IN THE HIGH COURT OF SOUTH AFRICA

DELETE VVHICHSVER inVvj.bllf' PROVINCIAL DIVISION)
Case No: **268/2006**

(1) REPCRTAELa: yicS/i HO.
(?.) OF INTErIEST TO **Cfi** HER JUDGES: yt 3/rjo.
(3) REVISED.

PATE **Dates** heard: 29/06/2006 Date of

.....judgment: **04/ 07 / 2006**
SIGNATURE

In the matter between:

THINT (PTY) LTD	,ST APPLICANT
PIERRE MOYNOT	2ND APPLICANT
BIJOU FRANCO1SE-MOYNOT	3RD APPLICANT

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	1ST RESPONDENT
THE INVESTIGATING DIRECTOR: DIRECTORATE OF SPECIAL OPERATIONS JOHAN DU PLOOY	2ND RESPONDENT
	3RD RESPONDENT

JUDGMENT

DU PLESSIS J:

This application concerns an investigation into allegations of corruption and fraud in connection with government contracts for the supply

of armaments. After a preparatory investigation conducted between November 2000 and August 2001, the second respondent on 24 August 2001 instituted an investigation in terms of section 28(1)(a) of the **National Prosecuting Authority Act, 32 of 1998** ("the Act"). The third respondent is a senior special investigator whom the second respondent has authorised to conduct the investigation.

On 12 and 15 August 2005 the third respondent in chambers applied to the judge president of this court for the issue in tenns of section 29 of the Act of more than 20 search and seizure warrants. The learned judge president granted the application and issued the warrants. One of the warrants was issued in respect of the office premises of the first applicant. Another warrant was issued in respect of the home of the second and third applicants. The **warrants,** including the two in respect of the applicants' premises, were executed on 18 August 2005 and items, including documents and computers were seized.

The applicants launched this application under a separate case number. They seek relief aimed at setting aside the warrants, at declaring

the searches and seizures to have been unlawful and at the return of the items seized.

It is necessary to determine the nature of this court's jurisdiction to deal with this application. The application for the warrants was made without notice to any of the persons affected thereby. As such it was an *ex parte* application and should perhaps have been brought on notice of motion in accordance with the Riles of this court that provide for such applications. A rule ***nisi*** with interim effect should perhaps have been sought (See **Pretoria** Portland Cement Co **Ltd and** Another v Competition Commission **and** Others 2003 (2) SA 385 (SCA) at paragraph 2). As the order issuing the warrants was made *ex pane*, it was by its nature provisional and it is subject to reconsideration after all the parties who have a direct and substantial interest in the order have been heard (See the **Pretoria Portland** Cement case at paragraph 44 to 47). Although the application to set aside the warrants bears a separate case number and was brought on notice of motion as if it were a new application, what is before me still is the application for the issue of the warrants that I am called upon to reconsider in the light of al! the evidence now before me. What the applicants termed their founding affidavit in substance, though not in form,

constitutes their answering affidavit to the second respondent's affidavit in support of the warrants (See the **Pretoria Portland Cement** case at paragraph 48). It is convenient to refer to the parties as they are referred to in the applicants' "new" application.

The second and third applicants' application can be disposed of immediately. The respondents concede that the warrant issued in respect of their home was invalid, albeit that they contend that it is invalid on what may be termed a technical ground. As the respondents have arranged for the return of the items seized and have tendered to pay the applicants[1] costs up to the date of the tender, counsel were agreed that, with one reservation, no order is necessary in respect of the second and third applicants. The reservation is this: In the course of the search, the investigators drew a detailed plan of the applicants' home. The plan is still in the respondents' possession. Understandably motivated by concern for their personal security, the applicants seek the **return** of the plan. For the respondents Mr Trengove pointed out that the plan comprises a detailed record of exactly where items were seized. For that reason, counsel contended, the respondents need to retain the plan for use in the event of future disputes. I suggested to counsel that an order that the plan be lodged with the registrar

of this court for safekeeping might resolve this issue. Both Mr Naidu for the applicants and Mi" Trengove accepted the suggestion and I shall make such an order.

That brings me to the warrant issued in respect of the first applicant's premises. Counsel for the applicants contended that, for different reasons, the warrant was "unlawfully and improperly" obtained.

In the first place Mr Collins (who appeared with Mr Naidu and who argued this aspect for the applicants) contended that the third respondent did not, in his founding affidavit, comply with the duty to make full disclosure of all the material facts. An applicant who seeks relief against another by way of an *ex parte* application must observe the utmost good faith in placing before the court all the material facts (See **Herbstein and Van Winsen: The Civil Practice of the Superior Courts in South Africa,** 4[1] edition p.367).

1 have made reference to the investigations instituted by the second respondent and conducted by the third respondent into allegations of **corruption,** money laundering, fraud and related offences. The allegations implicated, amongst others, Mr Jacob Zuma, Mr Schabir Shaik and the

French-based Thomson/Thales group of companies. The first applicant is one of the locally registered members of the latter group. As a result of investigations Mr Shaik and 11 corporate entities, including the first applicant, were charged on various charges of corruption, money laundering and fraud. When the trial commenced on 11 October 2004, the charges against the first applicant was withdrawn. This was done as a result of an agreement between the company's legal representatives and the then National Director of Public Prosecutions. The trial against the other accused continued and was concluded on 8 June 2005. The first applicant was throughout, and still is, represented by an attorney and senior counsel. It appears from the applicant's affidavit that it received, on a daily basis, copies of the record of the trial of Shaik and the other accused. All the accused were convicted on one count of corruption. Some of the accused, including Shaik, were convicted of fraud and Shaik was convicted on a second count of corruption. Some of the corporate accused were convicted of money laundering. The evidence led during the trial and further investigations, according to the respondents, implicate the first applicant in allegedly corrupt payments to Mr Jacob Zuma. When the application for the warrant was brought, the first respondent had already decided to prosecute Mr Zuma and he had already appeared in court and had been released on

bail. As for the first applicant, no decision to prosecute it had been made. Prosecuting the first applicant was contemplated however, and after the warrants had been issued and executed, a decision to prosecute the first applicant was made.

The third respondent's founding affidavit contains a lengthy summary of the background facts. Counsel for the applicant submitted that, nevertheless, it does not fully disclose the terms of the agreement to withdraw the charges against the first applicant. Consequently, the argument went, the learned judge president was'not aware that the first applicant potentially was an accused.

It is correct that the affidavit does not fully set out the **terms** of the agreement to withdraw the charges against the applicant. But, in the affidavit the third respondent stated: **"The** State withdrew the charges solely as a result of the agreement and not because of any considerations of the merits of the charges against THINT (Pty) Ltd. The State remained convinced (and is still so convinced) that a prosecution against THINT (Pty) Ltd was merited on the strength of the evidence against it." The affidavit then proceeds to set out at some length the evidence led during the trial and

the findings of the trial court that implicated the first applicant. The third respondent concluded this part of the affidavit by stating: "In summary, I am of the opinion that there is no credible evidence that reasonably detracts from the State evidence against Zuma or Thomson/Thales on both charges of corruption. There remains at the very least a reasonable suspicion that these offences have been committed." In my view the reasonable inference to be drawn from the papers as they were before the learned judge president is that the prosecuting authorities were still contemplating to charge the first applicant. At best for the applicant there is nothing on the papers as they were to suggest that the first applicant could and would not be charged. I conclude that the papers correctly conveyed that the first applicant could be charged.

From the papers that the first applicant filed it appears that senior counsel and an attorney had throughout represented it. The first applicant and its legal representatives kept abreast of developments and on a daily basis received copies of the record in the Shaik-trial. In his founding affidavit the third respondent did not state that the first applicant was legally represented.

Counsel submitted that the failure to mention that the first applicant was legally represented constitutes a material non-disclosure. The non-disclosure is material, counsel submitted, because had the learned judge president been apprised of the fact that the first applicant was legally represented, he would have realised that there was a possibility that information protected by legal professional privilege might be on the premises. The judge president would then have ensured that privileged information is protected in terms of the warrant. At least, he would have required the warrant to contain an explicit reference to section 29(11) of the Act. Section 29(11) 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".

In suppoit of this argument counsel referred me to two judgments that deal with three of the other warrants that the learned judge president issued on 12 August 2005. In **Zuma and Hulley v National Director of Public Prosecutions and Others (D** & CLD, case no. 14116/05) Hurt J dealt with warrants issued to search the respective premises of Mr Zuma and his **attorney, Mr Hulley.** In **Mahomed v NDPP and Others** (WLD case no. 19104/05) Hussain J dealt with a warrant to search the premises of an attorney who formeriy acted as Mr Zuma's legal advisor. In both cases **the warrants** were set aside, *inter alia* on the ground that they should have contained explicit references to section 29(11) so as to alert the attorneys to their right to claim privilege.

Section 29(11) js the manner in which the legislature chose to protect privileged information. The Act does not require a **warrant** to contain either a reference to section 29(11) or an explicit notification that privilege may be claimed in the course of a search and seizure. Counsel did not attack the constitutional validity of the Act. As a general proposition neither an

explicit reference to section 29(11) nor one to the right to claim privilege is a prerequisite for a valid warrant. I accept, however, that there may be circumstances in which the judge issuing the warrant will in his or her discretion deem it in the interests of justice to require that an explicit reference to section 29(11) or to the right to claim privilege must be part of the warrant. By the same token a court that reconsiders the decision to issue a warrant may set it aside because, on the specific facts of the case, a failure to make reference to section 29(11) or to the right to claim privilege, constituted an unlawful disregard for the rights of the person whose premises are to be or were searched. As I understand the **Hulley** and **Mahomed** judgments the learned judges held that, on the facts in those cases, there should have been a reference to section 29(11),

There is no indication on the papers that the third respondent acted in bad faith by not disclosing that the first applicant was legally represented. In fact, it is not clear on the papers that he appreciated that. In the circumstances I think that the materiality or otherwise of the non-disclosure must be determined on all the facts as they are before this court. I shall nevertheless consider first whether the non-disclosure was material on the facts as they were before the judge president.

On the one hand, the fact that a person whose premises are to be searched is legally represented, increases the possibility that privileged information might be found on the premises. On the other hand, the very fact that a party is legally represented renders it probable that he will seek legal advice when the **warrant** comes to his knowledge. On the probabilities a lawyer who is consulted about a warrant issued in terms of section 29 of the Act will immediately read at least that section of the Act and **will** be alerted to the provisions of section 29(11). In this instance, the lawyers had been representing and advising the first applicant for some time in connection with the very allegations that the warrant sought to investigate. I have no doubt that they were alive to the possibility that privileged information might be on the premises. 1 do not think that mentioning the fact that the first applicant had legal representation would have prompted the learned judge president to ensure greater protection than that which the legislature deemed adequate when it enacted section 29(11).

Turning now to the facts as they are before this court, Ms Govender, whom the first applicant employs as the second applicant's personal assistant, was present when the first applicant's premises were searched.

(The second applicant is a director of the first applicant.) Ms Govender, who has been employed in her present capacity since 2003, in her affidavit explicitly states that she had been made aware thereof that certain exchanges between the first applicant and its lawyers were "highly confidential" and "privileged". In fact, the second applicant toid her which documents or information on her computer fell into this category. On the day of the search, a mirror image of her computer's hard drive was made. She says that she claimed privilege in respect of certain information on the hard drive. There is a dispute of fact about her alleged claim of privilege to which I shall return. It is for present purposes sufficient to note that she knew about and. allegedly claimed privilege in respect of electronically stored information. It is not in dispute that she actually claimed privilege in respect of certain documents found in a filing room. When she did so, the first applicant's attorney had arrived and she called in his assistance. After some negotiations the documents in respect whereof privilege was claimed, were by agreement dealt with substantially in terms of section 29(1 1).

The facts therefore show that the first applicant's representatives were at all times aware of the right to claim privilege and actually did so. There was on the facts of this case no need for the warrant to have contained a

specific reference to section 29(11) or to the right to claim privilege. In the result the fact that the founding affidavit did not make reference thereto that the first applicant was legally represented, is not material.

Although I did not understand counsel to make the submission in oral argument, the heads of argument contain a submission that the third respondent should in his affidavit have made specific reference to section 29(11) and that the failure to do so constitutes a material non-disclosure. For the reasons that I have given, I do not think that such non-disclosure was material. Moreover, it is not for a party to instruct the judge about the law in the course of evidence. That is the duty of counsel who appears for the party. Lastly, it is improbable that the learned judge president did not read section 29 when he considered the application.

Finally as regards non-disclosure, counsel submitted that the third respondent failed to disclose fully that the first applicant had in the past co-operated with the investigators. Had that been disclosed, counsel argued, the learned judge president wouid not have been satisfied that there is a need for the invasive step of authorising a search and seizure warrant.

In the affidavit the third respondent states that the first applicant had in the past co-operated with the investigation team. The affidavit states that certain infonnation was obtained by way of a summons in tenns of section 28 of the Act. The affidavit makes the further point, however, that not all the relevant information has been forthcoming from the first applicant. It makes the further point that it is improbable that an accused person who is actually guilty would voluntarily furnish all the relevant information to the investigating authorities. The second applicant in his affidavit makes the same point albeit in the context of submitting that a" warrant was unnecessary because, if the first applicant were guilty, it would not have kept incriminating evidence.

The facts pertaining to the present investigation are many and span a long period of time. The third respondent of necessity had to summarise them and decide what to state in the affidavit and what not. Therefore, it will always be possible to point to facts that could have been stated more fully in the affidavit. The question is, as Mr Trengove put it, whether in this inevitable culling process, the third respondent erred materially by not giving more detail about the first applicant's co-operation. 1 do not think so for the following reasons. The first applicant is presumed to be innocent.

There is a reasonable possibility however that it might not be. Common sense dictates that the persons investigating the first applicant's possible guilt must bear in mind the possibility that it might not be willing to furnish to the investigators all the relevant evidence. In that context the search was necessary. Even if every instance of co-operation had been mentioned in full, this common sense possibility would have remained.

It is axiomatic that a search and seizure warrant seriously invades different important rights of the person or entity whose premises are to be searched in terms thereof. For that reason, as was pointed out in the **Zuma and Hulley** judgment (p 25) a judicial officer should only authorise search and seizure if "resort to it is reasonable in all the circumstances". To determine whether search and seizure is reasonable in all the circumstances the rights of the person or entity, including those to privacy, freedom and dignity must be weighed against society's need to combat crime. The likelihood that the information sought can be obtained by less invasive means must be taken into account. In the present context, regard must be had thereto that the First applicant is a company who is not the bearer of human dignity and whose rights to privacy are attenuated (See Investigating Directorate: Serious Economic Offences **v Hyundai Motor Distributors**

2001 (1) SA 545 (CC) at paragraphs 18, 53 and 54). Applying these considerations to the facts of this case, I conclude that even if the third respondent had more fully dealt with the first applicant's co-operation in the past, the need to issue the warrant would have been reasonable in ali the circumstances.

Mr Naidu submitted that the terms of the warrant are fatally overbroad. In terms of section 29(1) read with section 29(4) and (5) a warrant may authorise the "Investigating Director or any person authorised thereto by him or her in writing ... 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, (to) enter any premises on or in which anything connected with that investigation is or is suspected to be, and ... (to) -

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

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

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

(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: ... ";

(The quotation if from section 29(1) of the Act)

I annex a copy of the **warrant** issued in this case to this judgment. The warrant comprises two introductory paragraphs or preambles. Then follows an adequate description of the premises to be searched. The authorising paragraph that follows the description of the premises substantially follows the wording of section 29(1) of the Act. (There is a specific authorisation in respect of computer-related objects that are not contained in the Act. I leave that out of consideration for the moment and I shall return t it later.) It follows that the warrant does not authorise the search and seizure of

anything more than the empowering Act authorises. But a warrant "must convey intelligibly to both searcher and searched the ambit of the search it authorises" **(Powell NO and Others v Van der Merwe NO and Others 2005 (5)** SA **62** (SCA) at paragraph 59(d)).

Like any document, the warrant must be interpreted having regard to its full context. Although the first preamble identifies the offences that are investigated, it does not contain in its body any particulars thereof. The first preamble states that a need has been shown "for a search and seizure .... of any .object as per Annexure A *(to the warrant),* which has a bearing on or might have a bearing on the investigation". Counsel on both sides were agreed that this Annexure qualifies the authorising paragraph. From paragraphs 1 to 21 of the Annexure one can see who the persons and entities allegedly involved in the alleged offences are. One can also see, broadly, what they are accused of having done. Paragraph 5 of the Annexure gives an indication of the time span during which the offences were allegedly committed but 1 accept that one cannot infer with any certainty when the offences were allegedly committed.

The applicant's counsel argued that the failure to state the time when the offences were allegedly committed is fatal. I do not agree. One must bear in mind that the Act authorises search and seizure in respect of an investigation. In the nature of things, the investigating authority will not always have at its disposal full details of the offences under investigation. The present case is an example: The investigations have progressed far and accused persons and entities have already been convicted. Yet, it appears from the third respondent's founding affidavit that the investigators are still investigating whether corrupt payments are still being made. In my view the first applicant was in no doubt as to what was being investigated. I might add that the warrant, like any document, must be interpreted in its factual matrix. Not only has the first applicant been aware of the nature of the investigations since at the latest 2001, it has, with the aid of legal assistance been keeping abreast of developments since then. I appreciate that such facts cannot cure a fatally defective warrant (see the **Powell** case paragraph 54). Before a warrant can be found to be fatally defective, it must be interpreted with regard to all the legitimate aids to interpretation of documents, however.

For the applicant it was further submitted that paragraph 22 of Ann ex ure A to the warrant is overbroad in that it authorises the search and seizure of just about anything. The paragraph is vety wide but it is qualified thereby that only objects that **have** a bearing or might have a bearing on the investigation may be seized. To the extent that the last two sentences in paragraph 22 may not by the wording of the paragraph be so qualified, the authorising paragraph of the warrant contains that qualification. Therefore, the warrant, in its **terms,** authorises nothing more than the seizure of objects that have or might have a bearing on the investigation. In this respect the warrant differs from that considered in the **Powell** case where the warrant in its **terms** authorised seizure of matter unrelated to the investigation (see paragraphs 61 and 62 of the judgment in the **Powell** case).

I conclude that the warrant is not overbroad.

From the copy of the warrant annexed hereto it will be seen that the warrant, with reference to annexure B thereto, contains a specific authorisation in respect of computer-related objects. The ratio for this form of authorisation is explained in the founding affidavit as follows: Data that have been deleted from the hard drive and from other electronic storage

devices may be retrieved by means of specialised processes that cannot be earned out on the premises that are being searched. In order to conduct a proper examination of such devices, **mirror** images thereof must be made and those images can then be examined. If such images are not made, the device in question may be damaged by the examination. For the applicants it was contended that by authorising "searches by way of forensic analysis to identify and retrieve all which has a bearing or might have a bearing on the investigation ...", the **warrant** went beyond the terms of section 29(1). Section 29(1)(d) (and the warrant) authorises the seizure of "anything on or in the premises which has a bearing or might have a bearing on the investigation in question". The person authorised by the warrant may also, in terms of the sub-section and the warrant, seize anything that "he or she wishes to retain ... for further examination". To the extent that it may be said that the computers in question did not contain information that have a bearing or might have a bearing on the investigation, they could be seized for purposes of further examination.

Finally, it was argued on behalf of the applicants that Ms Govender claimed privilege in respect of information on her computer and that the information thereon should have been dealt with in terms of section 29(11).

The respondents' investigators who conducted the search deny that she claimed privilege. Mr Trengove submitted that this dispute of fact must be dealt with in accordance with the well-established "Plascon-Evans rule" and that the respondent's version must be accepted. In view of the nature of the proceedings before this court and what was said in the Pretoria Portland Cement case referred to above it is possible that the rule must be applied on the basis that the "applicants" in this case are in law the respondents and the other way around. I find Ms Govender's statement that she claimed privilege in respect of the computers improbable, but it is unnecessary to consider that or the correct application of the Plascon-Evans rule. I say that because the debate about privileged information on the computers is for two reasons academic. In the first place, the first applicant's attorney wrote to the second respondent on the day after the search. In the letter the attorney records that the first applicant did not consent to the seizure of communications or records that "might be protected by attorney/client privilege". The attorney was content to request an undertaking that copies of such information will not be made "should they appear anywhere on the mirror images that might be made". He further requested the return of copies of such documents that might already have been made. In view thereof that the first applicant, through its attorney, was content to leave it to

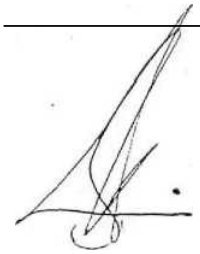
the respondents to decide which information on the computer is privileged, the applicant cannot now rely on a prior disputed claim of privilege to have the warrant set aside. Moreover, the relevant computers have been returned to the first applicant and no claim of privilege is contained in the papers. The respondents have even sent to the applicant electronically stored copies of the mirror images that have been made. There is nothing to stop the first applicant from going through the contents of the computers and the mirror images and to claim privilege should it be so advised.

I conclude that the first applicant's application cannot succeed. Costs must follow the event. Both sides were represented by three counsel and, applying what Mr Trengove termed the "goose and gander principle", the first applicant must bear the costs of three counsel.

In the result the following order is made:

1. The respondents are ordered to lodge with the registrar of this court for safekeeping all copies of the plan of the second and third applicants' home that are in the respondents' possession.

2. The first applicant's application is dismissed with costs including the costs consequent upon the employment of three counsel.



B. R. DU PLESSIS

Judge of the High Court

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