THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 639/06
Reportable

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**FIRST APPELLANT**
INVESTIGATION DIRECTOR: DIRECTORATE OF SPECIAL OPERATIONS	**SECOND APPELLANT**
INVESTIGATION DIRECTOR: INVESTIGATING DIRECTORATE (SERIOUS ECONOMIC OFFENCES)	**THIRD APPELLANT**
INVESTIGATING DIRECTOR: INVESTIGATING DIRECTORATE (CORRUPTION)	**FOURTH APPELLANT**
DIRECTOR OF PUBLIC PROSECUTIONS (DURBAN AND COAST LOCAL DIVISION)	**FIFTH APPELLANT**

and

JACOB GEDLEYIHLEKISA ZUMA	**FIRST RESPONDENT**
MICHAEL HULLEY	**SECOND RESPONDENT**

CORAM: FARLAM, NUGENT, CLOETE, PONNAN et MLAMBO JJA

HEARD: 28 AUGUST 2007

DELIVERED: 8 NOVEMBER 2007

SUMMARY: Search and seizure – search warrant – validity of – warrants issued in terms of s 29 of National Prosecuting Authority Act 32 of 1989 – whether references to suspected offences inappropriately vague.

ORDER OF COURT SET OUT IN PARA 109 IN JUDGMENT OF NUGENT JA.

Neutral citation: **This judgment may be referred to as *The National Director of Public Prosecutions v Zuma* [2007] SCA 137 (RSA).**

FARLAM JA

INTRODUCTION

[1] This is an appeal against a judgment of Hurt J, sitting in the Durban High Court, in which he declared five search warrants invalid and the searches pursuant to them unlawful and ordered the appellants to return to the respondents all items seized under them together with all copies that had been made and to pay the costs of the application.

[2] Hurt J's judgment has been reported: see *Zuma v National Director of Public Prosecutions* 2006 (1) SACR 468 (D).

PARTIES

[3] The appellants, who were the respondents in the court below, are the National Director of Public Prosecutions (first appellant), the Investigating Director of the Directorate of Special Operations (second appellant), the Investigating Director of the Investigating Directorate: Serious Economic Offences (third appellant), the Investigating Director of the Investigating Directorate: Corruption (fourth appellant) and the Director of Public Prosecutions for the Durban and Coast Local Division of the High Court (fifth appellant).

[4] The respondents, who were the applicants in the court below, are Mr Jacob Zuma (first respondent) and Mr Michael Hulley, who has been acting as Mr Zuma's attorney in regard to criminal charges which were brought against him in June 2005 (second respondent).

RELEVANT STATUTORY PROVISIONS

[5] It is appropriate before the facts in this matter are considered to set out the relevant statutory provisions. They are contained in ss 28 and 29 of the National Prosecuting Authority Act 32 of 1998, as amended, which, as far as is material, provide as follows:

'28 (1) (a) If the Investigating Director has reason to suspect that a special offence has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may conduct an investigation on the matter in question, whether or not it has been reported to him or her in terms of section 27.

(b) If the National Director refers a matter in relation to the alleged commission or attempted commission of a specified offence to the Investigating Director, the Investigating Director shall conduct an investigation, or a preparatory investigation as referred to in subsection (13), on that matter.

(c) If the Investigating Director, at any time during the conducting of an investigation on a matter referred to in paragraph *(a)* or *(b),* considers it desirable to do so in the interest of the administration of justice or in the public interest, he or she may extend the investigation so as to include any offence, whether or not it is a specified offence, which he or she suspects to be connected with the subject of the investigation.

. . .

29 (1) The Investigating Director or any person authorised thereto by him or her in writing may, subject to this section, for the purposes of an investigation at any reasonable time and without prior notice or with such notice as he or she may deem appropriate, enter any premises on or in which anything connected with that investigation is or is suspected to be, and may-

(a) inspect and search those premises, and there make such enquiries as he or she may deem necessary;

(b) examine any object found on or in the premises which has a bearing or might have a bearing on the investigation in question, and request from the owner or person in charge of the premises or from any person in whose possession or charge that object is, information regarding that object;

(c) make copies of or take extracts from any book or document found on or in the premises which has a bearing or might have a bearing on the investigation in question, and request from any person suspected of having the necessary information, an explanation of any entry therein;

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

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

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

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

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

. . .

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

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

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

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

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

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

. . .

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

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

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

(10) (a) The Investigating Director or any person referred to in section 7 (4) (a) may without a warrant enter upon any premises and perform the acts referred to in subsection (1)-
(i) if the person who is competent to do so consents to such entry, search, seizure and removal; or

(ii) if he or she upon reasonable grounds believes that-
(aa) the required warrant will be issued to him or her in terms of subsection (4) if he or she were to apply for such warrant; and

(bb) the delay caused by the obtaining of any such warrant would defeat the object of the entry, search, seizure and removal.

(b) Any entry and search in terms of paragraph (a) shall be executed by day, unless the execution thereof by night is justifiable and necessary, and the person exercising the powers referred to in the said paragraph shall identify himself or herself at the request of the owner or the person in control of the premises.

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

[6] In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors (Pty) Ltd v Smit NO,* 2001 (1) SA 545 (CC) the Constitutional Court held, *inter alia,* that s 29 (5) of the National Prosecuting Authority Act (which I shall call in what follows 'the Act') is not inconsistent with the Constitution.

FACTS

[7] On 11 August 2005 Mr Johan du Plooy, a senior special investigator employed at the Directorate of Special Operations, established by s 7 of the Act, made an affidavit in support of an application for 21 search warrants to be

issued in terms of s 29(5) and 29(6) of the Act. On 12 August 2005 an application was made in chambers in terms of s 29(4) of the Act to Ngoepe JP in the Pretoria High Court, for the issue of the warrants sought in Mr du Plooy's affidavit and on the same day the learned judge president authorised the issue of the majority of warrants sought after requiring a modification to the wording of the drafts submitted to him so that the offences which were the subject of the investigation were stated.

[8] On the morning of 18 August 2005 the warrants authorised by Ngoepe JP were executed simultaneously at premises throughout the country by some 250 members of the Directorate of Special Operations of the National Prosecuting Authority and approximately 93 000 documents were seized. The purpose of the searches was to obtain further evidence for use by the prosecution in the criminal proceedings on charges of corruption then pending against Mr Zuma and for use in possible criminal proceedings against two companies, Thint (Pty) Ltd and Thint Holdings (Southern Africa) (Pty) Ltd.

[9] A short time after the searches took place these two companies were indicted to stand trial as co-accused with Mr Zuma in the Pietermaritzburg High Court.

[10] Proceedings were instituted in the Johannesburg High Court on 26 August 2005 by Ms J Mahomed, an attorney practising in Gauteng, who had acted as the legal advisor and representative of Mr Zuma, for an order setting aside two of the warrants authorised by Ngoepe JP, declaring the searches and seizures carried out in execution of the warrants to be unlawful and directing *inter alia* that all her property seized under the warrants be returned. On 9 September 2005 Hussain J granted Ms Mohamed the relief she sought. His judgment, which has been reported as *Mahomed v National Director of Public Prosecutions and Others* 2006 (1) SACR 495(W), has also been the subject of an appeal before us, in which the judgment is being delivered simultaneously with this one.

[11] On 6 October 2005 Mr Zuma and Mr Hulley brought this application

seeking relief in respect of seven of the warrants authorised by Ngoepe JP. The attacks on two of the warrants became moot and no order was made in respect of them.

[12] On 5 January 2006 Thint (Pty) Ltd and its director Mr Pierre Moynot brought an application in the Pretoria High Court for relief similar to that sought in the present case in respect of warrants issued by Ngoepe JP authorising searches and seizures at the company's office and at the residence of Mr and Mrs Moynot, both in Pretoria. The respondents were the first and second appellants in the present matter and Mr du Plooy, who had deposed to the affidavit on which the application for the warrants was founded. The respondents conceded the relief sought in respect of the warrant issued authorising the searches and seizures at the residence of Mr and Mrs Moynot but opposed the application in respect of the searches and seizures effected at the office of Thint (Pty) Ltd. The application so limited failed. Du Plessis J, who heard it, held that the warrant was valid and the searches and seizures effected under it were valid. Thint (Pty) Ltd and Mr Moynot have appealed against his judgment and the judgment on their appeal is also being delivered simultaneously with this one.

[13] The five warrants in regard to which the application succeeded related to searches of the following premises:

(a) Mr Zuma's flat in Killarney, Johannesburg, which was occupied when the warrant was executed by two of his sons, his daughter and the wife of one of his sons;

(b) Mr Zuma's residence at the Nkandla Traditional Village in the district of Nkandla in KwaZulu-Natal;

(c) Mr Zuma's former office at the Union Buildings, Pretoria;

(d) Mr Zuma's former offices at Momentum House, Ordinance Road, Durban; and

(e) Mr Hulley's offices in Durban.

[14] The five warrants authorised by Ngoepe JP which are relevant in the present case were, except for the particulars relating to the premises to be searched, in identical terms. They read as follows:

SEARCH WARRANT

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

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

WHEREAS it appears to me from information on oath setting out the nature of the investigation, that there exists a reasonable suspicion that an offence/offences has/have been or is/are being committed, to wit, Corruption in contravention of Act 94 of 1992, Fraud, Money Laundering in contravention of Act 121 of 1998 and/or the commission of tax offences in contravention of Act 58 of 1962, or that an attempt was or had been made to commit such an offence/offences, and the need, in regard to the investigation, being an investigation into allegations of corruption, fraud, money laundering and/or the commission of tax offences, for a search and seizure in terms of the above-mentioned section, of any object as per Annexure A, which has a bearing or might have a bearing, on the investigation in question.

AND WHEREAS it appears to me from the said information on oath that there are reasonable grounds for believing that an object(s) having a bearing or which might have a bearing on, or is/are connected with the investigation, is (are) on or in the premises or suspected to be on or in the premises of

. . .

YOU ARE HEREBY AUTHORISED to enter the said premises during the daytime and there to inspect and search and make such enquiries that you may deem necessary, examine any object found on or in the premises which has a bearing or might have a bearing on the investigation in question and, against the issue of a receipt, to seize anything on or in the premises which has a bearing or might have a bearing on the investigation, or if you wish, to retain it for further investigation or for safe custody, (including inspection, searching and seizing computer-related objects in the manner authorized in Annexure B) and to remain on the said premises and to complete the abovementioned inspection, search, enquiries, examination and seizure during the nighttime if necessary.'

[15] Annexure A, to which reference is made in the first paragraph of the preamble of all the warrants, was also in identical terms in the case of each

warrant except in the case of the warrant authorised in respect of the offices of the second respondent, Mr Hulley, which I shall deal with presently. It contained twenty-three numbered paragraphs which followed the wording of paragraphs 2 to 24 of Annexure A to the warrants authorised for the search at the residence and offices of Ms Mahomed which formed the subject matter of the application heard by Hussain J in the Johannesburg High Court and which are printed in full at pages 514 to 517 and 519 to 522 of the report of his judgment.

[16] The copy of Annexure A annexed to the warrant authorising the search of the offices of the second respondent had only two paragraphs. The first paragraph read as follows:

'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.'

[17] The wording of the second paragraph followed the wording of the twenty third paragraph of Annexure A in the other warrants under consideration in this case and the twenty fourth paragraph of that Annexure in the two warrants printed at the end of Hussain J's judgment to which I have referred. Hurt J described it as a 'catch-all paragraph'. It read as follows:

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

[18] Annexure B, to which reference was made in the authorising paragraph of all the warrants, was identically worded in each case. It read as follows:

'1. Making two mirror images (complete disc copies) of computers, laptops notebooks or hard drives, or any other electronic device on which information can be stored or saved, such as stiffies, compact discs and floppies.

2. Making digital images of any of the above for identification purposes.

3. Seizing computer hardware and software components and computer manuals necessary to facilitate forensic analysis.

4. Thereafter, and at a location removed from the premises, conducting searches by way of forensic analysis to identify and retrieve all information which has a bearing, or might have a bearing, on the investigation in question.'

[19] There was a dispute on the affidavits as to what happened when the warrant authorised in respect of the second respondent's offices was executed. Hurt J (at 489 b) relied only on the evidence given by the deponents for the appellants. (In doing so he was in my view correct, as the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) clearly applies, at least as far as disputes of fact relating to the execution of the warrants is concerned: whether it also applies in respect of disputes relevant to the authorisation of the warrants need not now be considered.)

[20] According to the version relied on by the learned judge Mr Johannes van Loggerenberg, a senior special investigator employed at the Directorate of Special Operations, who was the leader of the team which executed the search warrant at the second respondent's offices, arrived at the offices with a team of seven searchers before the second respondent did. When the second respondent arrived, Mr van Loggerenberg gave him a copy of the warrant which he read. He then informed Mr van Loggerenberg and his team that he could assist them by pointing out the documents he had received relating to the first respondent. (The reference was clearly to the documents referred to in the first paragraph of Annexure A to the warrant which he had read.) Mr van Loggerenberg followed the second respondent to his filing office where he pointed out two file boxes (which were still unopened), on the side of each of which was a foolscap page reflecting the contents of each box. With the agreement of Mr van Loggerenberg the second respondent made copies of the inventories of each box. The boxes were seized and the second

respondent was given a receipt for them. Some time thereafter the second respondent, who had been telephoned by the first respondent and told of the searches in Johannesburg and Nkandla, left for the airport en route to Johannesburg. On his way to the airport he telephoned Mr Anton Steynberg, a Deputy Director of Public Prosecutions, stationed at the regional office of the Directorate of Special Operations, KwaZulu-Natal, and told him that he wanted to challenge the lawfulness of the searches and that for that purpose he needed a copy of Mr du Plooy's affidavit pursuant to which the warrants had been obtained. After contacting his leader, Mr WJ Downer SC, who was in charge of the investigation, Mr Steynberg reverted to the second respondent and told him that he could obtain a copy of the affidavit from the registrar of the Pretoria High Court. The second respondent then asked whether all the documents seized could be sealed and lodged with the registrar of the High Court until the lawfulness of the search had been determined. Mr Steynberg's response was that he would check with Mr Downer but that the law did not make provision for documents to be lodged with the registrar in such circumstances. He then spoke to Mr Downer, who agreed with his approach. When he next spoke to the second respondent, who by this time had arrived in Johannesburg, Mr Steynberg told him what Mr Downer had said and suggested that he contact him. Thereafter the second respondent telephoned Mr Downer and requested him to stop the search until he had a copy of Mr du Plooy's affidavit and had had an opportunity to apply for a court order declaring the search of his offices unlawful. Mr Downer declined this request. He stated in his affidavit that the second respondent made no other request of him and did not claim privilege in respect of any of the documentation which had been in his possession. 'All he did', said Mr Downer, 'was to ask me what would happen if any documents were privileged and I said to him that he must decide which documents he considered to be privileged.' Mr Downer also said to the second respondent that it did not seem to him that any of them could be privileged because they emanated from Mr Shaik's attorney, Mr Parsee, according to whom they consisted of financial records.

[21] Later that day the second respondent spoke to Mr George Baloyi, a

Deputy Director of Public Prosecutions attached to the office of the Director of Public Prosecutions, Pretoria. He asked Mr Baloyi to agree to his proposal that the papers seized at his offices be deposited with the registrar. He stated that he needed time to peruse the papers, consult with counsel and then make a decision whether to challenge the legality of the search warrants. 'His request was', said Mr Baloyi, 'that pending such a decision, the documents be deposited with the registrar.' Mr Baloyi told the second respondent that he would discuss the matter with Mr Downer.

[22] The next morning the second respondent received a copy of Mr du Plooy's affidavit from Mr Baloyi, who told him that his request could not be acceded to. That afternoon the second respondent sent a telefax to Mr Steynberg in which he stated his view:

(1) that 'a certain privilege attaches to the entire body of documents seized' from his offices; and

(2) that in terms of the Act the 'documents ought to be lodged with the Registrar in these circumstances'.

[23] Mr Steynberg replied as follows on 22 August 2005:

'The search and seizure operation conducted at your offices on 18 August and our subsequent telephone conversations refer.

I am informed by the DSO [Directorate of Special Operations] members who conducted the search that you pointed out to them the documents described in the search warrant, namely the financial documents relating to Mr Zuma that were forwarded to you by his former financial manager, Mr Schabir Shaik, via his attorney Mr Reeves Parsee. No other documents were read or seized by the DSO members, nor were your offices physically searched.

I am informed further that at no stage did you or any of your staff indicate to the members present that the documents seized were, or might be, privileged.

In the abovementioned circumstances, we are of the view that such documents constitute evidentiary material that is highly relevant to the current investigation and that no legal privilege attaches to such documents.

We are therefore of the view that there is no reason in law why these documents should be

handed to the registrar for safekeeping and accordingly we decline to do so.'

DECISION OF COURT *A QUO*

[24] Hurt J's decision in favour of the respondents was based on three separate grounds. The first ground was that the appellants had not shown, as s 29(5)(c) required, that there was a need for a search and seizure in terms of the section. This was because the material put before Ngoepe JP did not contain a persuasive explanation of the necessity to invoke the provisions of the section.

[25] He expressed the view that it was 'open to considerable doubt' whether the additional evidence sought was needed by the authorities for the purposes of their investigation. In any event, he held, even if the evidence was necessary, it had not been established that it could not be obtained by invoking the provisions of s 28.

[26] The second ground on which Hurt J's judgment was based was that the warrants were unduly vague in two respects.

[27] The first was that they did not describe the suspected offences under investigation with sufficient particularity. He referred in this regard to the *dictum* of this court in *Powell NO v Van der Merwe NO* 2005 (5) SA 62 (SCA) in para 59 (d) and (e) that 'a warrant must convey intelligibly to both searcher and searched the ambit of the search it authorises' and that '(i)t is no cure for an overbroad warrant to say that the subject of the search knew or ought to have known what was being looked for: the warrant must itself specify its object, and must do so intelligibly and narrowly within the bounds of the empowering statute.'

He continued (at 487b-f):

'I consider that the precept in *Powell's* case, requiring the warrant to convey the ambit of the search "intelligibly", includes a requirement that the person to be searched must be given information as to approximately when the suspected offences have been committed and who is suspected of having committed them. It should be noted, as I have indicated earlier, that the warrants in this case are in the form of a notification by the authorising, judicial officer that

it "appears to (him/her) from information on oath" that the reasonable suspicion exists. The information on oath which was submitted to obtain authorisation for these warrants was that the suspected corruption arose from conduct, up to 2002, between the first applicant and Mr Shaik, that the suspected money laundering occurred over a similar period and that the fraud and tax offences related to non-disclosure in declarations required by statute. There was also, of course, the vague suggestion of a suspicion that corrupt activities may have continued beyond 2002. Without including those limits in the warrants, it would be impossible for the person on the receiving end of their execution to know what the searchers might reasonably be entitled to look for. I accordingly hold the view that the references to the suspected offences in the warrants are inappropriately vague and that the warrants are all invalid on that ground.'

[28] The second respect in which it was held that the warrants were unduly vague was based on the 'catch-all paragraph', which, in effect, so he held, constituted 'authority to search an accused person's premises "to find anything that [would] help [the appellants] in the prosecution".' He held further that the 'catch-all paragraph' in each of the warrants was not severable from the rest of the warrants because the authorities relied on in support of the severance argument (*Cine Films (Pty) Ltd v Commissioner of Police* 1972 (2) SA 254 (A) at 268 and *Divisional Commissioner of SA Police, Witwatersrand Area, v SA Associated Newspapers Ltd* 1966 (2) SA 503 (A) at 513 A-B) predated the Constitution and constitutional considerations now prevent the warrants in this case being pruned down to acceptable limits *ex post facto.*

[29] The third ground on which the judgment was based involved a finding that the second appellant should have been aware that attorney-client privilege might be jeopardised in the course of the search of the second respondent's offices, which could have resulted not only in prejudice to the respondents but also in a violation of the first respondent's fair trial rights. This could have been prevented either by referring in the warrant to the provisions of s 29(11) or by bringing these provisions to the attention of the second respondent when the warrant was served on him.

[30] In the course of his judgment Hurt J also considered and rejected a submission advanced before him by counsel for the respondents, which was repeated in argument in this court, to the effect that the powers conferred by s

29 can only be used against a person suspected of having committed a crime or crimes *before* he or she becomes an accused.

[31] Hurt J assumed in his judgment that the formal steps required to be followed by the appellants to obtain and thereafter execute the warrants complied with the statutory requirements. He accordingly made no finding on a number of issues raised in this regard on the papers by the respondents.

[32] In this court counsel for the respondents once again raised the contentions which Hurt J had assumed, without deciding, were not correct.

DISCUSSION:

THE VALIDITY OF THE WARRANTS

[33] As appears from the summary of Hurt J's judgment I have given, his finding that the warrants under consideration in this case were invalid because they were, as he put it, 'inappropriately vague' was based upon the application of the summary of the law on the point appearing in para 59(d) of the judgment of this court in *Powell NO v Van der Merwe NO, supra.* In this regard Hurt J found that the failure to include in the warrants the information relating to the nature of the investigation for the purpose of which the warrants were sought resulted in their not conveying to the persons on the receiving end of the warrants the ambit of the searches authorised by the warrants. That the warrants read on their own, without reference to Mr du Plooy's founding affidavit, were so defective cannot be gainsaid. It is clear from the operative part of the warrants that the power to examine and thereafter seize objects conferred was confined to things which had or might have a bearing 'on the investigation in question' but the terms of the investigation were stated in such general terms that it was not possible to ascertain what it covered.

[34] Mr *Trengove,* who appeared with Mr *Salmon* and Mr *Breitenbach* for the appellants, endeavoured to meet this point by submitting that para 59(d) of this court's judgment in *Powell* does not require that the warrant be intelligible 'then and there', as it was put, ie, at the time of the search, and that it is enough that the ambit of the search should be intelligible when and if

challenged in court after the person whose premises have been searched has had sight of the founding affidavit on the strength of which the warrant was issued. He pointed out that although para 59 in *Powell* purports to be a summary of the legal position as set out in the cases discussed in this part of the judgment the requirement of intelligibility to the searched did not feature at all in that discussion and that, as he put it, its pedigree was not clear. He did not, however, submit that this requirement in the judgment was incorrect but merely that it had to be qualified in the way I have indicated. He stated that he was unable to point to any authority in our law either for or against his submission in this regard and Mr *Kemp,* who appeared with Mr *Smithers* on behalf of the respondents, and argued for the contrary proposition, indicated that he was also unable to refer to authority on the point.

[35] In my view Mr *Trengrove's* attempt to introduce this qualification into what was said on the point in *Powell* cannot succeed. The suggested qualification is not only against the trend of the South African authorities to which I shall refer presently as well as that of decisions in Australia and New Zealand but there are also compelling reasons why that should be so, as I shall endeavour to indicate.

[36] I begin with the South African authorities to which reference was made in *Powell.* In *Pullen NO v Waja* 1929 TPD 838 at 849 Tindall J in a passage quoted in *Powell* at para 54 said:

It is desirable that the person whose premises are being invaded should know the reason why: the arguments in favour of the desirability of such a practice are obvious.'

[37] In *Minister of Justice v Desai NO* 1948 (3) SA 395 (A) the same judge, by this time Tindall ACJ, said (at 405), when discussing the desirability of including a recital in a warrant:

'a recital is a helpful part of a search warrant if it is properly drafted, for it apprises the occupier whose premises are searched of the reason for the encroachment on his rights and thus may tend to allay resentment and prevent obstruction of the police.'

[38] The topic is considered in a number of judgments delivered elsewhere in the Commonwealth, many of which are collected in the comprehensive

judgment of Burchett J delivered in the Federal Court of Australia in *Beneficial Finance Corporation Ltd v Commissioner of Australian Federal Police* (1991) 103 ALR 167 (Fed C of A). The statutory provisions considered in those cases were not materially different from those under consideration here. One of the cases to which he referred was *Auckland Medical Aid Trust v Taylor* [1975] 1 NZR 728 (CA) in which McCarthy P said (at 736 line 50 to 737 line 2):

'As, according to my view, s 198 required a warrant to be issued in respect of a particular offence, it seems to me to be a necessary requirement still that there be sufficient particularity to enable, as I have said, the officer executing it to know to what offence the articles he is searching for must relate, *and to enable the owner of the premises to understand, and if necessary to obtain legal advice about, the permissible limits of the search.'* (The emphasis is mine.)

In the same case McMullin J said (at 749 lines 12 to 22 and 37 to 42):

'It is important . . . that the executing officer should know just what is the offence in respect of which the warrant is issued for without that knowledge the search may be unbounded. *It is important, too, to the householder who may be concerned to know the scope of the warrant.* He is entitled to have the warrant produced to him by the officer executing it (s 198 (8)).[As he is in our law (s 29(9)(a)).] The production of a warrant may have a twofold purpose, (i) to satisfy a householder that the person presenting the warrant is a person having judicial authority to enter the premises, *and (ii) to enable the householder to ascertain to what things the search is to be directed.* . . . I am of the opinion that there should be a sufficient measure of particularisation of the offence in the warrant to enable both the officer executing the warrant *and the person on whose premises it is to be executed (who may not be the suspect) to know just what are the metes and bounds of the search and seizure contemplated.'* (Again, my emphasis.)

(See also *Rosenberg v Jaine* [1983] NZLR 1 at 5 and *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA) at 793 line 48 to 794 line 3.)

[39] Another decision to which Burdett J referred (at 183) was an unreported judgment of Toohey J in *Quartermaine v Netto,* delivered on 14 December 1984, in which the following was said:

'The requirement of particularity is not merely formal; it is aimed at ensuring that the person whose premises are being searched knows the object of the search and can therefore make some assessment of the material likely to prove relevant. It is unacceptable that such a person be left in the dark as to the object of the search.'

[40] In the case before him Toohey J held that there was 'sufficient

precision to enable the officer executing the warrant to know what he is required to look for and for those in whose premises documents are found to make some assessment of what is required of them.'

[41] The matter was also considered by the English Court of Appeal in *Regina v Inland Revenue Commissioners, Ex parte Rossminster Ltd* 1980 AC 952. That case concerned a warrant issued by the Common Serjeant of the City of London under s 20C of the Taxes Management Act 1970, as amended. The warrant was addressed to various officers of the Board of Revenue and it authorised them to enter certain premises, to search them and to 'seize and remove any things whatsoever found there which you have reasonable cause to believe may be required as evidence for the purpose of proceedings in respect of such an offence.' The expression 'such an offence' was a reference to 'an offence involving fraud in connection with or in relation to tax'. The warrant was challenged on the ground that it did not specify any particular offence involving fraud in connection with or in relation to tax. It was suggested that there might be twenty different kinds of such fraud.

[42] The application failed in the Queen's Bench Divisional Court but succeeded in the Court of Appeal. An appeal by the revenue commissioners to the House of Lords succeeded, mainly, as I see it, as far as the point presently under consideration is concerned, on what was held to be the correct construction of the section under which the warrant was issued. The Court of Appeal's construction of the section was held to be erroneous.

[43] In my view, however, the reasoning contained in Lord Denning MR's judgment on the point presently under discussion does apply to our section construed against the background of the Constitution and the rights set forth in our Bill of Rights, particularly s 14, which entrenches the right to privacy. Moreover our section, unlike s 20c of the Taxes Management Act, requires that a person who seizes anything should be authorized to do so by the warrant.

[44] The passage in Lord Denning MR's judgment which is in my view

relevant in this case runs from 973H to 974F. It reads as follows:

‘(T)he vice of a general warrant of this kind – which does not specify any particular offence – is two-fold. It gives no help to the officers when they have to exercise it. It means also that they can roam wide and large, seizing and taking pretty well all a man’s documents and papers.

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

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

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

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

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

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

[45] The passages quoted from *Christie v Leachinsky, supra,* by Lord Denning MR were in accordance with our law even before the Interim

Constitution came into force: see, eg, *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) at 46D-E.

[46] In the circumstances I am satisfied that para 59 of Cameron JA's judgment in *Powell* correctly states the legal position to be applied in this case and that the 'not then and there' qualification argued for by Mr *Trengove* would not be correct.

[47] Mr *Trengove* also submitted that in deciding whether the warrants were intelligible 'to the searched' one had to take into account the knowledge already possessed by Mr Zuma, not by the persons to whom the warrants in question were presented when the searches began. I think that there are two answers to this submission.

[48] First, regard being had to the need for the warrant, standing on its own, then and there to indicate with the required specificity 'the metes and bounds' of the authorised search and seizure, so that steps could be taken without a moment's delay for unauthorised search and seizure to be stopped, it must follow, as Mr *Kemp* in my view correctly submitted, that the warrant must be reasonably intelligible to the person to whom it has to be presented in terms of s 29(9)(a) of the Act. Secondly, even if Mr Zuma can be regarded as having had the requisite knowledge so as to understand the full ambit of the warrants (a matter on which I make no finding), I think that the answer to the submission is contained in subparagraph (f) of para 59 in *Powell,* which, it will be recalled, reads:

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

[49] I do not think that the appellants' case is taken any further by a consideration of the provisions of s 29 (10)(b). First, it is not clear whether the paragraph can pass constitutional muster unless a provision requiring disclosure to the 'searched' person of sufficient information to enable him or her to know 'the metes and bounds of the search and seizure contemplated' is

to be read in. Secondly, the need for an urgent search and seizure operation as envisaged under ss (10) did not exist in this case. It may be that if such a need had existed 'the metes and bounds' requirement may have been capable of being dispensed with on the application of the principles set forth in s 36 of the Constitution.

[50] What is important in this case is that s 29 (9)(a) requires a copy of the warrant to be handed to the person in control of the premises or affixed to a prominent place on the premises if such person is not present. As McCarthy P said in the *Medical Aid Trust* case, *supra* (at 736 line 39), the corresponding requirement in the New Zealand statute was put there for some purpose. What that purpose is appears clearly from the authorities to which I have referred. A construction of our section which would defeat that purpose can clearly not be upheld and could lead in certain cases to invasions of privacy which are totally unacceptable and contrary to the spirit, purport and objects of our Bill of Rights.

[51] In view of the fact that I am satisfied that Hurt J was correct in holding that all the warrants were invalid because they did not intelligibly convey the ambit of the search, it is unnecessary for me to consider Mr *Trengove's* submission that Hurt J erred in holding that the 'catch-all paragraph' could not be severed from the rest of the warrants. It is appropriate, however, to record that Mr *Kemp,* in my view correctly, did not support Hurt J's view that 'constitutional considerations have superseded the considerations which led the Appellate Division to hold that offending portions of a warrant could be severed from the acceptable potions' in the *Cine Films* and *SA Associated Newspapers* cases. In the *Ferucci* case, which Hurt J purported to follow, the court found (at 234 F) that severance was not possible because the difficulties flowing from the terms and contents of the warrant permeated the warrant as a whole, not because of new constitutional considerations which rendered the two Appellate Division cases no longer applicable.

[52] In the circumstances I am satisfied that Hurt J correctly held that the five warrants with which he was concerned were invalid.

SHOULD A PRESERVATION ORDER BE GRANTED?

[53] In view of the fact that I have come to the conclusion that Hurt J correctly held that the warrants under consideration in this matter were invalid it is necessary to consider Mr *Trengove's* further submission that the order of the court *a quo* should be varied by inserting therein paragraphs which are designed to ensure the preservation of the evidential material gathered under the warrants or copies thereof.

[54] Mr *Trengove* contended that a decision to the effect that the warrants were invalid amounts to a finding that the appellants unlawfully infringed the respondents' rights to privacy which are constitutionally entrenched in the Bill of Rights. The court has, so it was submitted, a wide discretion to determine the appropriate remedy in cases involving the infringement of constitutional rights. In this regard reliance was placed on s 38 and s 172 (1) of the Constitution.

[55] These provisions read, as far as is material, as follows:

'38 Anyone listed in this section [which includes "anyone acting in their own interest"] has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights . . .'

'172 (1) When deciding a constitutional matter within its power, a court

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including –

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[56] Mr *Trengove* submitted that in fashioning appropriate remedies so as to deal with constitutional violations the courts have to have regard to the interests of third parties where these are or would be involved. Examples of

cases where this was done are *Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA), *MEC Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) and *MEC for Local Government and Development Planning, Western Cape v Paarl Poultry Enterprises CC trading as Rosendal Poultry Farm* 2002 (3) SA 1 CC. He pointed out that the public have an interest in the prosecution of criminals: indeed, as was said in *S v Basson* 2005 (1) SA 171 (CC) at para 33 the effective prosecution of crime is an important constitutional objective. In the same case at para 32 it was said that '[t]he constitutional obligation upon the State to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework.' (See also *Key v Attorney-General, Cape Provincial Division* 1996 (4) SA 187 (CC) at para 13.)

[57] It was further submitted that a declaration that the warrants are invalid coupled with a preservation order would, in the language of s 172 (1)(b) of the Constitution, be 'just and equitable' because it would recognise and balance all the constitutional interests involved.

[58] Mr *Trengove* contended further that there was ample reason for the exercise in the way suggested of the court's remedial discretion. He listed four factors, viz:

(1) It is clear that the State at all times acted in good faith and there is no suggestion, nor can there be, that it acted in bad faith or with ulterior purpose.

(2) This is not a case of crass or gross violations of human rights;

(3) The search and seizure was undertaken in the course of an investigation of serious crimes of high public interest. All persons concerned, State, police and potential accused, have a material interest in the search for the truth and the materials seized can only contribute to that end. It follows that an order should be fashioned which preserves the evidence and does not expose it to the risk that it might be lost.

(4) In view of the suggestion made in the respondent's papers that Mr

Zuma's professional privilege may have been breached as a result of the execution of the warrants, it may become an issue at a possible future trial of Mr Zuma whether he has suffered irreparable prejudice in this regard. The interests of justice require that that issue should be capable of the easy and definitive resolution which only the preservation of copies of the materials seized can ensure.

[59] In support of his contention that this court should in the exercise of its wide powers under s 38 and s 172(1) of the Constitution Mr *Trengove* referred to the position in Canada where the applicable constitutional provisions resemble ours in certain respects. In particular s 24(1) of the Canadian Charter of Rights and Freedoms, which provides that '[a]nyone whose rights and freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances', uses language which appears to have influenced the framers of our Constitution in the drafting of s 38 and s 172 (1). In addition our s 35(5) (which provides that 'evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice') is clearly influenced by s 24(2) of the Charter, which reads as follows:

'(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.'

[60] Mr *Trengove* referred to the fact that some courts in Canada have adopted the view that unconstitutionally obtained evidence should always be returned unless 'the initial possession by the person from whom the things were seized was itself illicit, eg, in the case of prohibited drugs or weapons': see *Lagiorgio v the Queen* (1987) 42 DLR (4th) 764 (Federal Court of Appeal) at 767. In that case Hugessen J said (ibid): 'Anything less negates the right and denies the remedy.' Another case where a similar stance was adopted was *Re Weigel and The Queen* (1983) 1 DLR (4th) 374 (Sask QB), in which

Noble J said (at 380): ‘The rights of an accused must not be given away just to make it easier for the Crown to prosecute an accused person.’ Earlier in his judgment (at 379) he had said that it was necessary that illegally obtained evidence be returned to provide incentives for proper investigative conduct. ‘What justification’, he asked, ‘is there for ruling on the one hand that the issue of a search warrant was illegally made and in the next breath saying to the authorities – that is alright – you can use the seized articles as evidence against the accused anyway. Can it be said this clearly contradictory position will encourage police officers and persons in authority to abide by the laws designed to protect the rights of the ordinary citizen? I think not.’

[61] Mr *Trengove* also drew our attention to another line of cases in Canada where a more flexible approach was adopted. In one of them, *Re Dobney Foundry Ltd and The Queen* (No.2) (1985) 19 CCC (3d) 465, a judgment of the British Columbia Court of Appeal, Esson JA criticised the line of cases which included *Re Weigel and The Queen, supra,* saying (at para 19) that they rested ‘upon the premise that the purpose and effect of the Charter is to elevate individual rights and freedoms to an absolute value which excludes any consideration of competing values such as the desirability that the criminal law be enforced. The rationale for that approach is that only “the police” are concerned with the enforcement of the criminal law. That approach, I suggest, ignores the reality of the matter, viz., the interests of the community as a whole require that a reasonable balance be struck between individual rights and community interest.’

[62] The order made in that case was that the justice of the peace in whose possession the documents were being kept under seal pursuant to an early interim order of the court should return the documents seized to the appellants within seven days from the date of service of his order provided that if a new warrant or warrants had been obtained before the expiration of seven days the justice of the peace was to deliver to the Crown all documents covered by the warrant or warrants and to return all other documents to the appellants.

[63] In the course of his judgment Esson JA referred to *Re Chapman and R* (1984) 12 CCC (3d) 1 (Ontario Court of Appeal), a decision in which the court had ordered the return of documents seized under an invalid warrant, despite an assertion by the Crown that the items were needed for the purpose of a criminal prosecution. It had done so not by applying a rigid rule but in the exercise of a discretion.

[64] Another decision of the Ontario Court of Appeal on the point is *Commodore Business Machines Ltd v Canada (Director of Investigation and Research)* (1986) 50 DLR (4th) 559 (Ont C.A.), where stating (at 562) that '[i]t may be that in many, if not most, of the situations where a search has been conducted in violation of Charter rights the goods seized should be returned', Cory JA made an order permitting the Crown to retain copies of the documents seized.

[65] Mr *Trengove* submitted that the flexible approach adopted by the Ontario Court of Appeal should be followed. He cited with approval views of Professor Kent Roach of the University of Toronto which are set out in his book *Constitutional Remedies in Canada* (para 9.770) as follows:

' In my view, the Ontario Court of Appeal's approach is to be preferred to those taken by other courts. It allows courts to return evidence when necessary either to correct a s. 8 violation by restoring illegally seized property or to avoid condoning and participating in a serious violation. If courts refuse to return evidence obtained through flagrant breaches of the Charter, they will not only condone the unacceptable conduct, but actually assist it by retaining the fruits of illegal searches. At the same time, it is difficult to argue that crime control considerations should never be considered, especially in cases where the evidence, if returned, is likely to be destroyed or otherwise not be available in subsequent trials. Courts should recognize that the return of evidence is in a practical sense related to its possible exclusion at a criminal trial and should be hesitant to return evidence, if its exclusion could be not justified under s. 24(2).'

[66] It was accordingly contended that the court has the power, which in the circumstances of this case it should exercise, to fashion an order which preserves the evidence seized under the warrants (or copies thereof) so that the trial court can ultimately determine whether it should nonetheless be admissible in evidence. He submitted that the order should be sufficiently

widely framed to ensure that if following the final determination of this appeal and the related appeals Mr Zuma is not charged at all or if he is not charged within a reasonable time he and Mr Hulley may apply on the same papers duly amplified for an order directing the registrar to release the materials to them.

[67] Mr *Kemp* submitted that if this court were to hold that the warrants were invalid, the court should simply order the return of the documents. He submitted that the rights protected by s 14 of the Constitution include the right to control one's information and submitted that the violation of the respondents' rights would only end when the documents were handed back.

[68] In my view Mr *Trengove* was correct in submitting that this court has the power to order that the documents or copies should be retained under seal by the Registrar of the Durban High Court. It is true that such an order would involve a continuation to some extent (although a relatively minor one) of the violation of the respondent's constitutional rights to the documents but it is clear that the court's power under s 38 and s 172 (1) of the Constitution is wide enough to cover this.

[69] For the reasons given by Mr *Trengove* I think it would be appropriate in this case for an order to be made for the preservation under seal by the Registrar of the Durban High Court of copies of the documents seized under the warrants declared invalid in this case, with the originals being handed back to Mr Zuma and Mr Hulley.

SUGGESTED ORDER

[70] The following order should in my view be made.

1. Subject to what is set out below, the appeal is dismissed with costs including those occasioned by the employment of two counsel.

2. The order of the High Court is varied by the substitution of the following paragraph for the existing paragraph 2:

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

(b) The registrar is ordered to make copies (either in person or through a delegate) in the presence of the attorneys for the applicants and the respondents of all the documents seized pursuant to the warrants referred to in paragraph 1 and to cause images of all computer materials seized pursuant to such warrants to be made by an expert appointed by the registrar and must hand over to the applicants’ attorneys the originals of the documents and the computer materials seized and all copies of such items which the respondents or their agents may have made while the items have been in their possession (irrespective of the means by which such copies have been made or taken) after the copying process is complete.

(c) The registrar is directed to retain the copies and computer images made in terms of subparagraph (b) and to keep them accessible, safe and intact under seal until:

(i) notified by the respondents that the retained items or any of them may be returned to the applicants; or

(ii) if proceedings are instituted pursuant to the investigation referred to in the founding affidavit placed before Ngoepe JP when the said warrants were authorised, the conclusion of such proceedings; or

(iii) the date upon which the first respondent decides not to institute or to abandon such proceedings;

whereupon the items so retained must be returned to the applicants.

(d) The provisions of subparagraphs (b) and (c) are subject to:

(i) any order of any competent court (whether obtained at the instance of

the applicants or the respondents);

(ii) the lawful execution of any search warrant obtained in the future; or

(iii) the duty of either of the applicants or the registrar to comply with any lawful subpoena issued in the future

(e) the respondents must not take any step to obtain access to any of the retained or returned items unless they give the applicants reasonable prior notice before any such step is taken: in particular, but without derogating from the generality of this provision the respondents may not take any such step without giving the applicants:

(i) reasonable prior notice of any application for a search warrant or an order directing either or both of the applicants or the registrar to deliver or release any retained or returned item; and

(ii) a reasonable opportunity to challenge in court any subpoena before either of the applicants or the registrar is obliged to comply with it.

(f) The respondents must pay all costs of implementing the provisions of this paragraph.'

_____
IG FARLAM
JUDGE OF APPEAL

CONCURRING
CLOETE JA

NUGENT JA:

[71] I have read the judgment of my colleague Farlam. I cannot agree with the order that he proposes and I regret that I must indeed gainsay his view that the warrants were defective.

[72] In the course of his judgment the learned judge in the court below made certain observations that reflect an approach that I think is fundamentally unsound. The learned judge observed that with time the courts will develop a body of practice as to the circumstances in which it is appropriate for a warrant to be issued and, so it seems from what he said, as to the form that such a warrant must take, in much the way that courts have developed by gradual modification what is commonly known as the Anton Piller order. He added that considerable assistance is to be had in that regard by looking at the manner in which courts have dealt with statutory provisions of the kind that are now in issue in other legislation, and that such a 'body of rules' has already started to develop. In my view that approaches the matter the wrong way round.

[73] The example that the learned judge used of an Anton Piller order highlights the defect of that approach. The Anton Piller order is a remedy that the courts have created in the exercise of their inherent powers. It is to be expected in those circumstances that the courts have fashioned a 'body of rules' determining when and in what form such an order may be issued. But that is not what we are concerned with in this case. We are concerned with warrants that are issued under statutory powers. It is the statute that must dictate what is required for a warrant to be valid and not the warrant that must dictate to the statute.

[74] Whether or not a warrant is defective depends upon whether or not it meets the requirements of the statute and that is in turn a matter for construction of the statute. It would be quite wrong for courts to devise what they consider to be a satisfactory form of warrant and then to test the validity of a particular warrant against that self-devised template. And while decisions in other cases will sometimes be helpful in deciding whether a warrant meets the criteria demanded by a particular statute at other times they will not be. Statutes that allow for search and seizure are not all the same. Nor do I think that decisions from foreign jurisdictions need to be slavishly adopted least of all without careful consideration of the context within which they were decided.

[75] The proper starting point, in my view, is not with pre-conceived ideas of what a warrant must contain, whether drawn from other cases or otherwise, but rather with construing the particular authorising statute to see what its criteria are. And where the legislature, in a constitutionally valid law, has authorised the performance of an act if certain conditions are met, others cannot simply be added.

[76] But there are two criteria for validity that will indeed apply to all warrants for search and seizure on account of their nature alone. A warrant is no more than a written authority to perform an act that would otherwise be unlawful. Like any other written authority it must obviously be intelligible ('capable of being understood')[1] for it must be possible to determine with certainty the scope of its authority. A warrant must also authorise no more than is permitted by its authorising statute. If it purports to authorise what it is not permitted to authorise the warrant will be invalid at least to the extent of the excess. (It might be wholly invalid if the good cannot properly be severed from the bad.)

[77] Those criteria for the validity of a warrant were recently restated by this court in *Powell.*[2] The form in which it was expressed (a warrant must be intelligible to 'searcher and searched') was taken by counsel for the respondents to mean that a warrant 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. That is not what was said in *Powell* and the language that was used does not purport to do so. Whether that is required for a warrant to be valid is a question that goes to its necessary content rather than to its 'intelligibility' and was not considered or even discussed in *Powell*. But it has taken up most of the argument in this matter and I will return to it later in this judgment.

[78] Apart from those two generally applicable criteria for the validity of a

[1] Shorter Oxford English Dictionary.
[2] *Powell NO v Van der Merwe NO* 2005 (5) SA 62 (SCA) para 59.

warrant I do not think there are others that are material to this case. If there are other requirements for the validity of the warrants that are now in issue they must be found in the statute itself, whether expressly or by necessary implication, if they are to be found at all.

[79] A statute must generally be construed in accordance with the ordinary meaning of its language viewed within its context (which includes the purpose that the statute sets out to achieve). In this case there has been no suggestion that the powers that are conferred by the authorising statute are unconstitutional and thus invalid. Nor was that suggested when the Constitutional Court scrutinised the section in *Hyundai Motor Corporation.*[3] Some of the submissions that were made before us drew freely on what were said to be constitutional imperatives that justify the ordinary language being rewritten to a greater or lesser degree but none of those submissions paid any attention to the permissive provisions of s 36 of the Bill of Rights. That section permits the legislature to make inroads upon protected rights (which the present statutory provision does) if certain requirements are met. There has been no suggestion that the inroads that are made by the present statute when construed in its ordinary meaning are not consistent with the provisions of s 36 and there is no reason then to give it another meaning.

[80] The clear purpose of the search and seizure section that is now in issue is to afford a tool to the Directorate of Special Operations (the Directorate) to perform its statutory functions. The Directorate was established in the office of the National Director of Public Prosecutions (NDPP) by s 7(1) of the National Prosecuting Authority Act of 1998. One of its functions is to investigate and prosecute the commission of 'specified offences', which include certain offences 'of a serious and complicated nature.'[4] (Nothing turns on what offences that term encompasses and for convenience I will call them simply 'offences'.)

[81] The general scheme of the Directorate's investigating powers was

[3] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributorsv (Pty) Ltd v Smit N.O.* 2001 (1) SA 545 (CC) para 40.
[4] *Powell*, above, para 6.

analysed by the Constitutional Court in *Hyundai Motor Corporation,* and again by this court in *Powell,* and I need only summarise it. The Act envisages that an investigation might be conducted in either of two forms. The Investigating Director may conduct a full investigation (in *Powell* it was called a plenary investigation and I will use that term) if he or she has reason to suspect that an offence has been or is being committed.[5] (A delegate may be appointed to do so on his or her behalf and where appropriate I will call the Investigating Director and his or her delegate interchangeably the 'investigator'). If the Investigating Director considers it necessary to hear evidence in order to establish whether there are reasonable grounds to conduct a plenary investigation he or she may also hold a preparatory investigation.[6]

[82] The statute gives extensive investigatory powers to an investigator (whether in a preparatory or a plenary investigation). He or she may summon any person who is believed to be able to furnish any information on the subject of the investigation, or to have in his or her possession or under his or her control any book, document or other object relating to that subject, to be questioned and to produce the item, to question the person concerned, and to retain for further examination or safe custody any such item.[7] An investigator also has wide powers of search and seizure. Subject in each case to a caveat that I will come to ss 29(1) and 29(9) authorise an investigator to enter any premises on or in which anything connected with that investigation is or is suspected to be and then to –

'(a) inspect and search those premises, and there make such enquiries as he or she may deem necessary;

(b) examine any object found on or in the premises which has a bearing or might have a bearing on the investigation in question, and request from the owner or person in charge of the premises or from any person in whose possession or charge that object is, information regarding that object;

(c) make copies of or take extracts from any book or document found on or in the premises which has a bearing or might have a bearing on the *investigation* in question, and request from any person suspected of having the necessary information, an explanation of any entry therein;

---

[5] Section 28(1).
[6] Section 28(13).
[7] Section 28(6) read with s 28(14).

(d) seize, against the issue of a receipt, anything on or in the premises which has a bearing or might have a bearing on the *investigation* in question, or if he or she wishes to retain it for further examination or for safe custody…'

[83] Extensive as those powers of search and seizure are I do not find it surprising that they are given. It can be expected that at the time an investigation commences (whether it be preparatory or plenary) an investigator will have little or no knowledge of when or where or how or by whom the suspected offence was committed. For an investigation may be initiated on no more than suspicion, and suspicion that an offence has been or is being committed is quite capable of existing without details of that kind being known. It is also unlikely that an investigator will know, without further enquiry, what documents or books or objects exist that might have a bearing on the investigation. How else is an investigator then to discover whether an offence has been or is being committed, and if so when, and where, and by whom, and in what manner it was or is being committed, and how else is he or she to discover what evidence there is to substantiate those conclusions, other than to search for and examine objects and documents that might reveal those facts? I do not think that complex criminal conduct, which is the kind of conduct that the directorate was established to investigate, can be expected to be uncovered by relying only on information and material that is volunteered.

[84] In some circumstances an investigator may enter premises and perform all the acts listed in s 29(1) without a warrant.[8] Where those circumstances exist an investigator may thus search the premises and examine any object found on or in the premises, make copies of or take extracts from any book or document found on or in the premises, and seize anything on or in the premises, if the item concerned has or might have a bearing on the investigation that he or she is conducting. Before entering the

[8] (10)(a) The *Investigating Director* or any person referred to in section 7(4)(a) may without a warrant enter upon any premises and perform the acts referred to in subsection (1) –
(i) …
(ii) if he or she upon reasonable grounds believes that –
(aa) the required warrant will be issued to him or her in terms of subsection (4) if he or she were to apply for such warrant; and
(bb) the delay caused by the obtaining of any such warrant would defeat the object of the entry, search, seizure and removal.

premises and performing those acts the investigator need only identify himself or herself to the owner or the person in control of the premises. The investigator need not inform the person concerned of the nature of the investigation, nor provide any information relating to the investigation, nor identify in any way to the person in charge of the premises the material that is being sought.[9]

[85] Where the circumstances referred to in s 29(10) do not prevail those powers may be exercised if that is permitted by a judicial warrant (and only if it is so permitted). Section 29(4) provides that in those circumstances the premises referred to in subsection (1) may only be entered, and the acts referred to in that subsection may only be performed, 'by virtue of a warrant'[10] issued in chambers by a magistrate or a regional magistrate or a judge.

[86] The function of a warrant, as it is expressed in the language of the section, is to permit an investigator to perform the acts that are authorised by s 29(1). It functions as what the Divisional Court in England (approved by the House of Lords)[11] described as 'the key to the opening of the door to a power that is granted by [the authorising statute)'.[12] While it may permit an investigator to perform all the acts that are authorised by s 29(1) that must necessarily include the power to permit an investigator to perform only one or more of those acts or to perform one or more of them only to a limited extent.

[87] Such a warrant may be issued (s 29(5))

'if it appears to the magistrate, regional magistrate or judge from information on oath or affirmation, stating -

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

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

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

[9] As in the case of a search and seizure under warrant, it must be conducted only with 'strict regard to decency and order, including a person's right to, respect for and the protection of his or her dignity, the right of a person to freedom and security, and the right of a person to his or her personal privacy' (s 29(2)).

[10] The ordinary meaning of 'by virtue of', according to the Shorter Oxford Dictionary, is 'by the authority of, in reliance upon, in consequence of, because'

[11] *Inland Revenue Commissioners v Rossminster Ltd (On appeal from Regina v Inland Revenue Commissioners, Ex parte Rossminster Ltd)* [1980] AC 952 (HL).

[12] At p. 961G.

section,

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

[88] The warrants that are now in issue (I exclude for the moment the warrant to search the premises of Mr Hulley) are all in the same terms (but for the premises that they describe). Attached to the body of each warrant are two annexures. Annexure A lists, in 23 paragraphs, various species of documentation that is to be searched for and seized. Annexure B relates to electronic forms in which that material might be stored. The scope of the annexures is circumscribed by a clause in the body of each warrant that limits the material to that which 'has a bearing or might have a bearing on the investigation in question'. The offences that are being investigated, according to the body of each warrant, are 'corruption in contravention of Act 94 of 1992, fraud, money-laundering in contravention of Act 121 of 1998, the commission of tax offences in contravention of Act 58 of 1962' and any attempt to commit such an offence or offences.

[89] A search and seizure on the terms that are described in the warrants would have been permitted without a warrant in the circumstances that are referred to in s 29(10). The various species of documentation and material that are described in the warrants, which are all capable of identification, are limited to documents and material that has or might have a bearing on the investigation that is in progress, and they all fall within the terms of s 29(1). That search and seizure would have been permitted by s 29(10) notwithstanding that the person in charge of the premises ('the searched') was unable to identify for himself or herself the material that was capable of being seized. Indeed, it would have been permitted without information of any kind relating to the investigation being provided to the person concerned.

[90] Yet it is contended in this case that a search and seizure on those terms is not permitted under a warrant unless the 'searched' is provided with information of that kind in the warrant (precisely what information was said to be required has never been made altogether clear). I would find it remarkable

if an investigator was capable of doing without a warrant what he or she is not capable of doing under the judicial control of a warrant. I find nothing in the statute to support that conclusion. Whether or not s 29(10) is constitutionally invalid, as my colleague has suggested it might be, does not seem to me to be relevant to construing the ordinary meaning of the statute. It might be that that section, and consequently the section that is now in issue, on their ordinary meaning, are indeed invalid (I do not suggest that they are) but that is not a matter that we have been called upon to decide.

[91] The learned judge in the court below said (relying on the decision in *Powell*) that it is 'now authoritatively established' that in order to be valid a warrant must, amongst other things, 'set out the "specified offences" suspected of having been committed or being committed'. He went on to say that that required that 'the person to be searched must be given information as to approximately when the suspected offences have been committed and who is suspected of having committed them.' In that respect, so the court held, the warrants were 'inappropriately vague' and they were defective on that ground alone.

[92] I do not understand the learned judge to have meant that as a matter of law a warrant must 'set out the offences' that are suspected. Certainly that was not established by *Powell* and the statute also does not require it. I understand the learned judge to have meant only that where a warrant allows for the seizure of material that has or might have a bearing on 'the investigation' (as the warrant did in *Powell* and as they do in this case) the failure to 'set out the offences' that are under investigation will necessarily mean that the scope of the authority is vague.

[93] I do not think that that, either, was established by *Powell.* In *Powell* the warrant, construed in its particular context, allowed for the seizure of material that exceeded what was permitted by s 29(1) (which confines itself to material that has or might have a bearing on an investigation, by which is meant an investigation into the suspected commission of offences) and it was for that reason that the warrant was defective. There is no dispute that the

investigation in the present case (and accordingly the warrants) is confined to the investigation of suspected offences. The point that is made in this case is one that was not dealt with in *Powell* (in view of the construction that was placed on the warrant it was not necessary to do so) and I do not think that case is of assistance.

[94] I think that the finding of the court below needs to be clarified. The learned judge said that the failure to specify what was under investigation meant that the terms of the warrant were vague. I do not think that is correct. Merely because one needs to look outside a written instrument to establish what it relates to in concrete terms does not mean that the instrument is vague. As pointed out by Watermeyer CJ in *Rottcher's Saw Mills*[13] (in relation to a written contract but it applies as much to a warrant) it is always necessary, in one way or another, to look outside a written instrument to translate the 'abstraction' that it expresses to the 'concrete thing in the material world'. If the outside source that must be looked to for its interpretation establishes with certainty what the instrument means then the instrument is not vague at all.

[95] In this case the subject of the investigation is indeed capable of being established with certainty. The investigator, with intimate knowledge of what the investigation entails, is quite capable of establishing with certainty what may or may not be seized. A court that might be called upon to decide whether the authority of the warrant has been exceeded will also be capable of doing so with certainty upon evidence of what the investigation entails. It is not that the warrant is vague. I think that what the court below had in mind was rather that they contain insufficient information to enable the 'searched' to identify from the terms of the warrant alone what may and what may not be seized (to relate the 'abstract' to the 'concrete thing'). The question is whether a warrant must indeed place the 'searched' in that position in order to be valid.

[96] My colleague bases his support for the finding of the court below on what was said by Lord Denning in *Rossminster* (albeit that he was overruled

[13] 1948 (1) SA 983 (A) 990-991.

by the House of Lords)[14] and in certain cases decided in New Zealand. I am sure that statements to the same effect are to be found in other cases as well because there might indeed be statutes that require that of a warrant. But as I observed at the outset of this judgment I think that is the wrong way to approach the enquiry. The enquiry is whether the statute in this case requires that of a warrant. Certainly it does not do so expressly and my colleague has pointed to nothing in the statute that requires it by necessary implication.

[97] If the necessity for embodying information of that kind in the warrant is to place the 'searched' in a position to identify what may and what may not be seized (no other purpose has been suggested) then I fail to see how that is achieved by informing him or her 'approximately when and by whom' the offence is suspected to have been committed. That, by itself, will be altogether insufficient for that purpose. Why the 'searched' need be told only 'approximately' when the offences are suspected to have been committed, and why he or she need not also be told where and in what manner it is suspected that they were committed (though even that additional information will not be enough to identify all material that has or might have a bearing on the investigation) is unexplained. In endorsing its finding my colleague says only that the investigation was 'stated in such general terms that it was not possible to ascertain what it covered' without saying what would have sufficed. Assertions by the respondents' counsel as to what was required are equally unhelpful. For in each case one is left asking why some features are selected for disclosure in preference to others, and why any of those features are required at all when none by themselves (or even in combination) will suffice for the intended purpose. It seems to me to be all rather random and arbitrary.

[98] In truth it will not be possible, in any practical terms, to embody in a warrant everything that is required to identify all material that has or might have a bearing on an investigation that is of any complexity. And if it is not possible to do so then I see no reason why a statute should require a warrant to make what is no more than an empty gesture in that direction and none has

[14] Citation above, fn. 11.

been suggested.

[99] Section 29(4) allows for all (or any) of the acts set out in s 29(1) to be performed (including the seizure of ‘anything that has or might have a bearing on the investigation’) if that is permitted by a warrant and I think it follows that a warrant may permit that in terms (which is what the warrants in the present case effectively do). There is nothing in the express language of s 29 to suggest that those acts may be permitted by a warrant only if a person who might be in charge of the premises (there may be no such person at all) is first placed in a position to identify then and there what may and what may not be seized. Indeed, nothing in the express language of the section suggests that a person who is in charge of the premises must be provided with any information relating to the investigation at all. The court below and my colleague have also not pointed to anything in the statute that suggests by necessary implication that that is required. On the contrary, in my view the section, construed in its context, necessarily implies the contrary, for at least five reasons.

[100] First, if that is indeed a requirement of the statute, then the information that must be conveyed must surely be capable of being circumscribed with some certainty, rather than by mere random assertion. Secondly, as I alluded to earlier, I do not think it would be possible, in an investigation of any complexity, to express in a warrant all the information that would be necessary for that purpose. One or more features of the conduct that constitutes the suspected offence will not serve that purpose, nor, indeed, any rational purpose at all, and I do not think that the section requires a gesture. Thirdly, to require the disclosure of the full nature of an investigation, such that all material that has a bearing is capable of being identified by those who might be implicated, seems to me to have the real potential to undermine the investigation. Fourthly, the person to whom the warrant is presented is not called upon to assist in identifying the material or to perform any other act. It is difficult to see in the circumstances why it should be essential that he or she is able to identify then and there the material that is subject to seizure. Any contest as to what may be seized under the warrant must necessarily be

resolved by a court, which is capable of determining that issue upon evidence of what the investigation entails. And finally, to return to a point that I made earlier, if a search and seizure in such terms is permitted without disclosure when it occurs without a warrant, I see no reason why the legislature should have required it when it occurs under the control of a warrant. Indeed, I think that would be an absurd result, which the section must be construed to avoid.

[101] The warrants in the present case express intelligibly and with certainty the scope of the authority that they confer. They permit a search for and seizure of all the species of material referred to in the annexures (all of which is capable of being identified) if the material has or might have a bearing on the investigation in respect of which they were issued. What that investigation entails, and whether the material has or might have a bearing upon it, are all objective facts that are capable of being ascertained. A search and seizure in those terms also does not extend beyond what is permitted by s 29(1). I see nothing more that is required of the warrants by the statute.

[102] I should add that the learned judge in the court below also held that para 23 of annexure A to each of the warrants (he referred to it as the 'catch-all' clause) was so wide in its terms that its presence alone was sufficient to invalidate the warrants but I do not think that finding takes the matter further. In my view that clause does not differ materially from the other clauses of the annexure. The material that it encompasses is similarly confined to material that has or might have a bearing on the investigation and it all falls within the provisions of s 29(1).

[103] The court below also held that Ngoepe JP ought not to have issued the warrants because the information placed before him did not demonstrate the need for the search and seizure as required by s 29(5)(c). That was principally because, said the learned judge, the information placed before Ngoepe JP '[did] not make out a case that the [material] cannot be obtained by invoking the provisions of section 28'.[15] (That section authorises an investigator to summon a person to produce documents.) The learned judge seems also to

[15] That is the section that allows an investigator to summon persons to answer questions and to produce documents.

have been of the view that the investigation could make do without all the material that was sought but I do not think that a judicial officer is entitled to refuse a warrant for that reason. How an investigation is to be conducted falls within the prerogative of the investigator. If material has or might have a bearing on an investigation the investigator is entitled to have access to the material and I do not think that it is open to a court to say that he or she may have access to only some of it but not more. The section permits a judicial officer to refuse a warrant only if the need is not shown to resort to search and seizure for that purpose.

[104] In my view the court below set the bar far too high in requiring it to be shown that the material could not be obtained by invoking the provisions of section 28. I do not see how an investigator could ever show that other than by first asking for the material to be produced and having the request refused. If that were to be required before a warrant may be issued it would altogether undermine an investigation. I think that subsection (c) requires it to be shown only that the material cannot be expected in the ordinary course to be produced voluntarily. That will almost always be the case when it is being sought from a person who it might incriminate, as in the present case. I do not think that finding of the court below was correct.

[105] The warrants relating to the premises of Mr Hulley (who was Mr Zuma's attorney) were framed in the same general terms as the other warrants but the annexures were different. Annexure A had two paragraphs. The first paragraph described a collection of specific documentation that had been delivered to Mr Hulley by the attorney for Mr Zuma's former financial adviser. There is no difficulty identifying that material. When the warrant was executed at Mr Hulley's office he immediately pointed to two sealed boxes that contained the material. There is also no suggestion that that material falls outside the ambit of s 29(1). The second paragraph described various species of documentation, much as the annexures to the other warrants did, but again confined to material that has or might have a bearing on the investigation. No attempt was made to execute that portion of the warrant but in any event I do not think it was defective, for the reasons I have already given. Clearly it could

not be said that Mr Hulley, if he were free to act by his own accord, might not have been willing to produce the material voluntarily, but it must be borne in mind that he would not have been entitled to do so other than on the instructions of his client. In the circumstances the need for search and seizure in relation to that material was similarly established.

[106] Lastly to the question of privilege. Section 29(11) creates a mechanism for protecting the privilege that might be claimed for information contained in any material found on premises. It was submitted on behalf of the respondents that a warrant that does not contain at least a reference to that section is defective. Apart from asserting that proposition counsel provided no convincing explanation why that is a necessary implication of the statute and in my view the submission has no merit.

[107] The learned judge in the court below expressed himself on the importance of protecting legal privilege when executing a warrant and with much of what he said I agree but I do not understand the learned judge to have held that the execution of the warrant at the premises of Mr Hulley (or the execution of the warrants at other premises) was unlawful for any failure in that regard nor do I think it was. The warrant was presented to Mr Hulley who immediately identified two boxes containing the material covered by the first paragraph of the annexure and they were removed. No search took place at his premises and no further material was seized. There was no reason for the appellants to have thought that the boxes might contain privileged information. The boxes were expected to contain documents that emanated from Mr Zuma's former financial adviser and not from an attorney. The day after the material was seized Mr Hulley wrote to the appellants asserting that 'a certain privilege' might attach to some of the documents, but he has never elaborated upon what that 'certain privilege' might be. There can be no doubt that that was not a claim that information contained in the documents was protected from disclosure by legal professional privilege for otherwise Mr Hulley would have said so. Even now there is no claim that any of the information was privileged. In the circumstances I do not think it has been shown that any special precautions to avoid the disclosure of privileged information were

called for when the warrants were executed.

[108] Other matters raised by the respondents in the papers were not seriously pressed before us and in any event I do not think they have any merit. I do not think that any of the warrants that are in issue in this appeal were legally deficient, nor that they were unlawfully executed. In those circumstances the directorate is entitled to have such access to the material as is ordinarily permitted by law and the application ought to have been dismissed.

[109] The appeal is upheld with costs. The order of the court below is set aside and an order is substituted dismissing the application with costs. In both cases the costs are to include the costs of two counsel.

_____
R.W. NUGENT
JUDGE OF APPEAL

PONNAN JA) CONCUR
MLAMBO JA)