6/2/06

**IN THE HIGH COURT OF SOUTH AFRICA**

**DURBAN AND COAST LOCAL DIVISION.**

**Case No. 14116/2005.**

**In the matter between :**

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| **JACOB GEDLEYIHLEKISA ZUMA** | First Applicant |
| **MICHAEL HULLEY** | Second Applicant |



**and**

| | |
|---|---|
| **THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** | First Respondent |
| **INVESTIGATING DIRECTOR: DIRECTORATE OF SPECIAL OPERATIONS** | Second Respondent |
| **INVESTIGATING DIRECTOR: INVESTIGATING DIRECTORATE (SERIOUS ECONOMIC OFFENCES)** | Third Respondent |
| **INVESTIGATING DIRECTOR: INVESTIGATING DIRECTORATE (CORRUPTION)** | Fourth Respondent |
| **DIRECTOR OF PUBLIC PROSECUTIONS (DURBAN AND COAST LOCAL DIVISION)** | Fifth Respondent |

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**APPLICANTS' HEADS OF ARGUMENT**

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1.

It is submitted that the entire matter can be resolved very simply and without getting bogged down in the many disputed aspects thereof. The following appears to be unanswerable:

(a) There are a number of privileges which protect documents and communications from being disclosed to especially adversaries in the legal process. Legal professional privilege takes pride of place as an independent fundamental principle and right on which the SA legal system is premised and this system underpins the constitution. This has been clearly and repeatedly stressed by the highest courts in the land. Indeed this privilege is seen as part and parcel of the right of access to the courts which wider right is now constitutionally entrenched.

(b) Section 29(11) of the NPA reads:

> *"If during the execution of a warrant or the conduction 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."*

(c) The warrants which are exclusively directed at documents contain no reference to these provisions and it is common cause that these provisions were not brought to the attention of the persons on the various searched premises or those persons off the premises - Zuma - who could conceivably claim privilege. Some of the types of documents (especially those in relation to the Shaik matter) identified as to be seized, by their very nature prima facie cover privileged documents - privilege can cover a wide range of documents including witness statements.

(d) The issue of legal professional privilege was especially important given the status of Zuma as an accused person who had already engaged lawyers to defend him on such charges and that an attorney's office was involved where such privileged documents would readily be expected

(including witness statements). Indeed, the first two Respondents anticipated this.

(e) It is incumbent on the prosecution (essentially the first two Respondents) to purposefully take all reasonable steps to ensure maximum compliance with constitutional obligations even in difficult circumstances - ***Jaipal v S 2005 (5) BCLR 423 (CC)*** paragraph 56. The prosecution brought the application ex parte (which brings its own special duties) and controlled and oversaw the execution of the warrants.

(f) It would have been easy and proper for the prosecution to insert the relevant information in the warrants and convey the necessary to parties on the premises and allow parties time to make a considered decision once the premises were secured. It elected to do none of this (this obligation even seems implicit in the NPA itself section 29(2) read with section 29(1)).

(g) The warrants were thus carried out at the crack of dawn in a number of places where Zuma had an interest. No attempt was made to bring section 29(11) to his or Hulley's or anyone else's attention. There was no reason at all why this could and should not be done.

(h) Despite section 29(11) being aimed at the interim

safeguarding of all parties interests in the event of a claim of privilege (security of material plus non-inspection in the interim), the prosecution in the face of a claim for in effect just such treatment of the documents at the time and a claim of privilege on the next day, merrily continued to read all the documents and judge for itself whether these were privilged (this much is not in dispute). Arguments regarding the wording of the claims for privilege would not even have arisen if the protection of section 29(11) was made known.

(i) This is clearly unconstitutional conduct which is simply invalid (even under the common law this would have been the result in these circumstances). It runs directly counter to the entire approach in the ***Powell*** decision of which the Respondents clearly were aware.

(j) The Applicants are accordingly entitled to the orders they seek.

Hereafter are detailed heads dealing with various aspects.

**A. STRUCTURE OF HEADS :**



The structure of the applicants' Heads of Argument is as follows :

(a) We shall deal with the relevant history and provisions of the National Prosecuting Authority Act, No. 32 of 1998 ("the NPA"), the statute under which the respondents purport to act.

(b) We shall deal with the main issues which we submit fall to be decided in this application, namely the questions of :

(i) privilege;

(ii) the purpose for which the powers conferred upon the respondents under the NPA were exercised;

(iii) the discretion exercised in deciding to apply for the search warrants in the terms they did;

(iv) the terms and breadth of the search warrants.

(c) We shall deal with the remaining issues under the following heads :

(i) the respondents' challenge to the jurisdiction of this Court;

(ii) the respondents' challenge to the first applicant's **locus standi in judicio**;

(iii) the purported designation of Senior Special Investigator Du

Plooy under Section 28 (2) (a) of the NPA;

(iv) Du Plooy's alleged authority to bring the application for the search warrants;

(v) the unlawful execution of the search warrants.

B. **RELIEF :**

3.

The relief sought by the applicants is the following :

(a) The search warrants referred to in Schedule "X" to the Notice of Motion are set aside.

(b) A declarator that the searches and seizures carried out pursuant to the search warrants are unlawful.

(c) The respondents are directed to return forthwith to the premises from which they were seized and into the custody of the person or persons from whom they were seized, all items seized during the searches.

(d) The respondents are directed to deliver to the first applicant forthwith all mirror image copies taken by, or at the instance of, the respondents, of all computer processing units or computer hard drives seized during the course of the searches.

(e) The respondents are directed to deliver to the first applicant forthwith all copies made by, or at the instance of, the respondents, of all documents seized during the course of the searches.

(f) The respondents are directed to deliver to the first applicant forthwith all photographs taken during the searches, including hard copy photographs and negatives, and all copies stored in any electronic format or medium.

(g) An order for costs on the scale as between attorney and client, including the costs of three Counsel.

**Applicant's Notice of Motion, paragraphs 1 to 7.**

4.

The respondents have conceded that the search and seizure operation carried out at the premises at 8/10 Epping Road, Forest Town, Johannesburg, was unlawful.

**McCarthy's answering affidavit, pages 327 to paragraph 29 on pages 327 to 350.**

C. **RELEVANT HISTORY AND PROVISIONS OF THE NPA:**

5.

The issues in this application concern the ambit of the powers conferred and the duties imposed upon the Directorate of Special Operations by the provisions of Chapter 5 of the NPA.

6.

The predecessor to the NPA was the Investigation of Serious Economic Offences Act, No. 117 of 1991 ("the SEOA").

7.

The SEOA was the subject of scrutiny by the Courts, to which we shall refer below.

8.

The relevant provisions of the SEOA are the following :

(a) The long title of the Act provided that the Act was to "provide for the swift and proper investigation of certain serious economic offences".

(b) A "serious economic offence" was defined as "any offence which in the opinion of the Director (Director: Office for Serious Economic Offences established under the Act) is a serious and complicated economic offence".

... premises, and request from any person whom he suspects of having the necessary information, an explanation of any entry therein.

**SEOA, Section 6 (1) (c).**

(e) Section 7 of the SEOA dealt with the preservation of secrecy and the admissibility of evidence.

13.

In **Bogoshi v. Van Vuuren N.O. and Others** **1993 (3) S.A. 953 (T)**, the Court **a quo** tackled the "practical problem" of what should happen to documents seized under Section 6 of the SEOA in respect of which privilege was claimed. The Court **a quo** expressed the view that where the Director, Serious Economic Offences wished to seize a document and privilege was claimed in respect of that document, no inroads into the right to privilege would be made if the document was sealed in the presence of the person claiming privilege, and the document was then delivered to the Registrar of the High Court who would hold it until the question of privilege had been resolved.

**Bogoshi (supra) (in the Court a quo) at 961 D-E.**

14.

In **Bogoshi's** case (on appeal to the Supreme Court of Appeal reported in **1996 (1) S.A. 785 (A)**), the Supreme Court of Appeal held that the claim of privilege advanced in that case was not a **bona fide** claim advanced by an attorney under investigation in terms of the SEOA seeking to protect the interests of his clients, but was a claim advanced in the attorney's own interests for the purpose of thwarting a proper investigation into his own conduct.

**Bogoshi (on appeal) (supra at 794G-795H).**

15.

In **Bogoshi**, the Supreme Court of Appeal held that there could be no doubt that the SEOA did not exclude the operation of attorney/client privilege (being the species of legal professional privilege arising in that case). The Supreme Court of Appeal was of the view that it could be safely assumed that, because of the fundamental nature of attorney/client privilege, privileged documents would normally be protected from seizure and that, where privilege applied, a seizure of documents under Section 6 of SEOA was, despite the section's wide wording, **ab initio** to be confined to non-privileged documents.

**Bogoshi (supra on appeal to the Supreme Court of Appeal) at 793 D-E.**

16.

The legislature, as it was enjoined to do, took the aforequoted dictum in **Park-Ross** to heart. It seems that the legislature also took heed of the practical solution to claims for privilege posed by the Court **a quo** in **Bogoshi**.

17.

The SEOA was repealed in its entirety by the NPA Act which came into force on 16 October 1998. The NPA Act provides for the establishment of a single National Prosecuting Authority in the Republic of South Africa pursuant to Section 179 of the Constitution.

18.

The National Prosecuting Authority comprises the National Director, Deputy National Directors, Directors, Deputy Directors and Prosecutors.

**NPA Act, Section 4.**

19.

The office of the National Director of Public Prosecutions consists of the National Director, Deputy National Directors, Investigating Directors and Special Directors, other members of the Prosecuting Authority appointed at or assigned to the Office, Special Investigators and members of the administrative staff of the Office.

**NPA Act, Section 5 (2).**

20.

At the time at which the NPA Act was enacted, Section 7 (1), (2) and (3) provided as follows :

"(1) (a) The President may, by proclamation in the Gazette, establish not more than three Investigating Directorates in the Office of the National Director, in respect of specific offences or specified categories of offences.

(b) A proclamation referred to in paragraph (a) shall be issued with the concurrence of the Minister and the National

Director.

(2) A proclamation referred to in sub-section (1) (a) must specify the offences or the categories of offences for which an Investigating Directorate had been established.

(3) The head of an Investigating Directorate shall be an Investigating Director, and shall perform the powers, duties and functions of the Directorate subject to the control and directions of the National Director".

21.

Section 43 (7) provided as follows :

"(a) As from the date of the commencement of this section -

(i) the Office for Serious Economic Offences established by Section 2 of the Investigation of Serious Economic Offences Act, 1991 (Act 117 of 1991), shall become an Investigating Directorate, which shall be deemed to have been established by the President under Section 7 and which shall be known as the Investigating Directorate: Serious Economic Offences ;

(ii) subject to the provisions of this Act, the Director and staff of the Office for Serious Economic Offences referred to in

Section 3 of the Investigation of Serious Economic Offences Act, 1991, shall remain in office and continue their functions under this Act ; and

(iii) all pending matters pertaining to the Office for Serious Economic Offences shall be dealt with as if this Act had at all times been in force.

(b) Notwithstanding the repeal of the Investigation of Serious Economic Offences Act, 1991, the regulations made under Section of that Act shall remain in force pending the repeal or amendment thereof under Section 40 of this Act.

(c) The President may, on the request of the National Director and by proclamation in the Gazette, further specify the categories of offences in respect of which the Investigating Directorate: Serious Economic Offences must exercise its functions".

22.

The powers, duties and functions of Investigating Directorates were provided for in Chapter 5 of the NPA Act (Sections 26 to 31).

23.

Section 26 (1) of the NPA Act (at the time of its enactment) provided that a "specified offence" means any offence which in the opinion of the Investigating

Director falls within the category of offences set out in the proclamation referred to in Section 7 (1) in respect of the Investigating Directorate concerned.

24.

In **Powell N.O. and Others v. Van Der Merwe N.O. and Others 2005 (5) S.A. 62 (SCA),** the Supreme Court of Appeal drew attention to the fact that the SEOA, unlike the NPA Act, did not contain the concept of "specified offences", nor did the SEOA require that the offences subject to it be specified by notice in the Gazette. The Supreme Court of Appeal held that the SEOA eschewed specification, instead defining a "serious economic offence" simply as "any offence which in the opinion of the Director is a serious and complicated economic offence". The NPA Act introduced greater clarity and precision by defining more rigorously the ambit of the Investigating Directorate's powers. Whereas a "serious economic offence" under the SEOA was a matter for the Director's opinion, a specified offence under the NPA Act had to be specified by notice in the Gazette. The Gazette in question (as at the date on which **Powell's** case was decided), contained a detailed specification that limited very considerably the opinion the Investigating Director may form as to what a specified offence was. The conclusion that the Supreme Court of Appeal reached in **Powell's** case was that the NPA Act is a post-constitutional statute which attempted to remedy constitutional flaws in its predecessor.

See: **Powell N.O. and Others v. Van Der Merwe N.O. and Others 2005 (5) S.A. 62 (SCA) at 75G-75E [26] and [27].**

**Proclamation R.123, Government Gazette 19579, 4 December 1998, annexure "LM.12" to McCarthy's affidavit.**

25.

On 12 January 2001 (subsequent to the relevant dates of the actual seizures in **Powell's** case), the NPA Act was substantially amended by the National Prosecuting Authority Amendment Act, No. 61 of 2000 (date of commencement 12 January 2001).

26.

In consequence of the amendments to the NPA Act on 12 January 2001, the definition of a specified offence under Section 26 (1) of the NPA Act was substituted by the following definition of a "specified offence" under Section 1 of the NPA Act :

> "'Specified offence' means any matter which in the opinion of the head of an Investigating Directorate falls within the range of matters as contemplated in Section 7 (1) (a) (aa) or any proclamation issued in terms of Section 7 (1) (a) (bb) or (1A), and any reference to the commission of a specified offence has a corresponding meaning".

27.

The Directorate of Special Operations was established under Section 7 (1) of the NPA Act which thenceforth provided as follows :

"(1) (a) There is hereby established in the Office of the National Director an Investigating Directorate, to be known as the Directorate of Special Operations, with the aim to -

(i) investigate, and to carry out any functions incidental to investigations ;

(ii) gather, keep and analyse information ; and

(iii) where appropriate, institute criminal proceedings and carry out any necessary functions incidental to instituting criminal proceedings, relating to -

(aa) offences or any criminal or unlawful activities committed in an organised fashion ; or

(bb) such other offences or categories of offences as determined by the President by proclamation in the Gazette.

(b) For the purpose of sub-paragraph (aa), `organised fashion' includes the planned, ongoing, continuous or repeated participation, involvement or engagement in at least two incidents of criminal or unlawful conduct that has the same or similar intents, results,

accomplices, victims or methods of commission, or otherwise are related by distinguishing characteristics.

(1A) The President may, by proclamation in the Gazette, establish not more than two additional Investigating Directorates in the Office of the National Director, in respect of matters not contemplated in sub-section (1) (aa) or (bb)".

**NPA Act, Section 7 amended by Act No. 61 of 2000 with effect from 12 January 2001.**

28.

Section 7 (3) of the NPA Act thenceforth provided that the Head of the Directorate of Special Operations would be a Deputy National Director, assigned by the National Director, and the Head of any other Investigating Directorate, would be an Investigating Director who would perform the powers, duties and functions of the Investigating Directorate concerned, subject to the control and directions of the National Director.

**NPA Act, Section 7 (3).**

29.

Section 7 (4) (a) (iiA) provided that the Head of the Directorate of Special Operations would be assisted in the exercise of his or her powers and the performance of his or her functions by Special Investigators.

**NPA Act, Section 7 (4) (a) (iiA).**

30.

Also on 12 January 2001, by virtue of the provisions of Act No. 61 of 2000, Section 43A was introduced into the NPA Act as follows :

"(1) Any Investigating Directorate (in this section referred to as a former Investigating Directorate) which had been established prior to the amendment of Section 7 by the National Prosecuting Authority Amendment Act, 2000, shall, as from the date of the commencement of that Act, cease to exist as a separate Investigating Directorate and become part of the Directorate of Special Operations.

(2) Any proclamation which had been issued under Section 7 in respect of a former Investigating Directorate, prior to the amendment of Section 7 by the National Prosecuting Authority Amendment Act, 2000, shall, as from the date of the commencement of that Act, be deemed to have been issued under Section 7 (1) in respect of the Directorate of Special Operations.

(3) Subject to the provisions of this Act, the Investigating Director and staff of any former Investigating Directorate shall remain in office and continue their functions under this Act in the Directorate of Special Operations.

(4) As from the date of the commencement of the National Prosecuting Authority Amendment Act, 2000, all pending matters pertaining to any former Investigating Directorate shall be dealt with as if that Act had at all times been in force".

31.

As indicated earlier in these Heads, the powers, duties and functions of Investigating Directorates are set out in Chapter 5 of the NPA Act. (Sections 26 to 31). The provisions relevant to the issues in this application are contained in Sections 28, 29, 30 and 31.

32.

Section 28 of the NPA Act provides for :

(a) an investigation by the Investigating Director, where the Investigating Director has reason to suspect that a specified offence has been or is being committed or that an attempt has been or is being made to commit such an offence ;

**NPA Act, Section 28 (1) (a) ;**

(b) a preparatory investigation by the Investigating Director where the Investigating Director considers it necessary to hear evidence in order to enable him or her to determine if there are reasonable grounds to conduct an investigation in terms of Section 28 (1) (a) ;

**NPA Act, Section 28 (13).**

33.

Section 28 (1) (c) of the NPA Act provides that the Investigating Director, at any time during the conducting of an investigation (or a preparatory investigation), and if he or she considers it desirable to do so in the interest of the administration of justice or in the public interest, 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.

**NPA Act, Section 28 (1) (c).**

34.

Section 28 (2) of the NPA Act provides that the Investigating Director may, at any time prior to or during the conducting of the investigation (or preparatory investigation) designate any person referred to in Section 7 (4) (a) (including a Special Investigator such as Du Plooy) to conduct the investigation, or any part thereof, on his or her behalf and to report to him or her. A person so designated has, for the purpose of the investigation concerned, the same powers as the Investigating Director has in terms, **inter alia**, of Sections 28 and 29 of the NPA Act.

**NPA Act, Section 28 (2).**

35.

An investigation or preparatory investigation in terms of Section 28 must take place in camera and the procedure to be followed must be determined by the

Investigating Director, at his or her discretion, having regard to the circumstances of each case.

**NPA Act, Section 28 (3) and (4).**

36.

For the purpose of an investigation (or preparatory investigation) the Investigating Director has wide powers to summon persons to appear and to produce books, documents or other objects, and to question such persons, under oath or affirmation, and examine or retain for further examination or for safe custody such books, documents or other objects.

**NPA Act, Section 28 (6).**

37.

Section 28 (8) of the NPA Act provides that the law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a Magistrate's Court shall apply in relation to the questioning of a person in terms of Section 28 (6): Provided that such a person shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him or her to a criminal charge. Further, no evidence regarding any questions and answers contemplated in Section 28 (8) (a) shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in sub-section (10) (b) or (c), or in Section 319 (3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955). (The latter section refers to a charge of statutory perjury).

**NPA Act, Section 28 (8).**

38.

Section 28 (10) of the NPA Act provides that any person who has been summoned to appear before the Investigating Director and who without sufficient cause fails to appear or to remain in attendance until excused, or, at his or her appearance, fails to produce a book, document or other object in his or her possession or under his or her control which he or she has been summoned to produce, or refuses to be sworn or to make an affirmation, or, having been sworn or having made an affirmation, fails to answer fully and to the best of his or her ability any question lawfully put to him or her, or gives false evidence knowing that evidence to be false or not knowing or not believing it to be true, shall be guilty of an offence.

**NPA Act, Section 28 (10).**

39.

Section 29 (1) of the NPA Act provides that the Investigating Director or any person authorised thereto by him or her in writing, may, 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 Section 29 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.

**NPA Act, Section 29 (1).**

40.

Section 29 (2) of the NPA Act provides that any entry upon or search of any premises in terms of Section 29 must 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.

**NPA Act, Section 29 (2).**

41.

Section 29 (4) of the NPA Act provides that, subject to sub-section (10), the premises referred to in sub-section (1) may only be entered, and the acts referred to in sub-section (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 are 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.

**NPA Act, Section 29 (4).**

42.

Section 29 (5) of the NPA Act provides that a warrant contemplated in sub-section (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 sub-section (1) is on or in such premises or suspected to be on or in such premises.

**NPA Act, Section 29 (5).**

cf. **Park-Ross (supra) at 172 H-I.**

43.

Section 29 (8) of the NPA Act provides that a warrant issued in terms of Section 29 must be executed by day unless the person who issues the warrant authorises the execution thereof by night at times which shall be reasonable in the circumstances.

**NPA Act, Section 29 (8).**

44.

Section 29 (11) of the NPA Act provides as follows :

"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".

**NPA Act, Section 29 (11).**

cf. **Bogoshi (supra) (Court a quo at 961 C-E).**

45.

Section 30 of the NPA Act deals with the powers and functions of Special Investigators. Section 30 (1) provides that a Special Investigator may, subject to the control and direction of the Head of the Directorate of Special Operations, exercise such powers and must perform such duties as are conferred or imposed upon him or her by or under the NPA Act or any other law and must obey all lawful directions which he or she may from time to time receive from a person having the authority to give such directions.

**NPA Act, Section 30 (1).**

46.

Section 31 of the NPA Act establishes a Committee, to be known as the Ministerial Co-Ordinating Committee, which may determine, **inter alia**, policy guidelines in respect of the functioning of the Directorate of Special Operations.

**NPA Act, Section 31 (1) (a).**

47.

In **Investigating Directorate: SEO v. Hyundai Motor Distributors 2001 (1) S.A. 545 (CC)**, the applicants had challenged the constitutionality of the provisions of the NPA Act authorising the issuing of warrants of search and seizure for the purposes of a preparatory investigation under Section 28 (13) of the NPA Act. The Court **a quo** had declared the provisions of Section 29 (5), 28 (13) and 28 (14) of the NPA Act inconsistent with the Constitution and invalid, to the extent only that they permit the issue of a warrant to authorise the search and seizure of property and accordingly the invasion of privacy of persons where there are no reasonable grounds to suspect that a specified offence has been committed.

**Investigating Directorate: SEO v. Hyundai Motor Distributors 2001 (1) S.A. 545 (CC) at 551 D [3].**

48.

In proceedings for the confirmation of the order of invalidity in the Constitutional Court, the Constitutional Court held that in enacting Section 29 (5) the legislature

clearly intended to give effect to the **Park-Ross** judgment **(supra)** and to ensure that the search and seizure of property would be carried out in accordance with the provisions of the Constitution. The Constitutional Court further held that it was implicit in Section 29 (5) of the NPA Act that the Judicial Officer would apply his or her mind to the question whether the suspicion which led to the preparatory investigation, and the need for the search and seizure to be sanctioned, are sufficient to justify the invasion of privacy (under Section 14 of the Constitution) that must necessarily take place. On the basis of that information, the Judicial Officer must make an independent evaluation and determine whether or not there are reasonable grounds to suspect that an object that might have a bearing on a preparatory investigation is on the targeted premises.

See : **Hyundai (supra) at 562J-563G [37] to [39].**

49.

In **Hyundai (supra)**, the Constitutional Court declined to confirm the declaration of invalidity on the basis that Section 29 (5) is capable of an interpretation that is consistent with the Constitution, and permits a Judicial Officer to issue a search warrant in respect of a preparatory investigation only when he or she is satisfied that there exists a reasonable suspicion that an offence which might be a specified offence has been committed. The Constitutional Court further found that the legislature had expressly sought to draw the attention of officials to the requirements of the Constitution under Section 29 (2) of the NPA Act which obliges officials, in executing a warrant, to do so with strict regard to decency and order, respect for a person's dignity, freedom, security and personal privacy.

Furthermore, the Constitution Court found, the comments in **Park-Ross (supra)** had clearly been taken to heart by the legislature and that Section 29 (5) had been enacted with those comments in mind. This reinforced the view that the legislature set out to regulate the search and seizure of property in accordance with the provisions of the Constitution.

**Hyundai (supra) at 566I-567A [51].**

50.

In **Powell N.O. and Others v. Van Der Merwe N.O. and Others 2005 (5) S.A. 62 (SCA),** the issue was the lawfulness of a search and seizure operation carried out under the provisions of Section 29 of the NPA Act.

**Powell N.O. and Others v. Van Der Merwe and Others 2005 (5) S.A. 62 (SCA).**

51.

In **Powell's** case, the Supreme Court of Appeal laid great emphasis on the principle of legality which underlies the Constitution and which sets limits to all public power and scrutinises its exercise for conformity with those limits.

**Powell (supra) at 73 B-C [19].**

52.

In **Powell**, the Supreme Court of Appeal held that the principle of legality required the Investigating Director to confine himself in the exercise of his powers to what

the statute permitted, and no more. The Supreme Court of Appeal held that this was not a technical or formal matter. It was a matter of constitutional substance relating to the ambit of the Investigating Director's powers and the pre-conditions for their lawful exercise.

See: **Powell (supra) at 73H-74B [22].**

53.

In **Powell**, the Supreme Court of Appeal held, on the facts of that case, that the warrants issued were overbroad. They were set aside on that ground. In the circumstances, it was not necessary for the Supreme Court of Appeal to decide whether an invalid invocation of a preparatory investigation under Section 28 (13) or an absence of proper authority (flowing from an improper invocation of Section 28 (13)) to apply for the search warrants in question, invalidated the search warrants for those reasons alone. We respectfully submit that the only conclusion to be drawn from the Supreme Court of Appeal judgment in **Powell** is that, had the Supreme Court of Appeal been called upon to decide the question, it would have decided it against the National Director of Public Prosecutions on the basis of the principle of legality which confines the Directorate of Special Operations and his staff to their statutory powers to ensure that the investigation was pursued regularly and properly, and not haphazardly and unboundedly.

**Powell's** case **(supra) at 74 E-F [24] and [[25].**

D. **PRIVILEGE :**

54.

Privilege is a personal right to refuse to disclose otherwise dmissible evidence and, in the case of legal professional privilege, to prevent a legal adviser or an agent of either the client or the legal adviser from doing so.

55.

Professional privilege protects from disclosure communications between a legal adviser and his client which are made in confidence for the purpose of enabling the client to obtain legal advice. If the advice is required in connection with some contemplated litigation, the privilege will also extend to statements which the client or legal adviser has obtained from third parties for the same purpose. The privilege exists in order to promote the utmost freedom of disclosure by persons who need to obtain legal advice.

56.

The fact that the privilege extends beyond communications made for the purpose of litigation and to all communications made for the purpose of giving or receiving advice, makes it inappropriate to regard the doctrine as a mere rule of evidence. It is a fundamental rule of substantive law based upon the view that confidentiality is necessary for proper functioning of the legal system and not merely the proper conduct of particular litigation.

*State v. Safatsa and Others 1988 (1) S.A. 868 (A) at 878 et seq;*

*Mandela v Minister of Prisons 1983 (1) SA 938 (A);*

*Sasol III (Edms) Bpk. v. Minister of Law and Order 1991 (3) S.A. 766 (T) at 771-786;*

*Cheadle Thompson & Haysom v. Minister of Law and Order 1986 (2) S.A. 279 (W) at 283 D-H;*

*Bogoshi (supra) (in the Court a quo) at 959H-961G;*

*Bogoshi (on appeal to the Supreme Court of Appeal) at 793 D-F;*

*Mohamed v. President of the Republic of South Africa 2001 (2) S.A. 1145 (C) at 1151G-1152A;*

*Three Rivers District Council v Government and Company of the Bank of England (5) 2005 4 All ER 948*

57.

The primary and fundamental nature of privilege has been recognised in many Commonwealth jurisdictions.

***Re Director of Investigation and Research and Shell Canada Ltd. (1975) 55 DLR (3d) 713, (1975) 22 CCC (2d) 70 at 722 (the DLR citation);***

***Re Borden & Elliott and the Queen (1975) 70 DLR (3rd) 579, (1975) 30 CCC (2d) 337 at 583 (the DLR citation);***

**Solosky v. The Queen (1979) 105 DLR (3d) 745 at 757.**

**Per Dickson, J. :**

"Recent case law has taken the traditional doctrine of privilege and

placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a courtroom. The Courts, unwilling to so restrict the concept have extended its application well beyond those limits".

***Baker v. Campbell (1983) 49 ALR 385*, particularly per Dawson, J. at 444 :**

"The conflict between the principle that all relevant evidence should be disclosed and the principle that communications between lawyer and client should be confidential has been resolved in favour of the confidentiality of those communications. It has been determined that in this way the public interest is better served because the operation of the adversary system, upon which we depend for the attainment of justice in our society, would otherwise be impaired: See Waugh v. British Railways Board [1980] AC 521 at 535,536. Even if it were otherwise possible (and I do not think that it is), it is too late now, to suggest that the public interest would have been better served by restricting legal professional privilege to communications relating to actual or even anticipated litigation.

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

necessary for proper functioning of the legal system and not merely the proper conduct of particular litigation. It is inconsistent with that view to conclude that the compulsory disclosure of communications between legal adviser and client is in the public interest merely because the compulsion is for administrative rather than judicial purposes".

***Commissioner of Inland Revenue v. West-Walker 1954 NZLR 191*, particularly per North, J. at 219 :**

"The Solicitor-General claimed that this rule was only a rule of evidence and, therefore, had no application to enquiries made by executive officers pursuant to statutory authority. I do not agree. It finds expression, it is true, in Court proceedings, but it would be wrong, I think, to regard the rule as being of limited application. It is more than a contractual obligation. It rests, in my opinion, on the wider ground of public policy and, therefore, applies generally unless the terms of a particular statute either expressly or by necessary implication remove the protection".

***Sasol III (supra)* at 771-786 (where the above decisions and others were collected and cited with approval);**

***Three Rivers District Council & Others supra*,** particularly per Scott LJ at 958 (25) and 962j (38), Rodger LJ at 967 e-g (54), Carswell LJ at 990e-991a (112) (Copy attached)

58.

In ***Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R v. Fink [2002] 3 S.C.R. 209, 2002 SCC 61 (CanLII)***, the Supreme Court of Canada dealt with the issue of whether Section 488.1 of the Canadian Criminal Code, which set out a procedure for determining a claim of solicitor/client privilege in relation to documents seized from a law office under a warrant, infringed Section 8 of the Canadian Charter of Rights and Freedoms and, if so; whether the infringement was justified under Section 1 of the Charter. The procedure attacked was to the effect that the material seized be sealed at the time of the search, that the solicitor make application within strict time lines for a determination that the material is indeed protected by privilege and that, with the permission of the Court, the Crown may be permitted to examine the material in order to assist in a determination on the issue of the existence of privilege.

59.

The Supreme Court of Canada found that Section 488.1 of the Criminal Code more than minimally impaired solicitor/client privilege and amounted to an unreasonable search and seizure contrary to Section 8 of the Charter. The constitutional failings of the Criminal Code could result from :

(a) the absence or inaction of the solicitor;

(b) the naming of clients;

(c) the fact that notice is not given to the client;

(d) its strict time limits;

(e) an absence of discretion on the part of the Judge determining the existence of solicitor/client privilege; and

(f) the possibility of the Attorney-General's access prior to that judicial determination.

The Court found that the one principal, fatal feature shared by each of these failings is the potential breach of solicitor/client privilege without the client's knowledge, let alone consent. The fact that competent Counsel will attempt to ascertain the whereabouts of their clients and will likely assert blanket privilege at the outset does not obviate the State's duty to ensure sufficient protection of the rights of the privilege holder. Section 488.1 provides that reasonable opportunity to ensure that the privileged information remains so must be given to the privilege keeper, but not to the privilege holder. It cannot be assumed that the lawyer is the **alter ego** of the client.

60.

A further factor weighed by the Supreme Court of Canada was the absence of judicial discretion in the determination of the validity of an asserted claim of privilege. The Criminal Code conferred an entitlement on the Crown to access

the seized documents if an application were not made, or not proceeded with, within the time limits imposed by the Code. This mandatory disclosure of potentially privileged information, in a case where the Court has been alerted to the possibility of privilege by the fact that the documents were sealed at the point of search, could not be said to impair the privilege minimally. Reasonableness dictated that Courts must retain a discretion to decide whether materials seized in a lawyer's office should remain inaccessible to the State as privileged information if and when, in the circumstances, it is in the interests of justice to do so.

61.

Moreover, the provisions of the Criminal Code permitting the Attorney General to inspect the seized documents where the application Judge was of the opinion that it would materially assist him or her in deciding whether the document is privileged, was also an unjustifiable impairment of the privilege. Granting the Crown access to confidential solicitor/client communications would diminish the public's faith in the administration of justice and create a potential for abuse. This provision is unduly intrusive upon the privilege and of limited usefulness in determining its existence.

62.

The Supreme Court of Canada further held that the impugned section of the Criminal Code could not be infused with reasonableness, in a constitutional sense, on the basis of an assumption that the prosecution would behave honourably. Nor could it be saved by the provisions of Section 1 of the Charter: While effective police investigations are a pressing and substantive concern, the impugned

provisions of the Criminal Code do not establish proportional means to achieve that objective. It was held, as a result, that the impugned provisions of Section 488.1 of the Criminal Code should be struck down and that the process for seizing documents in the possession of a lawyer is a delicate matter which presents procedural options best left to Parliament.

63.

The Supreme Court of Canada laid down the following guidelines reflecting present day constitutional imperatives for the protection of solicitor/client privilege and applicable to law office searches until new legislation was in place :

(a) A search warrant should not issue for documents known to be protected by solicitor/client privilege.

(b) As well, search warrants should not issue if other reasonable alternatives to the law office search exist.

(c) The issuing justice must be rigorously demanding with respect to solicitor/client privilege.

(d) Unless otherwise authorised by the warrant, all documents in a lawyer's possession must be sealed before being examined or seized.

(e) Every effort must be made to contact the lawyer and the client when

a search warrant is executed and, where the lawyer or the client cannot be contacted, a representative of the Bar should oversee the sealing and seizure of documents.

(f) The Investigating Officer executing the warrant should report the efforts made to contact all potential privilege holders to the Justice of the Peace. These privilege holders should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.

(g) If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the Court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.

(h) The Attorney General may make submissions on the issue of privilege but should not be permitted to inspect the documents beforehand, and the prosecuting authority can only inspect the documents if and when it is determined by a Judge that the documents are not privileged.

(i) Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.

(j) Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person

designated by the Court.

A copy of the **Lavallee** case is attached to these Heads of Argument for the convenience of this Court.

64.

It is well recognised by South African Courts that privileged documents may not be seized under a search warrant, and an intention of the legislature to do away with the privilege can only be inferred if there is a very clear indication that that was intended.

***State v. Safatsa (supra) at 257;***

***Sasol III (supra) at 782-785*** (departing from ***Andresen v. Minister of Justice 1954 (2) S.A. 473 (W))*** and echoing the criticism of ***Andresen*** in ***Cheadle, Thompson & Haysom (supra) at 283 D-G;***

***Bogoshi (in the Court a quo) at 960F-961E;***

***Bogoshi (on appeal to the Supreme Court of Appeal) at 793 D-F.***

**E. APPLICATION OF THE PRINCIPLES PERTAINING TO PRIVILEGE TO THIS CASE :**

65.

We respectfully submit that there was an abject failure on the part of the State to observe attorney/client privilege. We respectfully submit that this impacts on the State's case in at least four ways :

(a) Non-disclosure at the stage at which the search warrants were sought.

(b) The failure to request the incorporation of any safeguards into the search warrants.

(c) The failure to advise either the first or the second applicant, or any other person whose premises were searched, of their right to claim privilege, or the consequences of such a claim under Section 29 (11) of the NPA Act.

(d) The State's failure to comply with the provisions of Section 29 (11) once privilege was claimed.

F. **FAILURE TO DISCLOSE :**

66.

The State approached Ngoepe, J.P. in Chambers ***ex parte***. It is trite that where an Order is sought ***ex parte*** the utmost good faith must be observed. All material facts must be disclosed which might influence a Court in coming to its decision, and withholding or suppression of material facts, by itself, entitles a Court to set aside an order, even if the non-disclosure or suppression was not wilful or ***mala fide***. As the Supreme Court of Appeal put it in **Powell (supra)**, Du Plooy was under a duty to be ultra-scrupulous in disclosing any material facts that might influence the

Court in coming to its decision.

***Schlesinger v. Schlesinger 1979 (4) S.A. 342 (W) at 348E-349B;***

***National Director of Public Prosecutions v. Basson 2002 (1) S.A. 419 (SCA) at 428 I [21];***

***Powell (supra) at 79 D-E [42].***

67.

We respectfully submit that it is plain that the State must have foreseen, and did in fact foresee, that there was a grave risk, if not a substantial certainty, that privileged documents would be examined or seized during the course of the search and seizure operations, and that claims to privilege might be made. Muller was specifically tasked to deal with matters relating to privilege during the operation at the second applicant's office, should any arise. In the circumstances, it would be idle for the State to contend that it did not in fact foresee that claims to privilege would be made.

**Muller's affidavit, paragraph 5 (b).**

68.

We respectfully submit that the State was under a duty to disclose to Ngoepe, J.P. at the time at which the warrants were sought that, as the first applicant had already been charged, it was highly likely, if not substantially certain, that preparations for his defence would already have begun and that privileged documents were at risk of examination and seizure during the course of the search

and seizure operations at the wide range of premises affected by the search warrants. This fact pertained not only to the second applicant, but also to the first applicant as the person in whom the privilege vested. No such disclosure was made. We submit this is fatal to the State's case.

## G. FAILURE TO INCORPORATE SAFEGUARDS :

69.

There were no safeguards incorporated in any of the warrants against the examination or seizure of privileged material. We respectfully submit that this flows directly from the State's failure to disclose the likelihood of the presence of privileged material at the premises searched. We respectfully submit that there is ample authority and precedent for the incorporation of safeguards in search and seizure orders.

70.

The well known Anton Piller procedure, to which the application for the search warrants was specifically likened by the Court in **Park-Ross (supra) at 173 A-B**, entails the exercise of a discretion by a Court whether the terms of the order sought are no more onerous than is necessary to protect the interests of the person applying for the order, and an overbroad order need not be wilful or **mala fide** to result in the discharge of a **rule nisi**.

***Shoba v. Officer Commanding, Temporary Police Camp, Wagendrift Dam 1995 (4) S.A. 1 (A) at 16 B-C:***

***Dabelstein v. Hildebrandt 1996 (3) S.A. 42 (C) at 66 C-E;***

***Enterprise Connection Cape (Pty) Ltd. v. Clarotech Consultants [2001] 3 All S.A. 194 (C).***

71.

The terms of an Anton Piller order should ordinarily not be so wide as to give the applicant access to documents to which the evidence did not show him or her to be entitled. The order requires built-in protection measures. Usually, provision is made for the attendance of a supervising attorney, who is a person whom the Court considers suitable in the circumstances and who is not a member or an employee of the attorneys acting for the applicant. The supervising attorney together with the Sheriff may be required to make an Inventory of all items removed by the Sheriff in terms of the Anton Piller order and he or she may be required to also file with the Registrar a concise report describing the manner in which the order was complied with. The order will normally provide for attention by the Sheriff of all items in his possession and may, in certain circumstances, even preclude inspection or making of copies thereof.

***Sun World International Inc. v. Unifruco Ltd. 1998 (3) S.A. (C) 151 at 174 D-E;***

***Memory Institute SA CC t/a SA Memory Institute v. Hansen 2004 (2) S.A. 630 (SCA) at 633 F;***

***Enterprise Connection (supra) at 205a-h.***

In the **Mohamed** matter arising out of the same set of search warrants under scrutiny in this case, Hussain, J. found at **page 18** (of the unreported judgment) **line 5 to page 19, line 14** as follows :

> "In my opinion where the National Director of Public Prosecutions intends to apply for a warrant to search an attorney's premises, assuming that an ex parte application was warranted in the first place, then the following applies:
>
> (a) There is a positive duty on the NDPP to disclose to the judicial officer that the subject of the search involves an attorney.
>
> (b) There is a positive duty on the NDPP to draw the judicial officer's attention to the potential claims of privilege.
>
> (c) There is a positive duty on the NDPP to draw the judicial officer's attention to the safeguards provided in the Act.
>
> (d) There is a positive duty on the NDPP to assist the judicial officer in addressing those safeguards and in the execution of the warrant. The NDPP must assist the Judge in crafting an order which incorporates the protections afforded in the Act.
>
> (e) There is a positive duty on the NDPP to canvass with the judicial

officer the possibility of obtaining the information from an attorney by means of other less invasive means.

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

Absent the above the safeguards incorporated within the provisions of the Act may well be rendered entirely ineffective. It is abundantly clear that if the provisions of Section 29 of the Act are applied without the safeguards, attorney/client privilege will be breached - as the facts of this case ably demonstrate. The respondents in failing to make full disclosure misdirected the learned Judge. Whether this was done intentionally or not is irrelevant. On this basis alone the applicant's application should succeed".

73.

In **Lavallee (supra)** the Supreme Court of Canada drew attention to a comprehensive list of safeguards applicable to a search and seizure operation at an attorney's premises. We respectfully submit that similar safeguards should have been incorporated in the search and seizure warrants in this case.

**H. THE STATE'S FAILURE TO WARN THE APPLICANTS OF THEIR RIGHTS :**

74.

We respectfully submit that it is plain that the State was aware of the provisions of Section 29 (11) of the Act and of the possibility that claims for privilege would be raised. It follows that they must have been aware of the applicants' rights to claim privilege. Indeed, Muller was specifically tasked to deal with any such claims.

75.

Yet it is abundantly clear from the papers that the State elected to remain mum on the matter. They took the stance to such extremes that they even purported to contend, in the face of a direct request, on their own version, that the documents be sealed and lodged with the Registrar, that such a request was invalid because it was not preceded or accompanied by the magic word "privilege". We respectfully submit that such an approach constitutes a cynical infringement of the applicants' rights. We respectfully submit that on the basis of the State's conduct in executing the warrants and failing to advise the applicants of their rights, the warrants fall to be set aside on that ground alone. The Supreme Court of Appeal has not hesitated to set aside an entire warrant on the basis that it was unlawfully executed in contravention of the rights of the persons whose premises were searched.

See: ***Pretoria Portland Cement Company Ltd. v. Competition Commission 2003 (2) S.A. 385 (SCA)***

I. **STATE'S CONTRAVENTION OF SECTION 29 (11) OF THE NPA ACT:**

76.

We respectfully submit that Section 29 (11) of the NPA Act is inconsistent with any notion that the legislature envisaged that an accused person's right to claim privilege might be overridden by the terms of a search and seizure warrant issued under Section 29 of the NPA Act.

**NPA Act, Section 29 (11).**

77.

We respectfully submit that the provisions of Section 29 (11) are unequivocal. We respectfully submit that upon the mere **claim** of privilege, the person executing the warrant is under a duty, 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, to 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.

78.

On the respondents' own version, the respondents squarely contravened the provisions of Section 29 (11).

79.

We respectfully submit that it must have been plain to the respondents, when it was first raised by the second applicant on 18 August 2005, that the request to seal the documents and lodge them with the Registrar could be nothing other than a claim for privilege entailing that consequence. In the face of the second applicant's request, and therefore the claim of privilege, the respondents blithely proceeded to seize the documents.

80.

To make matters worse, even when, on the respondents' own version, a claim of privilege was expressly raised in "AS.2" to Steynberg's answering affidavit, on 19 August 2005, the respondents remained in contravention of Section 29 (11). Instead, the respondents purported to arrogate themselves the right and power to query that claim, adjudicate thereon and pronounce judgment to the effect that the documents were not privileged. The respondents negated the provisions of Section 29 (11) of the NPA Act as effectively as if it had never been enacted. The privilege has been breached and the damage has been done irretrievably. We quote Southey, J. in ***Re Borden & Elliott and the Queen (supra) at 585-586*** :

> "If the privilege could not be invoked to prevent the seizure and examination of documents under a search warrant, the Crown would be free in any case to seize and examine the files and brief of defence Counsel in a criminal prosecution. It would be small comfort indeed to the accused and to his Counsel to discover that his only

protection in such a case was to prevent the introduction into evidence of the documents that had been seized and examined. Such a result, in my view, would be absurd".

81.

We respectfully submit that the conduct of the State, in contravening the provisions of Section 29 (11), and for the reasons set out in detail in the second applicant's replying affidavit, justify the relief sought by the applicants in this case.

J. **ABUSE OF POWER :**

82.

It is long established that when a public body is given a power for a particular purpose, that power cannot be used for obtaining any other object. In particular, powers given to a public body for one purpose cannot be used for ulterior purposes which were not contemplated at the time when the powers were conferred. There is no room for a distinction between a public body and a public official. They are in the same position. To pretend to use a power for the purpose for which alone it was given, yet in fact to use it for another, is an abuse of that power and amounts to **mala fides**, regardless of whether any moral obliquity can be attached to the person so exercising it.

See: ***Fernwood Estates v. Cape Town Municipal Council 1933 CPD 399;***

***Orangezicht Estates Ltd. v. Cape Town City Council 23 SC 297 at 308, per De Villiers, C.J;***

*Habib v. Pietersburg Municipality 1905 TS 63, per Innes, C.J;*

*Van Eck N.O. and Van Rensburg N.O. v. Etna Stores 1947 (2) S.A. 984 (A) at 996-999;*

*Sinovich v. Hercules Municipal Council 1946 AD 783 at 792;*

*Sehume v. Atteridgeville City Council and Another 1992 (1) S.A. 41 (A) at 571-58A;*

*Mathebe v. Government of the Republic of South Africa 1988 (3) S.A. 667 (A) at 700 B-C;*

*Speaker, National Assembly: Re National Education Policy Bill 1996 (3) S.A. 289 (CC) at 305 D [33], Footnote 22.*

83.

We respectfully submit that the "extension" on 8 August 2005 of the investigation to include the suspected commission or attempted commission of, **Inter alia**, contraventions of the Income Tax Act, No. 58 of 1962, is an extraordinary charge. Even the respondents are constrained to concede this.

***First applicant's founding affidavit, paragraphs 56 to 63***

***McCarthy's answering affidavit, paragraph 36, particulary 36 (b) and (d).***

84.

We respectfully submit that the only inference to be drawn is that the "extension" of the investigation in August 2005 to include the alleged income tax charge, was made purely to justify the raids sought to be authorised in terms of the search

warrants. It had nothing to do with the exercise of the State's powers under Section 29 of the NPA Act.

85.

We respectfully submit that, on this ground alone, the search warrants fall to be set aside. **(AWAITING FURTHER INPUT ON THIS POINT, TOGETHER WITH FURTHER INPUT ON THE COMPETENCE OF USING SECTION 29 SEARCH AND SEIZURE POWERS AFTER THE PERSON HAS BEEN CHARGED).**

K. **DISCRETION :**

86.

We respectfully submit that the respondents were required to exercise a discretion under Section 29 as to whether to invoke the powers conferred upon them under that section.

87.

We respectfully submit that the following factors had to be taken into account in exercising the discretion to invoke the wide powers of the NDPP under Section 29 against the first and second applicants :

(a) The first applicant is the former Deputy President and a Cabinet Minister of the Republic of South Africa. There was no history of destruction of documents, or any suggestion of intention to destroy or

secret evidence. There was no warrant to exercise such wide powers against him.

(b) The second applicant is a recently appointed attorney acting for the first applicant in a specialised and exclusive role as defence attorney in the criminal trial. There is no history of destruction or any suggestion of intent to destroy or secret evidence on the part of the second applicant. Indeed, such a suggestion would be an extraordinary and unfounded one. There is no warrant to exercise such wide powers against him either.

(c) The second applicant is a sole practitioner. It would only be by chance that he would be present at his premises when the warrant was served. In his absence, there was no reasonable prospect that anyone would be in a position to claim privilege.

(d) Given the time at which the warrants were executed (at about 06h30 in the morning), there was no real prospect that any of the persons whose premises were to be searched would be in a position to seek or obtain legal advice regarding the search.

(e) In addition, the first applicant having already been charged, the State must have foreseen that there was a real risk that preparations for his criminal trial had already commenced and that there would be privileged documentation at the premises to be searched.

(f) Even in the light of the aforegoing, the respondents sought to incorporate no safeguards in the warrants to be executed, and failed to advise the applicants of their rights.

88.

We respectfully submit that the respondents, as public officials, were under a duty in terms of Section 195 of the Constitution to act honestly, lawfully, ethically and fairly. They had fairly to consider whether or not to exercise their powers, and to exercise their discretion fairly.

See: ***Section 195, Constitution of the Republic of South Africa, Act No. 108 of 1996;***

***Reuters Group PLC and Others v. Viljoen and Others NNO 2001 (12) BCLR 1265 (C);***

***Cabinet for the Interim Government of SWA v. Bessinger 1989 (1) S.A. 618 (SWA) at 622 B-E.***

89.

We respectfully submit that the cumulative factors referred to above vitiate the discretion which the respondents purported to exercise in invoking the Section 29 powers against the applicants.

90.

**THE WARRANT APPLICATION *ULTRA VIRES* SECTION 28 AND 29 NPA**

The contention is that once a person has been charged the State cannot utilise the provisions of chapter 5 in respect of those charges.

91.

**WARRANTS *ULTRA VIRES***

In sections 28 and 29 of chapter 5 of the NPA (32 of 1998) investigating directorates are both given the power to institute and conduct prosecutions as well as wide powers of interrogation, enforcing the production of documents and search of private premises and seizure.

92.

Such rights of search seizure production and interrogation are invasive on a wide range of constitutional and common law rights of individuals and extraordinary. They are by their very nature invasive of particularly the constitutional rights of dignity, privacy, equality and impact on the fair trial rights of a party in section 35 of the Constitution.

93.

The rights are extraordinary in that these rights are far more invasive than the

similar in nature rights given to the investigators of all crimes the SAPS

Compare for example : Section 20, 21 (qualified by section 28 and 29) and section 205 of the CPA

94.

The requirements for the exercise of such powers - the jurisdictional facts - are firstly put at a lower and different threshold. This is evident from a comparison of sections 20, 21 and 197 et seq and 205 of the CPA with sections 28 and 29 (if not these provisions would have been tautolegous since section 30 of the NPA gives CPA powers to the directorates).

95.

Moreover, the right against self-incrimination especially the right to silence is almost completely negated. The fact that the answers may not be used as direct evidence in a criminal trial is of little practical value to an accused especially where the statutory threat of a perjury charge to keep the interrogated party to his extracted answers, is expressly made.

See especially : Section 28(8)(a), 28(1)(d) read with section 28(10) and section 29(1), (3) read with section 29(12) of the NPA

96.

These interrogative powers are also of great potential assistance to the State in enforcing the penal provisions of the Prevention of Organised Crime Act and gives it extraordinary advantages in what is expressly declared to be civil proceedings.

97.

The provisions are further extraordinary in that it unites wide powers over the gathering and control of evidence and prosecutions related thereto in the hands of a single entity (and even person). These functions and powers have traditionally been separated and the unification removes a certain independent appraisal and control which served as check and a balance in favour of the subject. This calls for careful scrutiny of the manner of exercise of these powers.

Compare : Commentary on the Criminal Procedure Act - Du Toit et al 1-4 I-J;

Paragraph 8 of the Prosecution Policy;

***R v Nabedi 1942 OPD 162;***

***R v Nigrini 1948 (4) SA 995 (C);***

Section 24 of the NPA;

Section 179 and 205-208 of the Constitution

98.

The powers in section 28 and 29 are given for the purpose of investigating specified offences in order to decide on whether someone is to be prosecuted for the same.

99.

The powers are given in relation to the investigation of a specified offence where the Director has reason to suspect its commission (or attempts at). See section 28(1), 28(6) and 29(1) - "for the purpose of an investigation".

100.

The decision to prosecute is an administrative act which is discretionary and reviewable.

See : Section 179(5) of the Constitution

Paragraph 4(c) of the Prosecution Policy

***Highstead 1994 (1) SA 387 (C)***

***Mitchell v AG Natal 1992 (2) SACR 68 (N)***

***S v Julius 1983 (2) SA 442 (C)***

***S v Khuele 1984 (2) SA 480 (O)***

101.

The decision to prosecute should only be taken if the prosecution has established a prima facie case : the averments made backed by evidence afford reasonable prospects of success. Defences need not necessarily be considered. Such a decision to prosecute should not be made in the absence of reasonable prospects.

102.

It is incumbent on the prosecution not to act arbitrarily throughout the process : ***Reuters Group PLC & Others v Viljoen & Others NNO 2002 (6) BCLR 660*** - and it must purposefully take all reasonable steps to ensure maximum compliance with constitutional obligations even under difficult circumstances.

See : ***Jaipal v S 2005 (5) BCLR 423 (CC) paragraph 56***

103.

The decision to prosecute is thus very different to the reason to suspect (there is some reason to investigate whether a crime may have been committed). Once this is followed by the institution of criminal proceedings the process has moved to a very different stage. This lis has commenced with battle lines drawn, the accused person prima facie loses his liability and an equality of arms is called for on constitutional considerations.

Compare : ***S v Sefadi 1995 (1) SA 433 (D)***

104.

The warrants in question were obtained for the purpose of furthering an investigation under the NPA. That investigation once instituted is designed to lead to a decision to prosecute or not to prosecute. To that end wide powers of search, seizure and interrogation are given. At some stage those powers must come and an end : an accused can hardly be hauled off in the midst of his cross-examination to face questions the relevance of which became or may have become apparent only after the trial commenced - he does not have a right of silence (see section 28). Or after acquittal asked where the body is, a search then being made and an appeal is augmented with the results thereof. At some stage those powers must be exhausted. The question is when.

105.

The answer seems obvious - at least when you have charged the person. When you have charged him with X that is the purpose of the "investigation met" under the NPA. He becomes an accused entitled to the special protection of section 35 of the Constitution which turns on a particular status in the prosecution process ("accused" is the ultimate one). The very act of charging the accused has a profound effect on a person - he gets locked into the criminal justice system with special rules and sanctions applicable to him, appearances etc. In principle he loses his liberty subject to bail, his freedom of movement is almost inevitably restricted.

Compare : ***Cuppan 1995 (4) 175 (D)***

***Geuking 2003 (3) SA 34 (CC)***

106.

It is sometimes easier to answer a question by dealing with what is not the answer. If the event of being charged does not bring down the curtain on the special investigative powers at least vis-à-vis the accused, what does? There is no express prescribed end moment in the Act - all other alternatives are nebulous or uncertain and certainly not transparent - one would have to investigate the internal workings of the directorates to come to a conclusion. That must in itself be a very undesirable state of affairs from a policy and confidentiality view point. (See ***Powell 2005 (5) SA 62 SCA*** which is generally very important and particularly paragraphs 36 and 37 on this issue). Especially where its policy is an oral one!

107.

Of course the investigation carries on after the accused is charged - that process is inherent in litigation. There is, however, no need for the special powers to continue (the NPA nowhere talks about searching the Accused's premises or questioning him); the CPA is still there and special investigators have all the powers of police officials under the Act (see section 30 especially (a) and (c) relating to investigation and entry and search). The requirements of section 20 of the CPA is somewhat more restrictive in some areas than section 29 of the NPA - the sections are not identical in their requirements as the separate enactments testify to (e.g. mere connection as opposed to

involvement is all that is required under section 29). Hence it matters under which section the application is brought (compare the analogous remarks in ***Powell*** and other cases). There are a number of contextual indications of the charge stage being the end stage parameter of the powers under sections 28 and 29:

(a) The absence of any reference to an accused;

(b) Section 29(5)(b) would be a rather unnecessary aspect;

(c) Section 29(3) states that the answers during the search shall not be admissible in any "subsequent criminal proceedings". Clearly the same rationale must cover current proceedings. The reason this is not mentioned is because this is not the situation which was contemplated by the legislature.

108.

**CONSTITUTIONAL CONSIDERATIONS**

There are a number of constitutional considerations which impact on the issue being raised.

109.

The constitution itself draws a distinction recognized in the case law, between suspects being investigated and arrested, detained or accused persons and

expressly grants specific rights to these categories of persons involved in criminal processes. In respect of accused persons this is the right to a fair trial which includes the rights in 35(3)(h) and (j) which reads:

> *"35(3) - Every accused person has a right to a fair trial, which includes the right..."*
>
> *"(h) - to be presumed innocent, to remain silent, and not to testify during the proceedings"*
>
> *"(j) - not to be compelled to give self-incriminating evidence"*

110.

It is clear that the utilisation of section 28 and section 29 in respect of an accused person would be directly in conflict with these rights which are non-derogable even in emergency situations - see section 37(5).

111.

Also of significance are the provisions of section 9(1) and (2):

> *"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*

(2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."*



Similarly section 36:

*"Limitation of rights*

(1) *The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*

(a) *the nature of the right;*

(b) *the importance of the purpose of the limitation;*

(c) *the nature and extent of the limitation;*

(d) *the relation between the limitation and its purpose; and*

(e) *less restrictive means to achieve the purpose.*

(2) *Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."*

113.

It is a well established principle of interpretation that legislation must be interpreted in consonance with the constitution and if needs be read down. This is also in accordance with the common law principle of *ut re magis quam pereat.*

See : ***National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*** 2000 (2) SA 1 (CC) ***at 23 and 24;***

***Hyundai supra***

114.

The position on the Respondents' view of chapter 5 of the NPA is that the non derogable constitutional rights of accused persons differ depending on whether they are charged with a specified offence or not. Those who are, can at any time and stage be questioned, searched and ordered to produce documents e.g. all the documents the Accused wish to use to discredit State witnesses) without reliance on the right of silence being possible. Other Accused are not subject to this - they can rely on their right of silence (the relevant provisions of the CPA are inter alia section 205).

115.

The provisions of section 30 of the NPA are thus of particular relevance in this regard especially given the overlapping subsections as to subject matter in 30(2)(a), (b), (c) and (d) and the strong assumption against tautology.

116.

Insofar as the Respondents may seek to rely on investigation of the "new" crimes of fraud and the tax evasion, this has no merit.

117.

The obvious reason why that is so is because that is not how the application for the warrant was framed. It was essentially premised on the further investigation of the already brought charges - inter alia it was brought in the light of certain "revelations" of a legal and factual nature during the Shaik trial. This does not explain why the warrants were not sought then before charging Zuma.

*See, inter alia :* Du Plooy : warrant affidavit
answer paragraph 19(f), (g) and (h), paragraph 30, 31(c), paragraph 44

In short, even a proper cause for a search warrant of sorts in respect of the new offences, cannot rescue a holus bolus application based primarily on other grounds in respect of which no powers of search and seizure existed. The bad taints the good. No-one can now say that the Judge would have granted any order or if he did, in what terms it would have been. Since the granting of such an order at least also is in a real sense administrative action, the principle that a decision based partly on improper grounds (especially where these are predominant) falls to be set aside, is decisive. The Respondents somewhat inappropriately would then in fact also seek to do what they cannot do directly. Moreover, it is well established that an impermissible abuse of statutory power occurs where an organ of state fails to utilize the least invasive mode of achieving the purpose for which the powers were bestowed:

See : ***Diepsloot 1994 (3) SA 336 (A) at 345 C-D read with 346 G-H***

119.

With the greatest respect it is not clear if the new offences of fraud and tax evasion were genuinely pursued why:

(a) The raid could not have been directed at Zuma's tax records in the Receiver's office or at worst in his home;

(b) Zuma could not simply have been questioned on this - the answer he was going to give was and is obvious;

(c) Why parliament could not simply have been asked for the declarations etc and the provisions of section 28 utilised or just those offices being raided ;

(d) Why Zuma could not simply have been asked about it. Especially as there is not the slightest suggestion that he ever refused to co-operate.

120.

It is really absurd to even suggest that an operation involving 300 plus persons, planned over several weeks and probably costing hundreds of thousands of Rand was launched to obtain evidence of these two offences. (Photostatting the documents at even 30c a page equates to R30 000,00 and how is 94,000 pages seized ever to be equated to the new offences as well as all the sites searched?).

See : Du Plooy answer para 56

121.

This is even more obvious when it is realized that these offences are wholly dependent on whether the corruption charges succeed or not. It is rather like

charging someone with not reporting the suspicious movement of a large cash amount - say R1 000 000,00 - when the movement consists of him stealing it and secreting it in various accounts. With respect, the bringing of these charges was a transparent stratagem to bolster a dubious application.

122.

What the Respondent's hoped to achieve is set out in Du Plooy's assertion:

> "In order for a search properly to be conducted it is necessary to search everywhere and everything on the premises in question".

123.

Clearly the Respondents hoped to obtain valuable material for the corruption trial.

See also : ***Josiah*** para 17

**L. <u>OVERBREADTH OF SEARCH WARRANTS</u> :**

124.

Section 14 of the Constitution of the Republic of South Africa, Act No. 108 of 1996 provides as follows :

*"Everyone has the right to privacy, which includes the right not to have -*

(a) *their person or their home searched ;*

(b) *their property searched ;*

(c) *their possessions seized ; or*

(d) *the privacy of their communications infringed".*

**Constitution, Section 14.**

125.

In **Mistry v. Interim Medical and Dental Council of South Africa and Others 1998 (4) S.A. 1127 (CC),** Sachs, J. on behalf of the Court explained the historical setting of the current constitutional safeguards to the right to privacy (at [25]) :

> "The existence of safeguards to regulate the way in which state officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police state. South African experience has been notoriously mixed in this regard. On the one hand there has been an admirable history of strong statutory controls over the powers of the police to search and seize. On the other, when it came to racially discriminatory laws and security legislation, vast and often restricted discretionary powers were conferred on officials and police. Generations of systematised and egregious violations of personal privacy established norms of disrespect for citizens that seeped generally into the public

administration and promotec against a great many officials habits and practices inconsistent with the standards of conduct now required by the Bill of Rights. Section 13 [of the interim Constitution; now Section 14 of the Bill of Rights] accordingly requires us to repudiate past practices that were repugnant to the new constitutional values, while at the same time reaffirming and building on those that were consistent with these values".

126.

The Supreme Court of Appeal in **Powell (supra)** held that our law has a long history of scrutinising search warrants with rigour and exactitude - indeed, with sometimes technical rigour and exactitude.

See: ***Powell (supra) at 81 F-G [50];***

***De Wet and Others v. Willers N.O. and Another 1953 (4) S.A. 134 (T) at 127 B-C;***

***Cheadle, Thompson & Haysom (supra) at 282-283.***

127.

In **Powell (supra)** the Supreme Court of Appeal traced the history of the line of cases dealing with the setting aside of search warrants for vagueness and overbreadth.

See: **Powell (supra) at 82 E [52] to 85 B [58] and the authorities there cited.**

In **Powell (supra) at [59]**, the Supreme Court of Appeal concluded the following :

(a) Because of the great danger of misuse in the exercise of authority under search warrants, the Courts examine their validity with a jealous regard for the liberty of the subject and his or her rights to privacy and property.

(b) This applies to both the authority under which a warrant is issued, and the ambit of its terms.

(c) The terms of a search warrant must be construed with reasonable strictness. Ordinarily there is no reason why it should be read otherwise than in the terms in which it is expressed.

(d) A warrant must convey intelligibly to both searcher and searched the ambit of the search it authorises.

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

(f) It is no cure for an overbroad warrant to say that the subject of the search knew or ought to have know 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.

**Powell (supra) at 85 C-F [59].**

129.

In **Powell's** case **(supra)** the Supreme Court of Appeal found that the "warrant was riddled with imprecision and vagueness, and that it had to be set aside on this ground alone".

**Powell (supra) at 85 G [60].**

130.

We respectfully submit that the search warrants in this case, suffer the same imprecision and vagueness. They are hopelessly overbroad. The first applicant has dealt with this aspect of the matter in detail in the first applicant's founding affidavit.

**First applicant's founding affidavit, paragraphs 70-80.**

131.

We respectfully submit that the conclusion which the Supreme Court of Appeal reached in **Powell (supra)** is equally applicable in this case:

> 'Those carrying out the search were given virtually untrammeled power to carry out ... 'a general ransacking' of [the first and second applicants'] premises. That has not been the law in this country since

at least 1891, and it is not the law under our Constitution, which preserved and enhanced what was best in our legal traditions. The diligent scrutiny of warrants for search and seizure survives as part of the best of that legacy, constitutionally entrenched in our new democracy. The warrants must be set aside as unlawful".

**Powell (supra) at 86 C-D [62].**

**M. JURISDICTION :**

132.

The respondents see fit to attack the jurisdiction of this Court to set aside the search warrants and grant the further relief sought by the applicants. We respectfully point out that no such attack was launched by the respondents to the jurisdiction of the Witwatersrand Local Division in **Mohamed's** case in which the Julekha Mahomed search warrant was set aside by the Witwatersrand Local Division. At the outset, we submit that there is judicial precedent that a Court, other than the Court of jurisdiction of the presiding Judge who authorised the issue of the search warrants, has jurisdiction to set aside the search warrants (even section 29(11) suggests differently).

133.

Search and seizure operations instigated and sanctioned by organs of State constitute in effect a multi-phase process. The decision to apply for the same is administrative in nature whilst the decision of the magistrate or judge in granting the warrant is somewhat *sui generis* in nature (albeit that numerous

administrative law tests to determine validity is applied e.g. failure to apply one's mind - there cannot be one test for validity for CPA warrants issued by a magistrate and another in nature for those issued by a judge); the execution of the warrant is in turn pure administrative action.

See generally : ***Pretoria Portland Cement supra***

134.

The Applicant Hulley resides and practices in this jurisdiction. He complains that the search and seizure operation and the warrant issued to authorize the same, infringes fundamental rights of his both at common law and constitutional level.

135.

This argument has thus no merit.

(a) Several of the premises searched are within the area of jurisdiction of this court. In respect of the remainder the doctrine of *causa continentia* would provide a jurisdictional basis if one is needed over and above what is set out hereunder. It seems in any event as if the objection is solely based on the fact that the warrants were issued in the TPD.

(b) The complaints in the application are not only directed at the warrants but also their manner of implementation and a number of these were executed in this jurisdiction. Nor is it possible to

always separate warrant and execution. In respect of Hulley's premises the absence of safeguards in respect of privilege in the warrant and in the execution thereof is complained of. The fact that a warrant may be silent on section 29(11) also does not mean that it need not be brought to the invaded party's notice by the executioners. That happened in this jurisdiction. This court clearly has jurisdiction.

(c) It would indeed be very undesirable that each facet is to be considered by a different court with the potential for conflicting judgments especially where the legislature has recognized the need for convenience (or is it only the State's convenience which matters?). It is of considerable importance to note that the basic principle is that a warrant must be sought where the premise to be searched is (this is recognition of this being the place where the invasive procedure takes place). If the legislature links this as a jurisdictional fact, why should the court ignore it as such? It is for the convenience of the State (and courts) in the ex parte application for the warrants that an exception exists in the case of multi-jurisdiction sites. The consequences of that opportunity for election of a forum (termed shopping by the Applicants) is not to be extended beyond that stage. If not the Applicant can in the event of a clash of judicial opinion on requirements, select the most favourable jurisdiction and hold the victim of the search to that.

(d) Any different interpretation is bound to impact on the Constitutional and common law rights of persons affected by such warrants and their execution. The inconvenience, costs and effort required to impugn a warrant thousands of kilometers from where its impact is felt and the principle of equality of arms in adversarial systems militate very strongly against this. A law which requires a R100 000,00 deposit before a plea of not guilty will be entered or a summons issued will clearly offend the right of access to the courts. Why not a law which requires this indirectly? It is irrational for the extra burden on an injured party, to depend on the State's convenience in the application.

(e) The principle of jurisdiction that a party aggrieved by an act or decision (including an administrative one) can seek relief in the jurisdiction where the harm is felt, is an established principle and effectively ensures the constitutionality of the process.

(f) It is clear that if there was a failure to place safeguards regarding privilege in the warrant and/or a failure to give effect to claims/rights of privilege in the execution, the effect was felt in respect of both litigants, here. That invasion of privacy is inherent in searches, is common cause. That takes place by virtue of the warrant and is felt where the warrant is executed. Documents which are the property of Zuma were seized in and taken from this jurisdiction (it is also somewhat unrealistic to distinguish between warrant and execution as the first opportunity to

impugn either only arises subsequent to execution commencing for that is the very purpose of the ex parte exercise).

(g) The target of the warrants in question is Zuma. The aim is to use the fruits of the warrants in his criminal trial set down in this division. The ultimate harm caused by the warrants and their execution will then be felt by him in this jurisdiction. Zuma would have been quite entitled to raise the issue of such evidence (admissibility, fair trial aspects) and the legality of the warrants (especially on an ultra vires basis for physical existence does not create a status quo of legality in such instance) in that trial and seek a definitive judgment on that.

(h) The State's attitude is wholly cynical of Zuma's rights in a particularly discriminating manner. The Mohamed application in the WLD, with the same basic State representatives, was allowed to go ahead with no query of jurisdiction in respect of a TPD warrant. No explanation for this has been offered.

136.

We respectfully submit that it is appropriate to scrutinise the jurisdictional attack from the first principles.

137.

The warrants were sought and obtained **ex parte**. There is long established

authority for the proposition that a party cannot by obtaining **ex parte** an order in his favour secure a more advantageous position than he would have been in if the other party had, consequent upon notice, an opportunity of opposing.

See: ***Bradbury Gretorex Co. (Colonial) Ltd. v. Standard Trading Co. (Pty) Ltd. 1953 (3) S.A. 529 (W) at 531 B-C;***

***Cargo Laden and Lately Laden on Board the mv "Thalassii Avgi v. mv "Dimitris 1989 (3) S.A. 820 (A) at 834 D-E;***

***Weissglass N.O. v. Savonnerie Establishment 1992 (3) S.A. 928 (A) at 936 G.***

138.

Furthermore, an order granted **ex parte** is, by its very nature, provisional, irrespective of the form it takes.

***Ghomeshi-Bozorg v. Yousefi 1998 (1) S.A. 692 (W) at 696 D-E;***

***Banco de Mocambique v. Inter-Science Research and Development Services (Pty) Ltd. 1982 (3) S.A. 330 (T) at 332 B-D;***

***Pretoria Portland Cement (supra) at [45] to [46].***

139.

We respectfully submit that, in asking the learned Judge President to issue warrants countrywide against the applicants under the proviso to Section 29 (4) of the NPA Act, the respondents could not, in consequence of the issue of those warrants,

confine the applicants, who are domiciled within the area of jurisdiction of this Division, to approach the Transvaal Provincial Division for a reconsideration of the order of Ngoepe, J.P.

140.

We respectfully submit that the following factors fall to be taken into account:

(a) Three of the premises affected by the search warrants in question are situate within the area of jurisdiction of this Division, and those warrants were executed within the area of jurisdiction of this Division.

(b) The applicants felt the harm occasioned by the warrants where the search and seizure warrants were executed, within the area of jurisdiction of this Division.

(c) The criminal trial is to be held at Durban. We respectfully submit that the issuing and execution of the search warrants impact directly upon the first applicant's right to a fair trial, and the derogation from that right has taken place within the area of jurisdiction of this Division where the warrants were executed.

(d) Considerations of convenience and commonsense dictate that this Court is an appropriate Court to reconsider the matter. It would make no sense for the applicants to have to approach each Court within the area of jurisdiction of which the warrants were executed.

Such an approach would give rise to a danger of conflicting decisions on the same facts.

(e) The order of this Division setting aside the warrants will run throughout the Republic and can be served and have legal effect on the respondents in Pretoria under Section 26 (1) of the Supreme Court Act, No. 59 of 1959.

(f) The respondents are, effectively, the National Prosecuting Authority with offices through South Africa, including within the area of jurisdiction of this Division.

Cf. ***Estate Agents Board v. Lek 1979 (3) S.A. 1048 (A), particularly at 1069 C-G;***

***Cordiant Trading CC v Daimler Chrysler 2005 (6) SA 205 (SCA)***

141.

We respectfully submit that there is authority for the proposition that judicial officers may from time to time carry out administrative, as opposed to judicial, functions.

Cf. ***President of the Republic of South Africa v. SARFU and Others 2000 (1) S.A. 1 (CC) at [141];***

***SAAPIL v. Heath 2001 (1) S.A. 883 (CC) at 900-902 [32] [35].***

142.

The Supreme Court of Appeal has also seemingly accepted, without deciding the point, that a Judge issuing a search warrant under Section 46 of the Competition Act, No. 89 of 1998 was performing an administrative, rather than a judicial, act.

See: ***Pretoria Portland Cement (supra) at [13] to [40], particularly at [39].***

143.

In the premises, we respectfully submit that there is no reason, of necessity, why the applicants should have to approach the Court in which the Judge who issued the warrants sits.

144.

We respectfully submit that this Court has jurisdiction to hear and determine the issues arising in this case.

145.

We respectfully submit that if we are wrong in the aforegoing regard, this Court may and should order that these proceedings be removed to the Transvaal Provincial Division under the provisions of Section 3 of the Interim Rationalisation of Jurisdiction of High Courts Act, No. 41 of 2001. Section 3 of the aforesaid Act provides as follows :

"(1) If any civil proceedings have been instituted in any High Court, and it appears to the Court concerned that such proceedings -

(a) should have been instituted in another High Court ; or

(b) would be more conveniently or more appropriately heard or determined in another High Court,

the Court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other High Court".

***Section 3 (1), Interim Rationalisation of Jurisdiction of High Courts Act, No. 41 of 2001.***

(This very Act underlines the unitary structure of the jurisdiction of the High Court)

**N. <u>FIRST APPLICANT'S LOCUS STANDI</u> :**

146.

As we understand the respondents' answering papers, they attack the first applicant's **<u>locus standi</u>** to set aside the search warrants in respect of Tuynhuis, the Union Buildings and the Provincial Government Offices in Durban.

147.

We respectfully that the attack on the first applicant's **locus standi** is misconceived. The warrants record that the respondents were looking for the first applicant's documents and materials. If it is the first applicant's property that the respondents were looking for, the first applicant must have **locus standi** to set aside the search warrants.

148.

We respectfully submit that the geographical locations where the documents and materials may be found, have nothing to do with whether or not the first applicant has **locus standi** to set the warrants aside. Whether they are found on the first applicant's own immovable property, or on movable property owned, controlled or occupied by someone else, the first applicant must have **locus standi** to set aside search warrants under which State officials are empowered to search for the first applicant's documents.

## O. DU PLOOY'S DESIGNATION:

149.

We respectfully submit that the various Section 28 investigations referred to in Du Plooy's founding affidavit in the application for the search warrants, have been flawed from the outset.

150.

The process is alleged to have started on 6 November 2000 when the Director of

the then Investigating Directorate: Serious Economic Offences, purported to institute a preparatory investigation in terms of Section 28 (13) in relation to "allegations of corruption and/or fraud" in connection with the acquisition of armaments at the Department of Defence.

Du Plooy's founding affidavit in the application for the search warrants, paragraph 3.

151.

We respectfully point out that the alleged preparatory examination was instituted prior to the amendments to the NPA Act by Act No. 61 of 2000. We respectfully submit that the only Investigating Directorate which would have had jurisdiction to investigate the alleged offences referred to in the purported preparatory examination instituted on 6 November 2000, would have been the Investigating Directorate: Corruption established by Presidential Proclamation R.14 of 2000, dated 24 March 2000. We respectfully submit that, after 24 March 2000, the Investigating Directorate: Serious Economic Offences did not and could not have had jurisdiction to investigate offences pertaining to corruption.

152.

Du Plooy further alleges that on 24 August 2001 the "Investigating Director" (no further details provided) instituted an investigation under Section 28 (1) (a) of the Act into the suspected commission of offences of fraud and/or corruption in contravention of the Corruption Act, No. 94 of 1992.

**Du Plooy's founding affidavit before Ngoepe, J.P., paragraph 4.**

153.

Du Plooy alleges that he was "duly designated by the investigating Director to conduct such investigation on his behalf in terms of Section 28 (2) (a) of the Act".

**Du Plooy's founding affidavit before Ngoepe, J.P., paragraph 5.**

154.

Annexure "LM.5" to McCarthy's affidavit contradicts Du Plooy's assertion before Ngoepe, J.P. that Du Plooy was duly designated. "LM.5" to McCarthy's affidavit records that "SSI Du Plooy" was authorised to conduct "a preparatory investigation in terms of Section 28 (13)" on the Investigating Director's behalf and to report to the Investigating Director. "LM.5" is dated 8 October 2002.

**"LM.5" on page 355**

155.

We respectfully submit that the designation of Du Plooy, for the reasons set out in detail by the Supreme Court of Appeal in **Powell's** case **(supra)** was no mere technicality or formality. The Investigating Director could only exercise the powers conferred upon him by the NPA Act, and Du Plooy could only lawfully exercise the powers lawfully conferred upon Du Plooy by the Investigating Director. We respectfully submit that the alleged error in the form of "LM.5" is fatal to Du Plooy's

alleged designation.

156.

We respectfully submit that Du Plooy's flawed designation on 8 October 2002 ("LM.5") was not and could not be cured by the subsequent designation relied upon by the respondents on 22 October 2002 ("LM.8" to McCarthy's affidavit).

157.

**THE AUTHORISATIONS**

It is incumbent on the Respondents to demonstrate that the warrants were obtained within the parameters of chapter 5 of the NPA. It is of no avail to state that the Judge had accepted the statements to this effect at face vale when this is later challenged. Whether this is in fact so is almost wholly within the knowledge of the Respondents and exacerbated by the fact that the policy to which the designations must conform, exists as an oral tradition within the Respondents Departments. That is especially why they should not baulk when this is raised in response to their affidavits.

158.

The last link between the powers to duly obtain warrants and the application for and granting thereof, is the extension of the investigation by Advocate

Mngwengwe the "acting Investigating Director" - LM9. Therein he purports to extend an extended investigation authorized on 15 October 2002.

(a) No such extended investigation of such date was put up. It was specifically requested in a Rule 35 notice. None was forthcoming. A non-existent extension was further extended.

(b) An extended investigation cannot always be extended with reference to all contained matter. The extensive powers of chapter 5 is limited by the area of application being specific offences. All extensions must relate to the specific offences. If not there is no meaningful limitation; every extension (even by non-specific offences) create a different parameter of extension, connectedness and relevance.

(c) Mngwengewe's appointment was specifically queried and given his acting status and the statutory requirements and the at best incorrect references in his authorizations, unsurprisingly (see inter alia paragraph 1 and paragraph 5 of his affidavit). One would have expected the Respondents to readily respond and lay the matter to rest. Clearly the failure to do so makes the probable inference that he was not duly appointed - nor does he claim to be duly appointed.

159.

It is submitted that the Respondents have failed to bring themselves within the ambit of chapter 5 and hence the entire authorisation of the warrant application does not rest on the decisions of the required officials, taken as required by chapter 5. Hence the entire warrant application was and is flawed.

160.

Matters were not improved by the contents of "LM.9" dated 8 August 2005, under which the "Acting Investigating Director" Advocate M. Mngwengwe, purported to extend the investigation to include, **inter alia**, the income tax charge. In this regard, we respectfully point out that "LM.9" makes reference to an extension of the investigation on 15 October 2002. There is no reference in any of the other documentation, or McCarthy's affidavit, to any investigation extended on 15 October 2002. In the premises, we respectfully submit that "LM.9" is flawed. "LM.10", being the purported designation of various persons to conduct the "extended" investigation into, **inter alia**, the income tax charge, is flawed for the same reason. We respectfully submit that it follows that the purported designations thereunder are defective and invalid.

**NOTE :** **Mngwenwe's appointment was specifically queried. The Respondents have failed to lay the matter at rest.**

**Notice in terms of Rule 35(12) on page 445 to 446 of the papers.**

161.

For the reasons set out above, we respectfully submit that Du Plooy's designation has been flawed from the outset.

**P. DU PLOOY'S AUTHORITY TO BRING THE PROCEEDINGS FOR THE SEARCH WARRANTS BEFORE NGOEPE, J.P. :**

162.

Du Plooy alleged in his founding papers before Ngoepe, J.P. that he was "duly authorised to make this affidavit". There was no allegation that he was authorised to bring the application.

**Du Plooy's founding affidavit before Ngoepe, J.P., paragraph 2.**

163.

In the applicants' founding papers in this court, the applicants specifically challenged Du Plooy to produce his authority to bring the application before Ngoepe, J.P.

**First applicant's founding affidavit, paragraphs 20-22 on page 29 of the indexed papers**

(Plainly, the applicants were challenging his authority to bring the application

*before Ngoepe, J.P.).*

164.

*The response to this challenge was revealing.*

165.

Du Plooy responded by stating that the decision to conduct the "searches" was taken in consultation **inter alia** with McCarthy and Downer. Du Plooy stopped short of saying that he was authorised to bring the application for the search warrants. At best for Du Plooy, the authority on which he relies is an oral authorisation given to him by McCarthy and Downer.

**Du Plooy's answering affidavit, paragraph 8 (a) on page 235 of the indexed papers**

166.

*Surprisingly, neither Downer nor McCarthy confirms Du Plooy's version.*

167.

To the contrary, Downer remains silent about the matter. He does not deal therewith at all in his affidavit.

168.

McCarthy takes a different view. McCarthy states that Du Plooy was authorised to bring the application before Ngoepe, J.P. because Du Plooy was a person "duly designated in terms of the Act to conduct the investigation on behalf of the Investigating Director".

**McCarthy's affidavit, paragraph 24 (c) on page 320 of the indexed papers**

169.

Extraordinarily, McCarthy does not confirm that Du Plooy had any oral authority to bring the application. His authority, on McCarthy's version, appears to have arisen purely from his alleged designation, and no other source.

170.

In addition, McCarthy states that there is a "prescribed office policy" which requires, **Inter alia**, that :

> "Applications for search warrants must in any event be authorised by the Investigating Director or by the head of the Directorate of Special Operations".

**McCarthy, paragraph 28 (g) (iv) on page 327 of the indexed papers**

(a) Wide powers are conferred on the person designated to conduct the investigation on behalf of the second respondent. The powers