailor its relief to accommodate other interests, where that is how justice and equity will best be served. In Modderklip the court not only afforded effective relief to the applicant land owner but also the homeless people and the public interest (thereby addressing the social issue underlying the case).

186. In this case there are three significant other interests at stake:

186.1. There is the public interest in the prosecution of crime. The courts have recognised that there is a constitutionally mandated public interest in the effective prosecution of crime. (S v Motloutsi 1996 (1) SA 584 (C) ("Motloutsi") 590A to 592G; Key v Attorney-General, Cape Provincial Division 1996 (4) SA 187 (CC) ("Key") paras 13 and 14; Hyundai paras 53 and 54; S v Basson 2005 (1) SA 171 (CC) ("Basson") para 33) The prosecution of corruption in government is very important.

186.2. There is the accused's right to a fair trial under s 35(3) of the Constitution – the searches may have yielded evidence which the defence can present as exculpatory.

186.3. Finally there is the public (represented by the state) which is entitled to a fair trial (Key paras 13 and 14; Basson paras 23 and 24; S v Jaipal 2005 (4) SA 581 (CC) para 29).

187. These three interests are best served by the preservation of evidence rather than the loss of it.

188. If the principles outlined above are applied to this case the implications are as follows:

188.1. The court has the power to find that the warrant and the searches are invalid, but at the same time to suspend the operation of that conclusion altogether by not ordering the return of anything e.g. until the State has had the opportunity to obtain a fresh warrant or until the finalisation of criminal proceedings or a decision has been taken not to institute criminal proceedings. That is the width of the power, but this is not the remedy which the State suggests.

188.2. The court has the lesser powers of ordering the preservation of the originals and the making and return of copies, or the making and preservation of copies and the return of the originals.

A preservation order should be made

189. In terms of s 35(5) of the Constitution, evidence may be admissible despite the fact that it was unlawfully obtained if the admission of that evidence would not render the trial unfair or not otherwise be detrimental to the administration of justice.

190. It is impossible for this Court to determine whether that would be so. The trial court is best placed to determine whether to admit it or not. The cases cited in paragraph 192 below show that the Constitution requires the trial judge to make a nuanced judgment which is case and circumstances dependent. (See also the following: Ferreira v Levin NO 1996 (1) SA 984 (CC) para 153; Key para 14; S v Mphala (1) 1998 (1) SACR 388 (W) 399; S v Maputle 2003 (2) SACR 15 (SCA) para 11).

191. Section 35(5) of the Constitution lays down the benchmark for the balancing of the interests referred to in paragraphs 184 and 185 above, although it does not apply to the determination of this case. It says that where the State has unlawfully obtained evidence there are countervailing interests that come into play which must be balanced. (See Motloutsi

590A to 592G; Fedics Group v Matus 1998 (2) SA 617 (C) paras 68 to 75; Schwikkard and others Principles of Evidence 2nd ed 168 to 179; Sopinka and others The Law of Evidence in Canada 2nd ed 410 to 424; Stuart Charter Justice in Canadian Criminal Law 4th ed 542 to 544.)

192. The following general principles emerge from the cases applying section 35(5) (Motloutsi 590A to 592G; S v Naidoo 1998 (1) SACR 479 (N) 490 to 503 and 525 to 530; S v Mphala (2) 1998 (1) SACR 654 (W) 657 to 660; S v Mkhize 1999 (2) SACR 632 (W) 636 to 639; S v Pillay 2004 (2) SACR 419 (SCA) paras 85 to 98 (pp 430 to 436) and paras 6 to 18 (pp 444 to 451)) and from the authorities about section 35(5) and its equivalent in Canada namely s 24(2) of the Canadian Charter (Currie and De Waal The Bill of Rights Handbook 5th ed 791 to 797; Schwikkard and others Principles of Evidence 2nd ed 200 to 208; Sopinka and others The Law of Evidence in Canada 2nd ed 424 to 462; Stuart Charter Justice in Canadian Criminal Law 4th ed 535 to 585).

192.1. Good faith points towards admissibility and bad faith points the other way, but there are cases in which even evidence obtained in bad faith was admitted because of exceptional circumstances.

192.2. A balance must be struck between respect by law enforcement agencies for the rights in the Bill of Rights and respect by

ordinary people for the judicial process which may be undermined if relevant evidence is excluded.

193. In any case such as this one if no preservation order is made there is a real risk that the evidence will be lost and the accused (Mr Zuma and the Thint companies if they are charged again), will complain (as they have already done) that there was a breach of privilege during the search and the State (and ultimately the trial court) will be left without a reliable record of what was seized.

194. I accordingly submit that if this Court accepts any of the applicants' attacks on the warrants or the searches, it should fashion an order which preserves the evidence seized under the warrants so that the trial court can ultimately determine whether it should nonetheless be admissible or not and so that there is an accurate record of what was seized. The elements of the order should be the following:

194.1. The originals of the seized documents should be sealed and kept by the registrar of the court in which the relevant proceedings for the setting aside of the warrants commenced. The relevant applicants should be entitled to copies. If any of the applicants shows a legitimate interest in getting back the originals then the originals not copies can go back.

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

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

195. I submit that if any of the applicants were to succeed on the "merits" in this case, there would be ample reason to exercise the court's remedial discretion in this way:

195.1. It is clear that the State at all times acted in good faith. It did not act in bad faith or with an ulterior purpose. There is, for example, no evidence in this case that the State consciously applied for extravagant warrants hoping that if they were successfully attacked it could fall back on a preservation remedy.

195.2. I have submitted that the search and seizure were entirely lawful but even if I am wrong, the highwater mark of the applicants' case to the contrary is that there were relatively minor flaws in

the warrant or the process. This is in other words not a case of crass or gross violations of human rights.

195.3. The invasion of privacy has occurred (i.e. it cannot be undone). There is however security against any further invasion of privacy because the documents will be sealed and with the Registrar. The applicants have had copies of the relevant documents seized from them since September 2006. Consequently the relevant applicants will be no better off by the denial of the preservation order than they would be if preservation were granted.

195.4. The relevant applicants will get effective relief, namely copies of all the information seized, even the originals if they have a legitimate reason to get them or once the purpose of the preservation has been achieved. Conversely, the State will not get a benefit to which the constitution does not entitle it. In any future trial it will have to justify the admission of the evidence despite its pedigree.

195.5. If the originals are returned the applicants' property is restored and the keeping of sealed copies by the registrar will not invade the applicants' privacy. If the originals are kept by the registrar the only option that the applicants will lose is that of destroying

the documents, which is something an owner can normally do. But in this case the law should not give priority to that option because the originals may be needed for production as evidence in future proceedings.

195.6. Privacy is a relative right in the sense that it can be infringed by other competing rights (Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another 1993 (2) SA 451 (A) at 462E-G; Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC) para 68). If this Court orders the preservation of documents under seal of the registrar, there is no infringement of a legally protected component of the right to privacy or, if there is, the privacy interest is outweighed by the public interest in preserving the information under seal of the registrar. On either approach the court's order will not invade the applicants' privacy.

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

195.8. It would be anomalous that if applications such as the present are brought before the start of the criminal trial and it is found that there has been an unlawful invasion of privacy (e.g. a technicality leading to unlawfulness), the response (order) should be the automatic return of the documents; whereas if the same point is raised during the criminal trial the documents may nevertheless may be admitted under section 35(5) of the Constitution. The applicants in this case are seeking to exploit that anomaly.

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

morass of uncertainty be avoided by the preservation of the originals or copies of all the materials seized. It is for this more limited purpose that Nugent JA, with Mlambo JA concurring, was willing to grant a preservation order in the Mahomed case in the SCA (see the judgment at paragraphs 27 to 34). I respectfully submit that, in his minority judgment in the same case, Ponnan JA's approach is unduly absolute, overlooking the specific factual matrix of the case. The State does not seek opportunistically to derive for itself an advantage from acting unlawfully that it would not otherwise have had. Even if it does derive an "advantage", it does not do so due to any premeditation on its part but rather due to *bona fide* conduct which inadvertently was technically flawed.

195.10. This further vital reason explains why in this case a preservation order is preferable to the State having to apply for fresh warrants or hand the documents back under cover of subpoenas. That said, if this Court upholds one of the intended appeals and does not make a preservation order, the State will consider implementing one of those alternatives. If the court declines a preservation order and leaves the State to such other remedies as it might have, the State will request that it be afforded a reasonable time (say 10 days) to take those steps, otherwise there is a real risk of there being no definitive copy of exactly

what was seized if it later becomes necessary to determine what it included and what it did not.

196. I consequently submit that even if the applicants succeed on the “merits” in the appeals for which leave is sought in case numbers CCT89/07 and CCT91/07, this Court can and should order the preservation of the originals or copies of all the materials seized.

THE MAURITIUS MLA APPEALS

The nature and purpose of Letters of Request

197. Before dealing with the complaints raised by Mr Zuma and Thint in their applications for leave to appeal to this Court in case numbers CCT90/07 and CCT92/07, I shall deal generally with the nature and purpose of Letters of Request under section 2 of the ICCM Act with reference to the facts of this case.

198. The State sought to secure the 14 original documents and formal affidavits from the Mauritian authorities referred to in paragraph 16 above, in advance of any possible trial. It did so as part of its continuing investigation. There is nothing unusual about that. It is what the State does in a criminal investigation. It marshals evidence and documents for filing in the docket to prepare for any trial that might eventuate. The State ought to be able to conduct its lawful investigations into suspected criminal offences unhindered by those suspected of committing such offences.

199. The process of obtaining these documents from Mauritius ought to have been straightforward. It is common cause that the documents are relevant to the present investigation. They are identified. They are lawfully held by an identified Mauritian authority. Both Mauritian and South African law make provision for such evidence to be requested and transmitted by way of mutual legal assistance.

200. What the NDPP sought from Levinsohn DJP was nothing more than his judicial imprimatur for the Letter of Request by the NPA. The court was required to do nothing more than satisfy itself that the jurisdictional facts required by section 2(2) of the ICCM Act had been satisfied and, if so formally "issue" the request. The Letter of Request remains the request of the NPA and not the court which issues it. Any facts alleged therein emanate from the NPA and not the court.

The key findings of the SCA

201. The SCA upheld the NDPP's contention that the issuing of the Letter of Request is not dispositive of any rights of the applicants, constitutional or otherwise. The documents that were seized in Mauritius do not belong to any of the applicants and they were not seized from the applicants' premises. The applicants have no more interest in seeking to interfere in the investigation at this stage than they would have in trying to prevent the State from interviewing State witnesses, or obtaining bank documents or forensic reports during the investigation. For this reason, the SCA unanimously held that the applicants had no *locus standi* to oppose the issuing of the Letter of Request.

202. However, this was not the only ground upon which the appeal failed. The SCA also held that the appeal fell to be dismissed on those aspects of the

merits which were pressed before it. In particular it found that the jurisdictional requirements of section 2(2) of the ICCM Act had been satisfied and that the issuing of the Letter of Request could therefore not be faulted on this basis. Despite this, the applicants now appear to approach the present applications to this Court on the basis that the appeal was dismissed solely on the basis of a lack of *locus standi*.

203. The applicants must therefore persuade this Court that their applications raise constitutional issues and that they have a reasonable prospect of success on both the issue of *locus standi* and the merits.

Locus standi

204. Section 2(2) of the ICCM Act does not make any provision for a suspect to be involved in or oppose the issuing of a Letter of Request. Consequently, the applicants had to show that they had an interest in the issuing of the Letter of Request sufficient to give them *locus standi* in the State's application under section 2(2).

205. To establish *locus standi* a litigant must show that his or her rights have been affected or that they will be affected in the future (declaratory proceedings) or that they will be affected by the litigation (intervention proceedings).

206. In the present cases, as the SCA found, the issuing of the Letter of Request would not adversely affect or determine any of the applicants' rights despite the applicants' claims to the contrary.

The rights claimed by Mr Zuma

207. Mr Zuma identifies the following constitutional rights which he claims have been infringed by the issuing of the Letter of Request and by reason of which he claims to have *locus standi* to oppose its issuing:

- his right to dignity in section 10 of the Constitution;
- his right to a fair trial in section 35 of the Constitution;
- his right of access to the courts in section 34 of the Constitution; and
- his right to "*enforce his rights to dignity and a fair tria*l" in terms of section 38 of the Constitution.

208. In paragraph 38 of his founding affidavit, Mr Hulley alleges that Mr Zuma complained of the infringement, or threatened infringement, of his right to <u>dignity</u> before Levinsohn DJP and the SCA. That is not correct. The papers before Levinsohn DJP reveal that no reference whatsoever is made to any alleged infringement of Mr Zuma's right to dignity. Nor was there any reference thereto in Mr Zuma's heads of argument filed in either the court of first instance or the SCA. This point, therefore, has been raised impermissibly for the first time in the present application. (I point out however that Mr Zuma did raise the point in two other matters, namely

the proceedings before Hugo J referred to in paragraph 17 above and the proceedings before Van Der Merwe J referred to in paragraph 77 above. In both matters this argument was rejected at pages 4 and 22 of the respective judgments.)

209. What Mr Zuma contends for, in essence, is a right not to be named as a suspect in a criminal investigation. I submit that there is no such right.

210. As Mr Zuma has frequently pointed out, he is presumed innocent until proven guilty, a fact which the Mauritian prosecution authorities must be presumed to understand. The mere fact that they have been informed that he is being investigated on suspicion of having committed an offence does not signify his guilt, which is yet to be determined by a court of law. The fact that Mr Zuma is being investigated on these charges is furthermore objectively true and is a fact which is already in the public domain. It is also a fact which I can confidently state is already well known to the Mauritian authorities. As noted by Hugo J, the Letter of Request was in any event dispatched to the Mauritian authorities prior to the noting of the appeal and prior to this complaint being raised by Mr Zuma. Mr Zuma's complaint that his dignity will be infringed by the issuing and dispatch of the letter, is therefore also moot.

211. Mr Zuma also claims that the issuing of the Letter of Request in terms of section 2(2) of the ICCM Act will infringe his <u>right to a fair trial</u> in any

subsequent prosecution. I submit that this is incorrect for several reasons.

212. The first is that the claim is premature. Mr Zuma was not an accused person at the relevant time. Even if he was, the issuing of the Letter of Request would not infringe his rights to a fair trial in any subsequent prosecution. Any potential infringement would occur only if and when he were charged and then only if the State sought to adduce the relevant documents in evidence.

213. The main fair trial right Mr Zuma relies upon is the right to adduce and challenge evidence. He claims that his rights to challenge the evidence of the relevant witnesses through cross-examination and to extract evidence from them which might assist his case would be curtailed by the use of section 2(2) rather than section 2(1) of the ICCM Act. This complaint, which was considered and rejected by the SCA, is without merit for the following reasons:

213.1. First, the witnesses from whom the NPA seeks statements are all officials of the Mauritian authorities whose evidence is of an entirely formal nature. The prospect of the applicants eliciting any favourable evidence from them is extremely remote.

213.2. Secondly, and more importantly, it is clear from section 5(2) of the ICCM Act that the admissibility of any evidence obtained by

means of section 2(2) is a matter in the discretion of the trial court. This discretion must be exercised in the interests of justice. Consequently, should Mr Zuma be charged and should the State seek to adduce the Mauritius documents in evidence, he will have ample opportunity to complain to the trial court that the admission of the documents (by mere production) would unfairly deprive him of his right to cross-examine the relevant witnesses. Should the court find that this right is infringed, then the State will either have to abandon its reliance on the documents or call the relevant witnesses to testify (either to attend the trial in person or on commission in terms of the provisions of section 2(1)). In the latter eventuality the applicants will have the opportunity to cross-examine the witnesses. If, on the other hand, the court finds that the admission of the documents would not unfairly infringe their right to cross-examine, then their right to a fair trial will not be infringed (S v Ndhlovu and Others 2002 (2) SACR 325 (SCA) at paragraph 50).

214. Even if Mr Zuma's fair trial rights were infringed or diminished by the issuing of the Letter of Request, this is sanctioned by the ICCM Act which specifically permits the State to obtain evidence in the manner prescribed by section 2(2) when no criminal proceedings are pending. None of the applicants have raised any challenge to the constitutionality of the ICCM

Act or any section thereof. It is therefore incorrect for Mr Zuma to complain that his fair trial rights are infringed when this is exactly what the ICCM Act contemplates will happen in every case (subject to the reasonable and justifiable safeguards provided by section 5(2)).

215. Mr Zuma appears to complain that the finding of the SCA that he lacks *locus standi* to oppose the issuing of the Letter of Request infringes his right of access to the courts. In response I submit that Mr Zuma has not been denied such access at all. He has been given full opportunity to file papers and address not only the High Court but also the SCA. Both courts have considered the facts he put up and the submissions he made and delivered judgments on the merits of his arguments. Moreover, as explained, if he is charged and tried and the State adduces in evidence documents sought under the Letter of Request, Mr Zuma (who will then undoubtedly have the *locus standi* to do so) may object to their admissibility in the manner described above.

216. Finally, Mr Zuma avers an infringement of his right to "*enforce his rights to dignity and a fair trial*". I submit that this "right" is not only dependent for its existence upon its predicates (i.e. the alleged rights to dignity and a fair trial dealt with above), but for the reasons given above Mr Zuma will have the opportunity to enforce his right to a fair trial in the appropriate forum (i.e. the court in which, if charged, he is tried).

Thint's contentions about *locus standi*

217. Unlike Mr Zuma, the Thint companies do not clearly identify the constitutional issues raised by their intended appeal. Although their affidavit in the present application contains certain rather vague references to matters of "*significant public importance*" and "*important constitutional issues*", they do not explain clearly how these matters and issues affect them.

218. As I understand the Thint companies' complaints regarding the SCA's rejection of their *locus standi*, they are as follows:

    218.1. As the premises searched in Mauritius belonged to their holding company Thales International (Africa) Ltd ("Thales") and certain of its officers, the Thint companies are sufficiently "closely connected" for them to have standing to challenge the decision on the strength of the Kolbatschenko case (Kolbatschenko v King 2001 (4) SA 336 (C));

    218.2. They also persist (albeit faintly) with the argument that the mere fact that the evidence sought may be used against them in a future prosecution is in itself sufficient to confer *locus standi* and that the SCA's finding to the contrary was wrong; and

    218.3. They contend that if they are not afforded *locus standi*, no one will be able to challenge the order, which they contend to be *ultra vires* and in conflict with the principle of legality.

219. In Kolbatschenko's case the court held that the applicant there had a sufficient interest in a section 2(2) request because he had a close interest in the documents sought (i.e. an interest that extended beyond a pure trial related one). The court also remarked (*obiter*, I submit) that the objects seized were intended for possible use in a prosecution in South Africa.

220. As regards the first basis, the facts in the present case are distinguishable in that the Thint companies did not a have any proprietary or other specific rights in respect of the items sought in terms of the Letter of Request. The only connections here are that, at the time, the company in Mauritius from which the items were removed was a 100% shareholder of Thint Holding which in turn owned 75% of Thint, and that, at the time, Thétard was a director of all three companies. This is insufficient to clothe the Thint companies with *locus standi*. No rights of their own have been or will be affected by the issuing of the Letter of Request.

221. Moreover, in the six years since the searches and seizures were carried out in Mauritius (in October 2001) pursuant to the earlier Letter of Request, neither Thales or Thétard has taken any steps to challenge the legality of the search or the Letter of Request on which it was based. On the contrary, Thales contented itself with bringing proceedings aimed at preventing the Mauritian authorities from communicating to the South African authorities any documents (or copies thereof) which did not fall strictly within the scope of the Letter of Request and the search warrant.

(The broad assertion in paragraph 14 of Mr Hulley's affidavit that Thales "challenged the searches" is accordingly misleading. It is clear from the papers that Thales' concern was that certain documents had been seized by the Mauritian authorities which fell outside the scope of the warrant and which contained sensitive trade secrets.) It has never been disputed that the 14 documents at issue fall properly within the scope of the first Letter of Request and Mauritian warrant issued and executed pursuant thereto. On the contrary, Thales in fact agreed that the remaining 14 documents in the possession of the Mauritian authorities be retained by them, provided that they would not be communicated to the South African authorities without the permission of the Mauritian Supreme Court, on notice to Thales. This agreement was recorded in the September 2003 consent order by the Mauritian Supreme Court, by means of which Thales' challenge was settled. Clearly, therefore, Thales is not in any need of these original documents.

222. The effect of the present Letter of Request, therefore, is no more than to trigger the process laid down by the September 2003 consent order, which will afford Thales (being the entity whose premises was searched and rights infringed) the opportunity to make out a case why the documents should not be forwarded to South Africa. This process has now commenced and Thales has already filed affidavits in opposition of the order sought in Mauritius to release the documents. Thales' rights are thus fully protected in Mauritius. I consequently submit that the

intervention of the Thint companies in the proceedings in South Africa which (through the Letter of Request) have given rise to the proceedings in the Mauritius Supreme Court in which Thales is participating, is entirely unnecessary and undesirable.

223. Turning to the State's intention to use the originals of the documents seized in Mauritius in any future prosecution in South Africa, I point out that copies of the documents in question have been in the possession of the State for several years now. They have also been in the possession of the Thint companies. They formed part of the docket and the State's bundle in the Shaik trial and some of them were admitted into evidence in the Shaik trial. The Thint companies knew this because they had counsel on a watching brief present throughout those proceedings. The contents of these documents are thus a matter of public record and it is difficult to conceive how obtaining the originals could now infringe any of the Thint companies' rights (especially their privacy).

224. The Thint companies' arguments based solely on the *obiter* comments in the Kolbatschenko case were emphatically rejected by the SCA and by Van der Merwe J (annexure "**JPD11**"). The State respectfully associates itself with what the learned judges have said. I have nothing to add.

225. As regards the principle of legality, the Thint companies make the trite point that the conduct of a judge must be in accordance with the law.

They then assert that "*[t]he refusal by the SCA to recognize the locus standi of the [second and third] applicants has the effect of denying anyone the right to challenge conduct which may be unlawful"* (paragraph 54 of their affidavit in case number CCT90/07). This, they claim, is in conflict with the Constitution. In response, I submit that the argument incorrectly presumes that just because they do not have *locus standi*, any persons who do will not be able to challenge the (alleged) unlawful conduct. If, however, the affected parties choose not to challenge the (alleged) unlawful conduct, or if such conduct does not in fact affect anyone, then to allow an unaffected party to challenge it would be a purely academic and futile exercise. The argument thus regresses to the Thint companies' underlying claim (which, I have already submitted, is incorrect) that they were adversely affected by the issuing of the Letter of Request.

The attacks on the "merits" generally

226. Even if this Court were to find that the applicants did have *locus standi* to oppose the issuing of the Letter of Request, I submit that their attacks on the decision to issue the Letter of Request are so weak that there is no reasonable prospect that this Court will overturn the unanimous findings of the SCA on the merits.

227. Before dealing with the applicants' attacks on the "merits", I must make two preliminary observations.

228. The first is that the applicants' grounds of opposition to the granting of the Letter of Request were initially extremely wide-ranging and included attacks on the legality of the original Letter of Request and the alleged unlawful conduct of the NPA officials in receiving copies of the documents. However, in their oral argument before the SCA the applicants considerably narrowed the attack. Their main argument was that the Letter of Request should have been issued in terms of section 2(1) of the ICCM Act instead of section 2(2) thereof. More specifically, they disputed that the NPA had satisfied the jurisdictional requirements of section 2(2)(c) of the ICCM Act.

229. This narrowing of the scope of the issues is reflected in the judgment of the SCA, which deals only with those issues which were seriously pressed in oral argument. Yet both Mr Zuma and the Thint companies now complain that certain of their arguments were not addressed in the judgment. In the present application Mr Zuma seeks to resurrect arguments which his counsel did not press before the SCA, notably the "clean hands" argument (at paragraphs 64 to 71 of the affidavit in case number CCT92/07) and the arguments about the court's discretion to grant on order in terms of section 2(2) (at paragraph 72 thereof).

230. The second preliminary issue is that the applicants' attacks on the "merits" do not raise a constitutional issue. In this regard I submit that whether or

not section 2(2) applies to a person in the position of the applicants is a straightforward issue of statutory interpretation. The constitutionality of the section is not in dispute. The decision of the SCA on that issue should be final. I further submit that the existence or otherwise of the required jurisdictional facts, is a factual enquiry which is also a matter on which the decision of the SCA should be final.

Mr Zuma's attacks on the "merits"

231. I submit that Mr Zuma's main complaints on the merits can be summarised as follows:

231.1. The issuing of the Letter of Request directly threatened his fair trial rights, should such a trial eventuate. This argument has already been addressed above under the heading of *locus standi*;

231.2. The NDPP failed to establish the facts required for an order in terms of section 2(2) of the ICCM Act;

231.3. The High Court did not have the power to grant the order in terms of section 2(2) on the facts of this case;

231.4. The NDPP did not approach the court with clean hands; and

231.5. The High Court should not have exercised its discretion to grant the Letter of Request in the present case.

232. As regards the facts required for an order in terms of section 2(2) of the

ICCM Act, Mr Zuma argues (from paragraph 55 of the affidavit in case number CCT92/07) that the State does not require the documents as a necessary part of its investigation (for the reason that it is already in possession of copies). This argument, I submit, is premised on a fundamental misconception of the nature of a criminal investigation. As the affidavits before Levinsohn DJP established and as the SCA confirmed, a criminal investigation does not consist solely of the discovery of unknown information about a suspected offence (i.e. “solving” the crime). It includes analysing such information and obtaining it in a form which will be admissible at a subsequent prosecution. In respect of eye witnesses, this involves obtaining their affidavits and filing them in the docket. In the case of documentary evidence, this involves obtaining the original document for presentation to court even if copies are already on file. Apart from its evidential value, an original document also has potential value for the investigation which a copy does not. For instance, the diary of Thétard may be subjected to handwriting analysis should its authenticity be disputed; alterations and forgeries may be more easily detected; documents may be fingerprinted and paper and ink analysed, etc.

233. In addition, Mr Zuma conveniently ignores the fact that the Letter of Request also requires affidavits from the Mauritian officials to establish the authenticity and the chain of custody of the documents. This is entirely new information which has never before been obtained.

234. I submit that the fact that the original documents were not obtained prior to the Shaik trial is neither here nor there. Attempts were made to obtain the originals prior to the trial, but were thwarted by the existence of the injunction in Mauritius (i.e. the September 2003 consent order). The decision to use copies in the Shaik trial was taken because there was then insufficient time to overcome this obstacle. That consideration no longer applies at present and it is thus incumbent upon the State to make all reasonable efforts to obtain the originals, more especially so since the applicants are on record as saying that they will oppose the admission of the copies.

235. Furthermore, it is contended, an investigator may not take any steps to obtain evidence in an admissible form for trial until the decision has been taken to prosecute, since, absent such a decision, the evidence is irrelevant. This, however, puts the proverbial cart before the horse. Decisions to prosecute must be taken on all the available evidence and includes an assessment of the admissibility thereof.

236. Finally in this regard, I submit that it is the task of the investigator and the prosecutor in the exercise of the powers and discretion conferred upon them by statute to determine what information and evidence they regard as “necessary” for their investigation and it is not within the accused’s rights to direct such investigations over their shoulder.

237. Turning to the Court's power to grant an order in terms of section 2(2) of the ICCM Act in this case, Mr Zuma asserts that there is a dividing line between circumstances in which section 2(2) may be applied and those in which the State is obliged to proceed in terms of section 2(1). According to him, this dividing line is the institution of criminal charges, which he says has already happened in his case (i.e. when he was arrested in June 2005 and later arraigned before Msimang J and assessors). My response is as follows:

237.1. In the first instance, nothing in section 2 of the ICCM Act provides that subsections (1) and (2) are in fact mutually exclusive. There is not necessarily a distinct "dividing line" between them. Broadly speaking section 2(2) is available for the purposes of obtaining information necessary for "*an investigation relating to an alleged offence*", while section 2(1) is available to obtain evidence at pending "*proceedings*".

237.2. Mr Zuma's argument rests on the faulty premise that if proceedings are pending, the investigation cannot still be existent. This is simply not correct. The investigation may proceed notwithstanding the fact that an accused has been arrested (which in the case of a serious offence like murder or a serious fraud case where the suspect is about to flee or where

intolerable damage is being caused to the public, may be at a very early stage of the investigation) and may even continue during the trial and in appropriate circumstances right up to the end of the defence case. This is best illustrated with a simple example. If an accused charged with murder raises an alibi for the first time in his plea, no reasonable person would dispute that the investigating officer is both entitled and obliged to investigate this version. If this investigation requires that information be obtained from a foreign country, then there is no reason why section 2(2) should not be available to do so, since the jurisdictional requirements would all be met. Should such information disclose a witness who could rebut the alibi, the prosecution would then be entitled to apply in terms of section 2(1) to obtain his or her evidence. Alternatively, should the section 2 (2) request produce documentary evidence disproving the alibi, the prosecution would be entitled to seek its admission in terms of section 5 (2).

237.3. Furthermore, it is not whether proceedings have been instituted that triggers the operation of section 2(1), but rather whether such proceedings are pending. In terms of section 2(1), these must be proceedings at which a court or presiding officer is presiding and the examination of a person in a foreign State is necessary. In the context of criminal proceedings, this can only

refer to the criminal trial, which commences once the accused has been asked to plead and has pleaded. Up until that stage (at the very least) section 2(2) is available to an investigator provided he or she is able to establish that the investigation is still current and the information sought is necessary therefore.

237.4. In any event, this debate is largely academic, since on any interpretation of the Act, there were no proceedings pending at the relevant time. I respectfully submit that both Levinsohn DJP and the SCA correctly concluded that there were no proceedings pending because the matter had been struck of the roll earlier (in September 2006).

238. Mr Zuma also argues that section 2(2) of the ICCM Act only provides for information to be obtained by way of the examination of witnesses and, consequently, that it was beyond the court's powers to grant the Letter of Request in its present form. At the outset I point out that this is an argument that Mr Zuma did not raise before the SCA and which the court accordingly did not consider, and moreover it concerns the interpretation of a statute and not a constitutional matter. I submit further that the argument is incorrect for the following reasons:

238.1. Section 2(2) provides for the obtaining of information "*… from a person or authority in a foreign state*" (section 2(2)(c)). The

section does not restrict the types of information that may be obtained or the manner in which it may be obtained. While it is correct that section 3(2) makes provision for the examination of witnesses, this section is clearly permissive and not peremptory. There is accordingly no reason in the present case, where information is already in the possession of the foreign authority, why the respondent should be required to go through the unnecessary charade of questioning a witness when all it requires is the documents already in its possession and a simple affidavit confirming their authenticity.

238.2. The information which may be obtained in terms of section 2(2) is "*such information as is stated in the letter of request*". The Act accordingly provides that the person requesting the information may define what is required, provided it also satisfies the three jurisdictional requirements. It is accordingly entirely permissible for the respondent to request that information in the form of documents or affidavits, depending on the exigencies of the investigation.

239. Mr Zuma next, surprisingly, attempts to resuscitate in this Court the "clean hands" argument which he did not persist in before the SCA and which the court accordingly did not consider. I nevertheless respond as follows to the "merits" of this argument:

239.1. Mr Zuma contends that the original Mauritius Supreme Court order of 5 October 2001 authorising the search and seizure (annexure "C" to the affidavit in case number CCT92/07) did not authorize the taking of copies. The Shaik trial court heard full argument on the evidence adduced by the parties – the State's evidence comprised a comprehensive affidavit by Adv. Downer (which was formally admitted by the accused under s 220 of the CPA) and the testimony of Inspector Coret from Mauritius. The Shaik trial court determined that the original Mauritius court order did indeed authorize the taking of copies. More specifically it found that it was clear from the affidavit supporting the South African application to the Mauritius authorities that copies of the documents were needed for prosecution purposes in South Africa. That was also clear from the affidavit supporting the Mauritius application to the Mauritius Supreme Court. Taking copies of the documents fell comfortably within the Mauritius court order that authorized searching for, and removing, the documents '*for purposes of executing the request*', i.e. for authentication and forwarding to South Africa.

239.2. Mr Zuma also complains that in removing the copies to South Africa Adv. Downer effectively placed them beyond the jurisdiction of the Mauritian Courts and thereby stymied any

possible attempt by Thales to set aside the warrant and sue for the return of the documents, knowing that it would be improper for him to do so. This criticism is likewise unfounded. In the first place, the complaint is stale. As stated, there has never been such a challenge launched in the more than 6 years since the searches occurred. Secondly, Adv. Downer was authorised by the Mauritian authorities to remove the copies. Thirdly, Mr Thétard and the officers of the entities searched were entirely co-operative and indeed expressed their desire to assist in the investigation in any way they could. In these circumstances, there was nothing to foreshadow and no reason whatsoever for Adv. Downer to believe that there would be any litigation aimed at returning the documents.

239.3. I also dispute that the removal of the copies prevented the owners from challenging the search and seizure and so restoring the *status quo ante*, had they so wished. The persons searched were perfectly able to challenge the search warrant and, if successful, obtain an order to have it set aside and for the return of all documents seized and any copies thereof. If that were to have happened and since requests for mutual legal assistance are premised upon cooperation and comity between the law enforcement authorities of the respective countries, I can categorically state that the copies would have been returned

should the Mauritian authorities have requested this.

240. The last of Mr Zuma's main arguments is that even if the jurisdictional requirements for an order under section 2(2) of the ICCM Act were met, Levinsohn DJP had a discretion to refuse the request in the interests of justice, which is what he should have decided in the circumstances. Once again this is an argument that Mr Zuma did not raise before the SCA and which the court accordingly did not consider. I submit moreover that the argument is bad, for the following reasons. None of Mr Zuma's reasons (in paragraph 72 of the affidavit in case number CCT92/07) for saying that Levinsohn DJP should have exercised the discretion in his favour, constitutes a ground on which an appellate court may to interfere with the exercise of the discretion. Mr Zuma does not allege that the discretion, which I submit is a discretion in the narrow sense involving a choice between two or more different, but equally permissible, alternatives (see the cases collected in Bezuidenhout v Bezuidenhout 2005 (2) SA 187 (SCA)), had not been exercised judicially or that its exercise was influenced by wrong principles or a misdirection on the facts (Ex parte Neethling and Others 1951 (4) SA 331 (A)). In any event, Mr Zuma has not explained why the manner in which Levinsohn DJP exercised this discretion raises any constitutional matter.

241. Mr Zuma has also raised certain other arguments on the merits, none of which, I submit, has any merit.

242. Mr Zuma contends, first, that the present request is simply a continuation of the original 2001 request. The argument is to the effect that the present application must continue in terms of the 2001 procedure, which was not launched in terms of section 2(2) of the ICCM Act. In response, I respectfully submit as follows:

242.1. The present request is an entirely new request for an entirely different purpose, namely to obtain the original documents in the possession of the Mauritian authorities, together with identifying and authenticating affidavits from its officials.

242.2. This assistance falls within the parameters of a request in terms of section 2(2) and the respondent is quite entitled to rely on these provisions, which the legislature has provided "*to facilitate the provision of evidence*" etc.

242.3. Mr Zuma is correct that the original request was not made in terms of section 2(2) of the ICCM Act. It was a request under section 31. The request was for a search and seizure and *commission rogatoire* and also contemplated the transmission of copies of documents seized, duly certified and authenticated. That process is now complete. More specifically, the request for the *commission rogatoire* was abandoned at the instance of the

Mauritian authorities, the searches were conducted and certified and authenticated copies of the documents have been provided.

243. Mr Zuma continues to submit that the present application is barred by the Mauritius injunction presently governing the documents in Mauritius (i.e. the September 2003 consent order). On the contrary, the fact that an injunction exists in Mauritius has absolutely no bearing on the present order. The Mauritian authorities require a fresh Letter of Request before they can take any steps to provide the originals. This much is common cause. That is why the present Letter of Request is necessary. The fact that such steps include obtaining the permission of court in Mauritius is a matter which falls outside the matters which the court issuing the Letter of Request is required to consider in terms of section 2(2) and is accordingly of no relevance to the present enquiry.

244. Mr Zuma seeks to rely on remarks made by Combrinck J in his judgment handed down on 22 March 2006 in the first section 2(1) application (which was made after Mr Zuma had been arrested and before the trial before Msimang J was to commence). Mr Zuma says that Combrink J "*clearly indicated that the first step was for the prosecution, in the same manner in which it persuaded the Mauritian authorities to carry out the search and seizure, to seek the upliftment of the injunction"*. However, Combrinck J said nothing of the sort. All he said was that he was not sure why it was necessary to obtain a court order to obtain the document and opined,

obiter, that all that was required was a request to the Mauritian Central Authority. I attach a copy of Combrinck J's judgment, marked "**JDP12**", and refer to paragraph 9 thereof. I record also that the Thint companies have given notice of their objection to such an informal mode of request.

245. Mr Zuma's last complaint appears to be that because (he alleges) he has reason to attack the legality of the receipt of copies of the Mauritian documents by the NDPP's officials, he is entitled to prevent the NDPP from obtaining the originals of these documents (which are untainted by such illegality) – Mr Zuma's idea seems to be that if the NDPP gets the originals he will lose the tactical advantage of exposing the alleged unlawful conduct of the State. In response, I submit that apart from the fact that both Levinsohn DJP and Squires J (the judge in the Shaik trial) have already ruled that the receipt and removal of the copies was perfectly lawful (the former *prima facie* and the latter beyond reasonable doubt), Mr Zuma's submission is illogical and incorrect. Mr Zuma has no right to prevent the State from obtaining this lawful, relevant and *prima facie* admissible evidence in order for him to "preserve" a dubious tactical advantage at any future trial. He has no more such right than a murder accused to seek to prevent the State from interviewing an eye witness to a murder.

The Thint companies' complaints

246. The Thint companies' major complaint is that the information sought is not "necessary" for the purposes of the investigation.

246.1. As a starting point, I repeat that what information is "necessary" for the purposes of an investigation is a matter which is pre-eminently determined by the investigator conducting that investigation, as advised by the relevant prosecutor. They are the persons who are closely steeped in the details of the investigation and who are in the best position to determine what information is required in order to establish whether a crime has been committed and what evidence they need to prove this at the ultimate prosecution. Accordingly, the judge considering an application under section 2(2) of the ICCM Act is entitled, when determining whether the information sought is necessary in the interests of justice for the purpose of the investigation, to accept the motivation of the investigator (unless of course the judge has reason to believe that the motivation is uncreditworthy). There was nothing in the papers before Levinsohn DJP that could have given him any cause to doubt my assertion that the original documents were indeed necessary in the interests of justice for the purpose of the investigation.

246.2. It is a matter of record that in the Shaik trial the accused admitted the authenticity of the documents and therefore did not

object to copies being admitted (rather than the originals). In the instant matter, the applicants have all indicated that no such concession will be forthcoming. It is accordingly incumbent upon the State to do everything in its power to obtain the originals and they are therefore clearly "necessary" for the purposes of this investigation.

247. The Thint companies complain further that the SCA did not pertinently deal with this argument in its judgment. This is disputed. It is clear from the SCA judgment as a whole that it regarded the obtaining of the documents as "necessary" to overcome the applicants' stated intention to object to the use of the copies.

248. The Thint companies also persist with their argument that "information" as used in section 2(2) does not include evidence sought for the purposes of trial. In response I say this interpretation is unduly restrictive and would lead to absurd results:

248.1. It is in conflict with the intention of the ICCM Act as stated in the preamble, namely to "facilitate" international co-operation in criminal matters.

248.2. The term "information" is comfortably wide enough to encompass evidence, which is simply information obtained in a form that is

designed to facilitate its admission as evidence at court.

248.3. It is also clear from the other provisions of the ICCM Act that information obtained may include evidence. Section 5(2) clearly contemplates that the information obtained may be admitted as evidence at a subsequent prosecution. Section 3(2) read with section 5(1) makes provision for the examination of witnesses under oath. If the purpose of section 2(2) was simply to obtain "information" in the narrow sense contended for by Thint, this procedure would be completely superfluous.

249. Finally, the Thint companies argue that Eisenberg's case (Minister of Home Affairs v Eisenberg & Associates: In re Eisenberg & Associates v Minister of Home Affairs and Others 2003 (5) SA 281 (CC)) is on all fours with the present facts and supports Thint's *locus standi*. I submit that Eisenberg's case is distinguishable on the facts. It dealt with the applicant's standing to challenge the constitutionality of regulations. Since those regulations directly affected the applicant as a member of the public and more especially because of the business it was in, it clearly had a direct or substantial interest in the matter. In the present circumstances, however, we are dealing with an administrative act which does not affect the applicants' rights or those of the public at large. The effect of the SCA's ruling is not to deny "anyone" the right to challenge the lawfulness of the ruling; it simply denies *locus standi* to those who do not have an

interest in the issuing of the Letter of Request.

No reasonable prospects of success

250. I consequently submit that the applicants do not have reasonable prospects of success in the appeals for which leave is sought in case numbers CCT90/07 and CCT93/07.

THE INTENDED APPEALS NOT IN THE INTERESTS OF JUSTICE

251. Section 167(6)(b) of the Constitution provides that the criterion for determining whether to grant leave or not is whether this court is satisfied that it is in the interests of justice to do so. The decision to grant or refuse leave is a matter for the discretion of this Court (S v Boesak 2001 (1) SA 912 (CC) para 12). In determining what is in the interests of justice, each case has to be considered in the light of its own facts and circumstances (S v Basson 2005 (1) SA 171 (CC) para 39; Prophet v National Director of Public Prosecutions 2006 (2) SACR 525 (CC) para 48).

252. The State submits that the granting of leave to appeal in the present cases would not be in the interests of justice for the following reasons in particular:

252.1. The applicants have poor prospects of success on the merits, for the reasons given above.

252.2. In the intended search-warrant appeals, even if the applicants were to succeed with one or more of their attacks, the applicants have poor prospects of persuading this Court that an appropriate preservation order should not be made.

252.3. The applicants' main interest in the intended appeals is to attempt to ensure that if they are prosecuted evidence (i.e. the contested documents) is not available to the State.

252.4. If there is a prosecution, the prosecution team will seek to enrol the trial on the earliest date which would be fair to Mr Zuma and the Thint companies. The trial judge will then determine the admissibility of any contested documents. Consequently, if there is a prosecution the intended appeals will be relevant only to the question whether the documents will be available in the short-term for production at that trial.

252.5. If the NPA decides not to prosecute Mr Zuma and the Thint companies, the respondents will forthwith return to them the documents seized in South Africa and request the Department of Foreign Affairs to notify the Mauritian authorities not to proceed with the actions requested in the Letter of Request.

CONCLUSION AND PRAYER

253. This affidavit will be delivered two days late. It proved impossible to answer all four of the applications for leave to appeal within the period of 10 court days permitted by this Court's rules both because of the sheer volume of work involved and because the availability of the respondents' counsel was limited (in some cases severely so) due to prior commitments and arrangements. The respondents will apply for condonation at the hearing of these applications, if any.

254. For the reasons set out above, the respondents ask that the applications for leave to appeal in case numbers CCT89/07, CCT90/07, CCT91/07 and CCT92/07, be dismissed with costs, including the costs of three counsel.

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JOHAN DU PLOOY

I certify that on the day of DECEMBER 2007 at the address given below the deponent signed the affidavit in my presence and declared that he:

(a) knows and understand the contents thereof;
(b) has no objection to taking this oath;
(c) considers the oath binding on his conscience,

and uttered the words "*I swear that the contents of this affidavit are true and correct, so help me God*".

_____

Commissioner of Oaths

Ex officio: South African Police Service

Full names:

Rank:

Address: