THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no: 503/2002
REPORTABLE

In the matter between:

Oliver Michael POWELL, NO First Appellant
and ten other appellants

and

The Honourable Mr Justice WJ Van der Merwe
First respondent

Magistrate AC FREUND Second respondent

DIRECTORATE OF SPECIAL OPERATIONS
Third Respondent

DIRECTOR OF THE DIRECTORATE OF SPECIAL OPERATIONS
Fourth Respondent

MINISTER OF JUSTICE Fifth Respondent

Before:	Harms JA, Cameron JA, Brand JA, Conradie JA and Southwood AJA
Appeal:	4 March 2004
Judgment:	1 April 2004

National Prosecuting Authority Act 32 of 1998 – Authorisation of investigation: requirements – Search warrants: requirements for issue and requirements for validity – Voidness for over-breadth

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JUDGMENT

CAMERON JA:

[1] At issue is the lawfulness of a search and seizure carried out under warrant at the Johannesburg home and business of the first appellant, Mr Powell, in October 1999, as well as a similar operation at his farm in Ellisras a fortnight later. The searches were carried out in reliance on the National Prosecuting Authority Act 32 of 1998 (the NPA Act). Powell seeks to have the searches declared illegal and the seized documents returned to him, together with an interdict against the disclosure of information gained from them. He also sought constitutional and other relief in which he no longer persists. His challenges all failed before van der Westhuizen J in the Pretoria High Court, with whose leave he now appeals.

[2] Powell is an insolvency practitioner. He attends to the administration and winding-up of companies in liquidation, to

insolvent estates and judicial management of corporations, and acts as a receiver for creditors under schemes of arrangement. In this he makes himself available for appointment by the Master of the High Court as a statutory liquidator. It is a lucrative business, for those who succeed in it as Powell has, and on the assertions of both parties not without its share of rivalry, intrigue and questionable dealing. In September 1999 a national Sunday newspaper published claims, which Powell vigorously denied, that he had a corrupt association with a senior member of the Master's office in the Pretoria High Court. As the dispute with the newspaper intensified, the Minister of Justice and Constitutional Development (the Minister) in October appointed a departmental investigation team to probe the appointment of liquidators by the Pretoria Master's office. Four days later, on 22 October, the head of the Investigating Directorate: Serious Economic Offences (IDSEO) established under the NPA Act,[1] Advocate Jan Swanepoel, invoked the statute to institute a preparatory investigation[2] into alleged irregularities in the appointment of liquidators and curators at the Pretoria Master. He designated an advocate on his staff,

[1] The NPA Act s 7(1)(a) gives the President the power to establish by Proclamation no more than three investigating directorates in the office of the National Director of Public Prosecutions in respect of specified offences or specified categories of offences.

Ms Gerda Ferreira, to conduct the investigation on his behalf.[3] This clothed Ferreira with power to apply for a search warrant, which she did the next day. On Saturday evening 23 October, Van der Merwe J granted the warrant[4] and the search took place on the Sunday. A large number of documents and files were seized at Powell's home and business premises. More were taken later at his farm, on a warrant Ferreira obtained from the magistrate at Ellisras.

[3] Five months later, in March 2000, after the Directorate had returned the bulk of the documents seized, Powell, his farm manager and a number of trusts and companies associated with his business and other interests (the present appellants, to whom I refer collectively as 'Powell') brought urgent proceedings claiming restoration of the rest. He joined Van der Merwe J as first respondent (this Court ruled later that citing high court judges who issue statutory search warrants is wrong),[5] and the magistrate at Ellisras as the second

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[2] NPA Act s 28(13).
[3] NPA Act s 28(2)(a): 'The Investigating Director may, if he or she decides to hold an inquiry, at any time prior to or during the holding of the inquiry designate any person referred to in section 7(4) to conduct the inquiry, or any part thereof, on his or her behalf and to report to him or her.' Section 7(4) sets out the categories of staff who assist the Investigating Director in the exercise of his powers and performance of his functions.
[4] NPA Act s 29(5).
[5] *Pretoria Portland Cement Co Ltd and another v Competition Commission and others* 2003

respondent. The Directorate is the third respondent, Swanepoel the fourth, and the Minister the fifth. The latter three oppose the proceedings, which started before van der Westhuizen J in September 2000. A striking-out application was argued in September and December, after which judgment was reserved. While judgment was pending Powell applied to re-open his case, and both sides filed supplementary affidavits. The main relief was eventually argued in October 2001 and judgment reserved. Van der Westhuizen J dismissed the application in March 2002, his reasons following in April. He granted leave to appeal in September 2002.

[4] The complaints Powell made about the search were numerous, and they were voluminously pursued over court papers that eventually totalled 1700 pages. Before us Mr Slomowitz, who appeared for Powell on appeal, narrowed the attack. He contended that the statutory investigation on the basis of which the warrants were issued was not lawfully initiated; that the warrants themselves should never have been granted; and that their terms were fatally over-broad.

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(2) SA 385 (SCA) paras 13-42.

First attack: Initiating a preparatory investigation in terms of s 28(13) of the NPA Act

[5] The power to launch a preparatory investigation that Swanepoel invoked on 22 October 1999 was scrutinised together with other provisions of the NPA Act in the *Hyundai* case,[7] where the Constitutional Court considered the scheme and intention of the statute. A preparatory investigation may be held if the investigating director is uncertain whether the grounds exist to hold a plenary investigation under s 28(1),[8] since for that a reasonable suspicion that a specified offence (or an attempt) has been or is being committed is necessary. Langa DP explained as follows the structure of the Act, the purpose of the investigating directorates it establishes, and the power to hold preparatory investigations:

> 'The investigating directorate is a special unit established under the Act to conduct investigations into serious and complex offences. If it were unable to commence investigations until it had a reasonable suspicion that a specified offence had been committed, initial investigations which may be sensitive and crucial would have been beyond its jurisdiction. The provisions of the Act authorising the investigating directorate to engage in preparatory investigations serve the purpose of enabling the investigating directorate to be involved in sensitive investigations from an early stage. The purpose therefore is to assist the investigating director to cross the threshold from a mere suspicion that a specified offence has been

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[6] *Van Rooyen and others v The State and others (General Council of the Bar of South Africa intervening)* 2002 (5) SA 246 (CC).

[7] *Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others: in re Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others* 2001 (1) SA 545 (CC). After the decision the Act was amended: Act 61 of 2000, assented to 5 December 2000, which came into operation on 12 January 2001.

[8] The 2001 Act made the terminology of s 28(1) consistent with that of 28(13) by changing 'inquiry' in s 28(1) to 'investigation'.

committed to a reasonable suspicion, which is the prerequisite for the holding of an inquiry.'[9]

When would it be appropriate for an investigating director to hold a preliminary rather than a plenary investigation? Langa DP said:

'At least two kinds of doubt may give rise to a decision to conduct a preparatory investigation rather than an inquiry: doubt whether there is reason to believe that an offence has been committed, on the one hand, and doubt whether an offence, suspected to have been committed, is in fact a specified offence.'[10]

He elaborated by emphasising the contingent and preliminary nature of the preparatory investigation:

'This form of procedure is instituted in order to enable the investigating director to determine if there are reasonable grounds to conduct an inquiry. It is therefore a preliminary step and is not an end in itself. It is a procedure that is available to an investigating director who has insufficient grounds or information to form a reasonable suspicion that a specified offence has been committed. A mere suspicion may therefore trigger a preparatory investigation, provided the purpose is to enable the investigating director to decide whether or not there are in fact reasonable grounds for a suspicion that a specified offence has been committed.'[11]

[6] At the time Powell's premises were searched, the President had established two investigating directorates: one for organised crime and public safety offences; and another for serious economic offences. (A third was later established for corruption.)[12] The NPA Act defines a 'specified offence' as 'any offence which in the opinion of the investigating director falls

[9] 2001 (1) SA 545 para 44.
[10] 2001 (1) SA 545 para 7.
[11] 2001 (1) SA 545 para 31.
[12] The gazetting details are set out in the *Hyundai* judgment 2001 (1) SA 545 para 4.

within the category of offences set out in the proclamation referred to in s 7(1) in respect of the investigating directorate concerned'.[13] The categories of offence in respect of which Swanepoel (as investigating director for serious economic offences) had to exercise his functions were gazetted as:

'(a) Any offence of –
(i) fraud;
(ii) theft ;
(iii) forgery and uttering; or
(iv) corruption in terms of the Corruption Act, 1992 (Act No. 94 of 1992); or

(b) any other –
(i) economic common law offence; or
(ii) economic offence in contravention of any statutory provision,
which involves patrimonial prejudice or potential patrimonial prejudice to the State, any body corporate, trust, institution or person,

which is of a serious and complicated nature.'[14]

[7] In a document dated and signed on 22 October 1999, Swanepoel sought to initiate a preparatory investigation as follows (my translation):

'INSTITUTION OF A PREPARATORY INVESTIGATION IN TERMS OF SECTION 28(13) OF THE NATIONAL PROSECUTING AUTHORITY ACT, 32 OF 1998
Whereas I consider it necessary to hear evidence to enable me to determine if there are reasonable grounds to hold an inquiry in terms of section 28(1)(a) of the National Prosecuting Authority Act, 32 of 1998 concerning alleged irregularities at the Master of the High Court, Pretoria, in regard to the appointment of liquidators and curators,
Therefore I have decided to hold a preparatory investigation in terms of section 28(13) of Act 32 of 1998.'

[13] NPA Act s 26(1).
[14] Proclamation R 123, Government Gazette 19579, 4 December 1998.

[8] He stipulated no offence in seeking to institute the preparatory investigation. He referred only to 'alleged irregularities'. To this he added a location (the Pretoria Master's office) and a focus (the appointment of liquidators and curators). But 'irregularity' is a wide word. It can encompass any behaviour, practice or phenomenon that deviates from a norm or rule, standard or convention.[15] The deviation does not have to be criminal. And if it is criminal, it does not have to be one of the scheduled crimes, or if scheduled 'of a serious and complicated nature'.

[9] On the face of the authority Swanepoel signed, a preparatory investigation into 'alleged irregularities' in the Master's office could therefore encompass various forms of conduct, including –

(A) criminal irregularities constituting specified offences (such as corruption, fraud and theft of a serious and complicated nature);

[15] Freely adapting from the Concise Oxford Dictionary. Swanepoel's words were 'beweerde onreëlmatighede'. The adjective 'onreëlmatig' is defined in Labuschagne and Eksteen's *Verklarende Afrikaanse Woordeboek* (8ed, 1993) as 'sonder reëlmaat, sonder inagneming van vaste reels, van die gangbare gedragspatroon', 'afwykend van die gebruiklike patroon', 'sonder enige orde, nie volgens voorskrif of gewoonte nie'.

(B) criminal irregularities not constituting specified offences (such as fraud, theft and corruption of a trivial or uncomplicated nature); or

(C) non-criminal deviations from norms, rules, standards and conventions in regard to appointments.

[10] The last category could embrace uncorrupt but erroneous preference given to certain liquidators because of mistaken understanding or disregard of statutory requirements, honest but mistaken preference for certain liquidators in ignorance or disregard of office rules, or, more widely still, irregular office practices such as unwitting disregard of civil service regulations in appointments, unprofessional service delivery relating to appointments, or even breakdown of regular office organisation and function in regard to appointments resulting from systematic misfiling and loss of documents and records.

[11] Only type-A irregularities fall within the investigating directorate's powers and functions.[16] Type-B irregularities fall outside the investigating director's functions and should be left

[16] NPA Act chapter 5; *Hyundai* 2001 (1) SA 545 (CC).

to the police to deal with.[17] Type-C irregularities are the business of neither the police nor the investigating directorate. They are matters for office management, organisation and discipline.

[12] The statute empowers the investigating director to hold a plenary investigation in terms of s 28(1) if there is a reasonable suspicion that type-A irregularities (or attempts) are occurring or have occurred. In addition, under the *Hyundai* analysis the statute in certain circumstances gives the investigating director power to act when he or she is confronted with type-B irregularities. A preparatory investigation may be held not only if the investigating director is uncertain whether an offence (which definitely would be a specified offence) has been committed at all (occurrence-uncertainty), but also if the investigating director in fact has reasonable grounds for suspecting an offence, but does not have reasonable grounds for suspecting that the offence in question is specified – in other words if the investigating director reasonably suspects a

[17] *Hyundai* 2001 (1) SA 545 para 47 – non-specified offences are those 'which should be left to the police to deal with'.

type-B irregularity but is uncertain whether it is a type-A irregularity (category-uncertainty).

[13] In *Hyundai* Langa DP left open the possibility that doubts regarding more than the occurrence or category of an offence could conduce to a s 28(13) inquiry.[18] He did not elaborate, but other kinds of doubt that suggest themselves include doubts about the nature, sufficiency, quality and availability of the evidence forming the basis for the investigating director's suspicion regarding the offence. In all these cases the preparatory investigation power is available.

[14] What is clear however is that to launch a preparatory investigation the investigating director must have at least a suspicion that some form of offence (or an attempt) is being or has been committed. There may be uncertainty about the fact of the offence or about its categorisation, or about the nature and strength of the evidence for it. But an offence there must be: and one that is capable of constituting a specified offence.

[18] 2001 (1) SA 545 para 7 ('At least two kinds of doubt …').

[15] Mr Maleka, who appeared for the investigating director and the Minister, accepted that 'alleged irregularities' included non-offences, but contended that s 28(13) enabled the investigating director to gather evidence even when unable to stipulate any offence. The stipulation, he contended, could follow as a consequence of the preparatory investigation. It was not its pre-condition. On this argument the statute would empower the investigating director to investigate non-offences, in search of an offence. That cannot in my view be correct. The statute gives the investigating director no jurisdiction to invoke the preparatory investigation machinery when no offence is in issue at all. The investigating director was no more entitled to investigate 'alleged irregularities' that did not constitute offences than he was to investigate office rivalries or jealousies or misspelling of names or innocent misapplication of regulations in the appointment of liquidators.

[16] In his affidavits Swanepoel states that 'although no offences were specified by me when the preparatory investigation was instituted, it was clear that the most likely offences were corruption.' And he points out that Ferreira did mention 'corruption' in the affidavit she submitted to Van der Merwe J

the next day. But why did Swanepoel not himself mention corruption in initiating the preparatory investigation? He records that his attitude was that s 28(13) did not require him to stipulate a specified offence:

> 'It is my interpretation that at the stage when a preparatory investigation is instituted, it is not necessary or even possible to specify the specified offence being investigated.'

[17] This stance the High Court upheld. The judge recorded that Powell's argument on this point had troubled him to some extent, but that to uphold it would be to adopt 'an overly literal approach' to reading the NPA Act. He pointed out that there could not be absolute certainty 'at such an early stage as to exactly which offence may have been committed or may be planned':

> 'Criminal investigations obviously start with perhaps one particular suspected offence in mind, and then result in charges relating to other offences. Furthermore, charge sheets can be amended. It would be a cynical and excessively literal approach to expect that one or more specified offences must be mentioned by name, well knowing that the investigation which will follow may produce evidence pointing to an offence which is formally different.'

[18] The learned judge upheld the respondents' contention that 'alleged irregularities' was not overbroad, because the phrase referred to a specific official, in a particular city, and specifically to the appointment of liquidators and curators. There could

therefore be no doubt 'in the minds of those conducting the investigation, or those being investigated, as to the object of the investigation'. Nor could there be any prejudice for Powell. He concluded that 'for purposes of formal or technical compliance, it might have been preferable if, for example, the crime of corruption were mentioned by name in addition to the reference to alleged irregularities':

> 'However, the mere mentioning by name of a specified offence, for example corruption, would not necessarily have resulted in narrowing the scope of the investigation, depending on the presence or absence of other detail. To investigate corruption, fraud or extortion in the office of the Master, or even in the office of the Master in Pretoria (without reference to for example the appointment of liquidators or curators) would not necessarily be any less of a fishing expedition than the formulation used in this case. In fact it could be wider. Any corruption, fraud or extortion by any person in or attached to such office, could then be investigated. The purpose is clarity, the narrowing of the scope of an investigation and the protection of the basic rights of those involved, rather than slavishness to a formal literal interpretation.'

[19] I cannot agree with this approach, which does not seem to me to be a correct application of *Hyundai*. The question whether the investigating director has to stipulate the offence he or she has in mind in initiating a preparatory investigation does not arise from a contest between literal and substantive approaches to reading the Act. Nor is it a technical or formal matter. It stems from the requirement of legality, which underlies our Constitution, and which sets limits to all public

power,[19] and scrutinises its exercise for conformity with those limits.

[20] The NPA Act grants the investigating director power to investigate only specified offences, and to exercise functions regarding other offences only in relation to that power. It does not grant independent power to investigate non-specified offences, and it confers no jurisdiction to investigate irregularities that are not offences at all. Giving due effect to this limitation becomes particularly important when one considers the very wide powers the Act does grant the Directorate once a preparatory or plenary investigation has been properly instituted.[20] The scope of those powers indicates that the investigating director's decision to initiate an inquiry must be properly tailored to the ends the statute permits him to pursue, and must be expressed in terms that commit him and his staff to the pursuit of those ends, and no more.

[21] In purporting to institute a preparatory investigation into 'alleged irregularities' the investigating director initiated a

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[19] *Pharmaceutical Manufacturers Association of SA and another: in re ex parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC) para 39.
[20] Compare *Hyundai* 2001 (1) SA 545 paras 9, 28, 37, 43, 46.

process that was overbroad because it encompassed elements that fell outside his statutorily assigned domain. In so doing he acted beyond the powers the statute entrusted to him. The fact that the term he chose was broad enough to cover specified offences (and other offences that might relate to his functions regarding specified offences) made no difference in the context of this statute, since in choosing not to differentiate he made it impossible for himself, and his functionaries, and those relying on the assertions of his functionaries, to distinguish between what he intended lawfully and narrowly and what he intended unlawfully and overbroadly. The untoward practical effect of this overbreadth on Ferreira's designation, and on the search warrants eventually issued, will later emerge.

[22] It is no answer to say, as Swanepoel does, that it was 'clear that the most likely offences were corruption', or, as the judge found, that in the minds of the investigators and the investigated there was no doubt as to the object of the investigation. The question is not whether it was clear (a matter on which I feel greater apprehension than the learned judge), but what powers the investigating director purported to arrogate to himself and his staff in initiating the investigation.

The principle of legality required him to confine himself in the exercise of those powers to what the statute permitted, and in specifying 'alleged irregularities' he went beyond that. To insist that he should not have done so is not technical or formal. It is a requirement of constitutional substance, relating to the ambit of the investigating director's powers and the pre-conditions for their lawful exercise.

[23] It is true that the statute empowers the investigating director to range broadly in carrying out duties. Given the problems of corruption, fraud, theft and other serious economic offences that beset our country, this is both necessary and right.[21] What Swanepoel could do lawfully was indeed very wide. But the statute did not give him unlimited power, nor power to range beyond its boundaries. Nor does it mean that confining him to the lawful ambit of his powers was pointless or formalistic. Clarity and precision are the allies of order in law. Imprecision and vagueness all too often are its enemies.

[24] The very ambit of the offences gazetted – together with the fact that a 'specified offence' means any offence which in the

investigating director's opinion falls within the category of gazetted offences[22] – shows that this approach is no undue encumbrance. Confining himself and his staff within the lawful domain was a requirement of legality. Its object was to ensure that the investigation was pursued regularly and properly, and not haphazardly and unboundedly.

[25] In determining whether the investigating director initiated the investigation lawfully, the question is not how broadly his actual investigation might eventually range, but whether he could from the outset arrogate to himself the power to investigate irregularities which constituted neither specified offences nor offences. That he could not lawfully do.

[26] The judge invoked the decision of this Court in *Bogoshi and another v Director, Office for Serious Economic Offences and others*[23] for the conclusion that an offence does not have to be stipulated when a preparatory investigation is instituted. *Bogoshi* was not decided under the NPA Act, but under its predecessor, the Investigation of Serious Economic Offences

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[21] See *Hyundai* 2001 (1) SA 545 para 53.
[22] NPA Act s 26(1).
[23] 1996 (1) SA 785 (A).

Act 117 of 1991. The 1991 Act, unlike the NPA Act, did not contain the concept of 'specified offences', nor did it require that the offences subject to it be specified by notice in the gazette.[24] The 1991 Act 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'.[25] The NPA Act introduced greater clarity and precision by defining more rigorously the ambit of the investigating directorate's powers.

[27] The contrast between the two statutes underscores the differences between *Bogoshi* and the present case. In *Bogoshi*, the Director was empowered to hold an inquiry if there was reason to suspect that a 'serious economic offence' had been committed. What that constituted was a matter for the Director's opinion. Exercising this power in 1991, the Director issued a search warrant and a summons. Both referred to 'alleged irregularities concerning claims' an attorney had submitted to the statutory Road Accidents Fund. This

[24] NPA Act s 7(2): 'A proclamation … must specify the offences or the categories of offences for which an investigating directorate has been established.'
[25] Act 117 of 1991, s 1.

Court found the formulation 'vague, but not fatally so'.[26] In regard to the warrants, the formulation was found to be in order because 'the discretion which is afforded those authorised is, as the Court *a quo* found, in accordance with the terms of the section itself'.[27] This is far from the present. The NPA Act is a post-constitutional statute, which attempted to remedy constitutional flaws in its predecessor.[28] It does not leave the meaning of the offences it covers to the opinion of the investigating director. It requires the President to specify them by notice in the gazette. The gazette in question contains a detailed specification that limits very considerably the opinion the investigating director may form as to what a specified offence is. *Bogoshi* can therefore not govern the NPA Act, nor justify Swanepoel's omission to stipulate a lawful ambit for the preparatory investigation.

[28] I therefore conclude that Swanepoel did not validly invoke s 28(13). It is unnecessary to decide whether his invalid invocation is intrinsically fatal to all steps taken in reliance on it, since each of those steps – his designation of subordinates to

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[26] 1996 (1) SA 785 796D-E.
[27] 1996 (1) SA 785 (A) 797D-E.
[28] See *Park-Ross and another v Director: Office for Serious Economic Offences* 1995 (2) SA

carry out the inquiry; and the search warrants they obtained – was, as will appear, tainted with the same disability. It is in fact a striking feature of the case that Swanepoel's overbroad formulation of his initial inquiry permeated everything done thereafter.

[29] On the day he launched the preparatory investigation, Swanepoel in terms of s 28(2)(a)[29] designated Ferreira and other officials on his staff to carry out the inquiry on his behalf. That designation similarly mentioned only 'alleged irregularities'. It therefore suffered from the same overbreadth. As a result, Ferreira lacked proper authority to apply for the search warrants the next day. It is, again, not necessary to decide that the warrants themselves were for this reason alone invalid, since, as later appears, they suffered from intrinsic defects of their own.

Second attack: Application for search warrants

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148 (C); *Hyundai* 2001 (1) SA 545 paras 38-39.

[29] NPA Act s 28(2)(a): 'The Investigating Director may, if he or she decides to hold an inquiry, at any time prior to or during the holding of the inquiry designate any person referred to in section 7(4) to conduct the inquiry, or any part thereof, on his or her behalf and to report to him or her.' Ferreira was a deputy director in terms of s 7(4)(i) and s 15(1)(b).

[30] The reason Swanepoel invoked the preparatory investigation procedure on the Friday was that he lacked 'reason to suspect' a specified offence – the requisite for a plenary investigation. Yet the next day Ferreira applied for a warrant under s 29. For this (it was common cause) she had to have reason to suspect at least an offence capable of constituting a specified offence. In *Hyundai* Langa DP said that the proper interpretation of s 29 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 warrant may only be issued where the judicial officer has concluded that there is a reasonable suspicion that such an offence has been committed, that there are reasonable grounds to believe that objects connected with an investigation into that suspected offence may be found on the relevant premises and, in the exercise of his or her discretion, the judicial officer considers it appropriate to issue a search warrant.'[30]

These, he added, 'are considerable safeguards protecting the right to privacy of individuals'.[31]

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[30] 2001 (1) SA 545 para 52.

[31] NPA Act s 29(5) at the time of the events in issue in this appeal, and when *Hyundai* was decided, read:
'A warrant contemplated in subsection (4) may only be issued if it appears to the magistrate, regional magistrate or judge from information on oath or affirmation stating –
(a) the nature of the inquiry in terms of section 28;
(b) the suspicion which gave rise to the inquiry; and
(c) the need, in regard to the inquiry, for a search and seizure in terms of this section, that there are reasonable grounds for believing that anything referred to in subsection (1) is on or in such premises or suspected to be on such premises.'
Act 61 of 2000 amended the letter of this provision to conform with *Hyundai*:
'A warrant contemplated in subsection (4) may only be issued if it appears to the magistrate, regional magistrate or judge from information on oath or affirmation, stating –
(a) the nature of the investigation in terms of section 28;
(b) that there exists a reasonable suspicion that an offence, which might be a specified offence, has been or is being committed, or that an attempt was or had been made

[31] Powell claims that these safeguards were violated when Ferreira applied for, and Van der Merwe J granted, the first search warrant. Ferreira largely repeated her assertions before the Ellisras magistrate, though she fortified them with information gleaned from the documentation seized in Johannesburg a fortnight earlier. The parties' arguments treated the applications for the two warrants, and the questions they raised before the judicial officers, as for practical purposes identical, and I shall do the same.

[32] Powell makes two principal complaints. He says that there was insufficient information of adequate quality before Van der Merwe J to justify the grant of the warrant. And he contends that Ferreira failed to disclose material facts in her application. In my view, neither complaint can be upheld. In saying this I will accept Powell's contention that Ferreira's affidavit contains a number of claims regarding the law and the practice relating to the appointment of liquidators that are inaccurate; and that

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to commit such an offence; and

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

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

her assertion that the then head of the Pretoria Master's office, Mr BC Nell, continuously gave preference to Powell was (on the basis of office data Powell later analysed) unjustified.

[33] Powell's difficulty in challenging Ferreira's application is that she based it on two sworn statements. One she obtained the previous evening, after Swanepoel started the preparatory investigation, and after she and Swanepoel were briefed by the already-appointed departmental investigation team. This was a deposition by a staff member, Ms Mahole, who became a Deputy Master in the Pretoria office in 1994. Mahole did not wish to go on record. But she was willing to go on oath. And Ferreira derived her assertions about Nell's preference for Powell from her affidavit, which on its face supported those claims. Mahole said that Powell 'was repeatedly nominated by and appointed by Mr Nell, without nominations from creditors', and that in instances where Powell was nominated by creditors whose claims were insufficient in number and value, Nell 'normally' gave Powell preference anyway. She also recounted two incidents which suggested that Nell strained to assist Powell to procure appointments even in the face of contrary decisions by colleagues.

[34] It is significant that Ferreira considered this affidavit insufficient on its own to apply for a search warrant. She says that the situation changed the next day when she obtained a second affidavit that pointed directly to a corrupt association between Powell and Nell. This was a deposition by one van Vuuren, from whom in 1995 Powell bought his Ellisras farm. From van Vuuren's affidavit Ferreira derived the assertion that Powell and Nell together visited van Vuuren's farm a number of times during the purchase negotiations, and that Nell made statements to van Vuuren signalling a corrupt relationship with Powell.

[35] Was this enough for Ferreira to apply for a warrant, and for Van der Merwe J to grant it? Van der Westhuizen J held that it was. A reasonable suspicion, he found, was an impression formed on the basis of diverse factors, including facts and pieces of information falling short of fact such as allegations and rumours. 'It is the total picture that is relevant.' I agree with this conclusion. At the stage in question, Ferreira was not required to have conclusive or even prima facie proof, but a reasonable suspicion, adequately and objectively established.

[36] This Court has endorsed and adopted Lord Devlin's formulation of the meaning of 'suspicion':[32]

> 'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end.'[33]

[37] To the passage already adopted I would add the sentence that immediately follows, since it has a bearing on the present: 'When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage.'[34] Ferreira and Swanepoel were not ready to charge Powell or Nell. Prima facie proof was as yet lacking. Lord Devlin went on to point out –

> 'another distinction between reasonable suspicion and prima facie proof. Prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. … Suspicion can take into account also matters which, although admissible, could not form part of a prima facie case.'[35]

[38] That applies also here, where Ferreira's application unavoidably relied on evidence on oath supplied to her by a witness who at that stage was not willing to come forward.

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[32] *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) 819I; *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) 50H-I; *BTR Industries South Africa (Pty) Ltd and others v Metal and Allied Workers' Union and another* 1992 (3) SA 673 (A) 690G-H.
[33] *Shabaan Bin Hussien and others v Chong Fook Kam and another* [1970] AC 942 (PC) 948B; [1969] 3 All ER 1627 (PC).
[34] [1970] AC 942 (PC) 948B-C.

What the statute required was that her application should set out the grounds of her surmise regarding the allegedly corrupt relationship between Nell and Powell with sufficient particularity to show that it was reasonable. In the *Hyundai* formulation, she had to 'place before a judicial officer an adequate and objective basis to justify' the issue of the warrant.[36] This entailed at least that she should show that her surmise was not fanciful, but grounded in fact; that it was based on sound evidence that was available to her; and that other persons in her position, considering the facts and the available evidence, would conclude that the surmise in question was not far-fetched, misguided, or patently mistaken. To this I would add that in assessing whether her suspicion was reasonable, she was required to bear in mind that the provisions she sought to invoke authorised drastic invasive action.[37]

[39] In my view these requisites were satisfied here. The two affidavits laid an adequate basis for Ferreira's averment that 'the relationship between Nell and Powell is suspect and the

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[35] [1970] AC 942 (PC) 949B-C.
[36] 2001 (1) SA 545 para 55.
[37] *Mabona and another v Minister of Law and Order and others* 1988 (2) SA 654 (SE) 658F, per Jones J: 'It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action.'

suspicion exists that corruption is being perpetrated'.[38] They also laid an adequate basis for her submission in her application that a search and seizure operation at Powell's and Nell's premises was justified.

[40] Powell did not seek to cross-examine Ferreira and I do not think there is any basis for impugning her good faith in relying on Mahole's and van Vuuren's assertions when she applied for the warrant. Nor is there any basis for saying that she acted unreasonably in doing so.

[41] Powell complains in addition (while not refuting what van Vuuren says) that van Vuuren was a thug associated with the notorious Vlakplaas facility who perpetrated gross human right abuses under apartheid and who had a bad relationship with Powell after the farm sale, and that Ferreira failed to disclose this and other information, such as the enmity and animosity within the liquidation business, and the antagonism towards Powell from major banks.

[38] 'Die verhouding tussen Nell en Powell is verdag en die vermoede bestaan dat korrupsie gepleeg word.'

[42] In invoking a procedure without notice to the party sought to be subjected to it, Ferreira engaged the processes of justice in an inevitably one-sided process. She was consequently under a duty to be ultra-scrupulous in disclosing any material facts that might influence the Court in coming to its decision.[39] But Ferreira says she did not know the details of van Vuuren's past, apart from the fact that he had been a Vlakplaas policeman, nor about his enmity with Powell. There is no basis for disbelieving her. She says that she was not influenced by media reports alleging a corrupt association between Nell and Powell. And she says she disregarded anonymous telephone calls and letters, and did not rely on complaints from Powell's competitors in the business or from financial institutions that opposed certain of his appointments.

[43] There is nothing to refute this. Powell's complaint that Ferreira failed to disclose an association with the Sunday journalist responsible for naming him and Nell as corruptly linked is devoid of substance. Her application at the outset mentions information obtained from a journalist and later names the individual concerned.

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[39] *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) para 21.

[44] In the light of the material available to Ferreira, it seems to me that Powell's complaints of improper motive, ulterior purpose, inadequate evidence and material non-disclosure cannot be sustained, and that van der Westhuizen J was correct in deciding this portion of the case.

Third attack: Breadth of search warrants

[45] The search warrants Van der Merwe J signed were breath-taking in their scope. They authorised the investigating director or his delegees to examine 'any object' and to seize 'anything' at Powell's premises relevant to or that could be relevant to 'the preparatory investigation concerned.[40] No offence is mentioned. The investigation in question is identified solely by reference to an annexure to the warrant. That annexure mentions no offence. It does not even refer to 'alleged irregularities'. Its recipient is not informed of the nature and ambit of 'the preparatory investigation concerned'.

[40] '… om enige voorwerp … wat betrekking het of betrekking kan hê op die betrokke voorlopige ondersoek …'

[46] What the annexure does is to itemise in eight paragraphs the documents and objects subject to seizure (I translate):

1. All contracts, transactions, agreements, negotiations, correspondence and/or communication engaged in, transacted or concluded between and/or by and/or on behalf of OC Powell and/or his spouse and/or a family member of theirs and/or an employee of OC Powell with BC Nell and/or his spouse and/or a family member of theirs;
2. All correspondence, notes, receipts or debit vouchers in connection with payments and/or benefits and/or rewards received from of made to, or moneys and/or benefits and/or rewards owed by or owed to OC Powell and/or BC Nell and/or their spouses and/or a family member of theirs and/or an employee of OM Powell by BC Nell and/or OM Powell and/or their spouses and/or an employee of OM Powell;
3. All correspondence, notes, contracts, agreements and/or other document or object in regard to the founding, creation, registration and/or members' interest of legal entities, partnerships and/or trusts in which BC Nell and/or OM Powell and/or their spouses and/or their family members and/or an employee of OM Powell has an interest;
4. All correspondence, notes, contracts, agreements and/or other documents or objects in connection with the purchase, sale, possession, use, utilisation, improvement and/or income from and/or interest in any assets in which BC Nell and/or OM Powell and/or their spouses and/or a family member of theirs and/or an employee of OM Powell has an interest;
5. All notes, correspondence, agreements and/or other documentation or object with regard to the nomination as liquidator and/or compensation and/or income of OM Powell and/or his spouse, including all bank statements, deposit slips, paid cheques, cheque counterfoils and/or vouchers of transfers from or to bank accounts;
6. All notes, correspondence, agreements, files and/or other documentation or object with regard to the estates of [certain corporations in liquidation].
7. Any other document and/or object that has relevance to or may have relevance to the investigation of which is sought to be retained for further investigation or for safekeeping;
8. Any computer, hard- or software and/or computer printout and/or sound or video tape and/or recording on which any information mentioned in paras 1-6 appears or may be applicable to it.'

[47] When Powell was confronted at his home at 06h00 on the Sunday morning, the warrants and annexures were read out to him, and the document initiating the preparatory investigation

(para 7 above) was presented to him. The search then proceeded. The next day Powell's attorney, who was present during its major part, wrote objecting that the warrants were void for vagueness and the search unlawful.

[48] The High Court rejected Powell's complaints. The Court found that –

> 'all in all it appears that [Powell] at least on Sunday 24 October 1999, and perhaps also at certain stages thereafter, indicated that he was willing to cooperate with the investigation and that he has nothing to hide. In view of this background, some of the objections raised and argued during the application appear to be quite technical.'

The learned judge was not persuaded –

> 'that there is any significant merit in the contention by [Powell] that the scope of the warrant was overbroad. Within the context of the facts of this case there could be very little doubt as to what was being investigated and that there was a reasonable limitation contained in the annexure to the warrant. There is no evidence that any dissatisfaction was expressed by [Powell] during the day. Once again it is probably true that it is unrealistic to expect absolute clarity and accuracy in documents of this kind, in view of the very nature and aim of the process involved. [Powell was] not prejudiced by the alleged broadness of the warrant.'

[49] With respect to the Judge, I cannot agree with this approach. The question of consent can be disposed of first. The Directorate's deponents stated that Powell agreed to cooperate with the search. This they said in response to complaints in Powell's affidavits that the warrants misdescribed his home and business addresses. None of the deponents suggested that

Powell waived any entitlement to object to the validity of the warrants. Waiver of rights is never lightly inferred.[41] This is certainly not less true of constitutional rights.[42] There can be no question that Powell consented to an unlawful search.

[50] Our law has a long history of scrutinising search warrants with rigour and exactitude – indeed, with sometimes technical rigour and exactitude.[43] The common law rights so protected are now enshrined, subject to reasonable limitation, in s 14 of the Constitution:

'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.'

[51] In *Hyundai*[44] Langa DP referred to this as the 'right to privacy in the social capacities in which we act'.[45] In *Mistry v Interim*

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[41] *Laws v Rutherford* 1924 AD 261 263 (Innes CJ); *Borstlap v Spangenberg* 1974 (3) SA 695 (A) 704G (Corbett AJA).
[42] *Mohamed and another v President of the Republic of South Africa and others* (2001) (3) 893 (CC) paras 61-66.
[43] *De Wet and others v Willers NO and another* 1953 (4) SA 124 (T) 127BC, per Ramsbottom J, Malan and Neser JJ concurring ('To enter premises, to search those premises, and to remove goods therefrom is an important invasion of the rights of the individual. The law empowers police officers to infringe the rights of citizens in that way provided that they have a legal warrant to do so. They must act within the terms of that warrant. When a dispute arises as to what power is conferred by the warrant the warrant must be construed with reasonable strictness, and ordinarily there is no reason why it should be read otherwise than in the terms in which it is expressed'); followed in *Cheadle, Thompson & Haysom and others v Minister of Law and Order and others* 1986 (2) SA 279 (W) 282-283.
[44] 2001 (1) SA 545 paras 15-20, 28, 55.
[45] para 16.

Medical and Dental Council of South Africa and others,[46] Sachs J on behalf of the Court explained the historical setting of the current constitutional safeguards:

> '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 unrestricted 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 promoted amongst 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 s 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 re-affirming and building on those that were consistent with these values.'

[52] *Ex parte Hull*[47] appears to be the first reported South African case in which a search warrant was set aside for vagueness and overbreadth. Kotze CJ (Jorissen J concurring) held that the warrant was 'too general and too vague'. He said that under a loose and arbitrary exercise of a general power to issue search warrants 'no one would be safe':

> 'The secrets of private friendship, relationship, trade and politics, communicated under the seal of privacy and confidence would become public, and the greatest trouble, unpleasantness and injury caused to private persons, without furthering the true purposes of Criminal Justice in the slightest degree. The secrecy and sanctity of private dwellings might be violated, and one of the first objects that men have in view in associating themselves in political communities throughout the civilised world would be frustrated, if the private citizen did not feel himself safe

[46] 1998 (4) SA 1127 (CC) para 25.
[47] (1891) 4 SAR 134.

against what may be nothing more than the curious eye of the police agent, sheltering itself behind the authority of a search warrant; except only where the Law, in order to further the interests of justice, and so protect society, allows and directs, under special circumstances, the issue of a search warrant.'

He added:

'Taking into consideration the great danger of misuse in the exercise of authority under a search warrant, it is not to be wondered at that the law of almost every country prescribe the limits, in a more or less definite manner, within which such warrants may be issued.'

[53] This general approach has been maintained and endorsed in cases too numerous to itemise. In *Hertzfelder v Attorney-General*,[48] Innes CJ analysed the warrant and found it 'most irregular in form'. It did not specify the crime alleged to have been committed 'and is in fact quite unintelligible'. It was held to be no authority. In *Ho Si v Vernon*,[49] a Transvaal statute provided that an 'Asiatic' who upon proper demand failed to produce his certificate of registration could be arrested without a warrant. Innes CJ (Smith J concurring) held that this did not authorise the police to enter forcibly his home to demand the production of the certificate. A general search warrant purporting to authorise a police officer to enter any premises by day or night and to search for and arrest 'Asiatics' illegally in the Transvaal or wanted on arrest or not in possession of

[48] 1907 TS 403.

registration certificates was held to be invalid. Innes CJ again scrutinised the terms of the warrant and found them 'not grammatically intelligible': they purported to entrust the bearer with a roving commission the attribution of validity to which would be 'subversive of the most elementary rights of freedom'.

[54] In *Pullen NO and others v Waja*[50] a warrant authorised the seizure of 'certain books and documents and other papers' the property of a named individual and a company. Tindall J emphasised that –

> 'the Courts ought to examine the validity of warrants with a jealous regard for the liberty of the subject and his rights to his property and to refuse to recognise as valid a warrant the terms of which are too general'.[51]

Unlike de Waal JP, he was not prepared to hold that a warrant invariably had to mention the alleged offence. It was sufficient for it either to describe the specific thing or things to be searched for (his example was 'a bicycle numbered 17528'), or – if this was not done – to identify them by reference to the offence. He nevertheless expressed himself in favour of warrants always mentioning the specific offence:

> 'It is desirable that the person whose premises are being invaded should know the reason why; the arguments in favour of the desirability of such a practice are obvious.'[52]

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[49] 1909 TS 1074.
[50] 1929 TPD 838.
[51] 1929 TPD at 846-847.

The warrant in question did not in any way identify the articles to be seized. The words 'certain book and documents and other papers' were 'so vague that it is impossible to say what they include':

> 'It is argued that Waja must have understood what books were wanted and the nature of the offence in connection with which their seizure was authorised. But that is by no means clear, and even if he had an inkling on these points, this cannot cure the defect in the warrant itself.'

This rejection of this argument is of particular relevance in the light of the Judge's finding that Powell knew what was being investigated.

[55] Twenty years later Tindall ACJ considered a search warrant issued as part of what appears to have been a national raid on 'non-European Trade Unions' and the Council for non-European Trade Unions. In *Minister of Justice & others v Desai NO*[53] the warrant authorised seizure of 'documents which may afford evidence as to the commission of the crime' of incitement to strike. But the statute permitted the issue only of a warrant in respect of 'documents as to which there are reasonable grounds for believing that they will afford evidence'. Tindall ACJ held the warrant bad on its face because it gave

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[52] Page 849.

the officer executing it 'a wider field of choice as to the documents to be seized' than the statute authorised.[54] This Court overruled a provincial division decision that licensed no more than 'a rough paraphrase of the section which empowers the seizure of documents for the purpose of being used in evidence'. Tindall ACJ said:

> 'But if his instructions contained in the warrant are to seize documents which *may* afford evidence, he is thereby directed to allow himself greater latitude than he would if he had been directed to seize documents as to which there are reasonable grounds for believing that they will afford evidence.'[55]

[56] In *Divisional Commissioner of SA Police, Witwatersrand Area and others v SA Associated Newspapers Ltd and another,*[56] when the Rand Daily Mail newspaper sought to publish an exposure of prison conditions under apartheid, part of a warrant authorised seizure of 'all other documents including statements of whatsoever nature concerning reports in connection with the conditions in gaol and experience of prisoners in gaols throughout the Republic of South Africa'. This Court held this portion of the warrant too general: it was couched in such wide terms as to justify the inference that the

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[53] 1948 (3) SA 395 (A).
[54] 1948 (3) SA 395 (A) 402.
[55] 1948 (3) SA at 404.
[56] 1966 (2) SA 503 (A).

justice of the peace who had issued it had not properly applied his mind to it. Beyers ACJ said:

> 'It has long been established that the Courts will refuse to recognise as valid a warrant the terms of which are too general (see *Pullen NO and others v Waja* 1929 TPD 838). The executing officer, when examining the documents referred to in the warrant must, in deciding whether he will seize a particular document, use his judgment as to whether it will afford evidence as to the commission of the crime being investigated (*Desai's* case *supra* at 404). It seems to me that in the present case the warrant allows him no discretion at all. He is allowed the latitude of seizing "all" the documents "concerning reports in connection with conditions in gaols, etc".'[57]

[57] This Court agreed with the statement by the Judge at first instance that 'The ambit is so wide that the imagination boggles at the suggestion that there existed reasonable grounds for believing that each and every document in this large category "would" not "might" afford evidence …'[58]

[58] In *Cine Films (Pty) Ltd and others v Commissioner of Police and others* 1972 (2) SA 254 (A) the warrant mentioned a statutory copyright offence. But what followed directed the seizure not only of specified infringing films plus 'correspondence or circulars referring to such films', but 'all stock books, stock sheets, invoices, invoice books, consignment notes, all correspondence, film catalogues'. The latter formulation was challenged. At first instance it was held

[57] 1966 (2) SA 503 (A) 512D-E.

that the reference to 'documents' had to be 'read to refer to such as will relate to the suspected offence'. This Court disagreed. The warrant had been drawn too widely. The documents to be seized had to be identified with the statutory offence in question. The challenged portion was set aside.

[59] These cases establish this:

(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.

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[58] 1966 (2) SA 503 (A) 512G-H.

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

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

[60] I set out the authorities in this way because they appear to have been overlooked when the warrant was granted, and because the Judge in rejecting the subsequent challenge did not refer to any of them, or to the principles they establish. They necessitate the conclusion, beyond any debate, that the warrant was riddled with imprecision and vagueness, and that it had to be set aside on this ground alone. It mentions no offence. Ferreira's affidavit did, but that was not made available to Powell. Even if in considering the warrant's legality we incorporate Swanepoel's institution of the inquiry, as read out to Powell, it is still irredeemably broad and vague. The documents whose seizure is authorised are not tied even to an

investigation into ‘alleged irregularities’ at the Pretoria Master’s office.

[61] A cursory glance at the provisions of the annexure reveals their startling scope. In what follows no comprehensive analysis is attempted; I give only illustrative instances.

- The first paragraph authorises the seizure of literally *all* documents passing between Powell, his family and Nell and Nell’s family. What if, as Powell deposed, he and Nell have been friends for many years? Christmas and birthday cards, emails between the families’ children, notes between their spouses, are included.
- The third paragraph would license the seizure of even share certificates in publicly listed companies ‘in which BC Nell and/or OM Powell and/or their spouses and/or their family members and/or an employee of OM Powell has an interest’.
- The seventh (‘any other document and/or object that has relevance to or may have relevance to the investigation’) is so unbounded as to resist coherent analysis. Some application of the phrase ‘the imagination boggles’, which

this Court endorsed in the *SAP v SAAN*[59] case, would seem appropriate. Together with the rest of the annexure this paragraph affords neither investigator nor investigated the slightest guidance as to what could, and what could not, lawfully be taken.

[62] Instead, those carrying out the search were given virtually untrammelled power to carry out what Mr Slomowitz in his argument justly called 'a general ransacking' of Powell's 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.[60] The diligent scrutiny of warrants for search and seizure survives as part of the best of that legacy, constitutionally entrenched in our new democracy.[61] The warrants must be set aside as unlawful.

Interdict

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[59] 1966 (2) SA 503 (A) 512H.
[60] Compare the comments of Chaskalson P in the *Pharmaceutical Manufacturers* case 2000 (2) SA 674 (CC) paras 40, 45 and 49.
[61] See *Mistry v Interim Medical and Dental Council of South Africa and others* 1998 (4) SA 1127 (CC) para 25, quoted in para 51 above.

[63] Mr Slomowitz at the outset of his argument adhered to Powell's application for an interdict prohibiting the Director and his staff from disclosing information 'which came to their knowledge in the performance of their functions under the NPA Act and relating to the business affairs [of Powell]', but I understood him to appreciate the substantial difficulties that lie in his path. Swanepoel is alleged to have disclosed only the contents of van Vuuren's affidavit, and since he did not obtain that through the impugned search Powell is not entitled to an interdict in respect of it. In regard to the rest of the documentation seized there is, as Mr Maleka pointed out, no apprehension that the investigating directorate will make any unlawful disclosure. The application must therefore be refused.

Conditional counter-application

[64] In the Court below the respondents gave notice of a conditional counter-application for a new warrant and consequent powers of seizure in the event that Powell's application for return of the documentation should succeed. In his written argument on appeal Powell tendered that the documents in issue should remain preserved for ten days to allow the directorate and the investigating director to initiate a

course of action in furtherance of the counter-application. Mr Maleka very candidly conceded that he could not give an assurance that the counter-application as it currently stands would be free of information obtained from the documents seized. He therefore accepted, in my view properly, the offer in Powell's written argument. In terms of the agreement the Directorate has ten days within which to launch an application for a warrant if so advised, and in that event, as offered by Powell, to allow the objects and documents seized to remain so preserved pending the determination of the counter-application. This agreement is noted.

[65] In the result –

1. The appeal succeeds with costs, including the costs of two counsel.
2. The order of the Court below is set aside.
3. In its place there is substituted:
    (a) The application succeeds with costs, including the costs of two counsel, to be paid by the third, fourth and fifth respondents jointly and severally.
    (b) The decision of the fourth respondent to hold a preparatory investigation in terms of s 28(13) of the National Prosecuting Authority Act 23 of 1998 is set aside.
    (c) It is declared that the search warrants issued by the first and second respondents are null and void and are set aside.
    (d) All documents, records, data and other property of the applicants seized by the fourth and fifth respondents under the warrants, as well as photographic or

electronic copies of them, must be returned to the applicants.

E CAMERON
JUDGE OF APPEAL

HARMS JA)
BRAND JA) CONCUR
CONRADIE JA)

SOUTHWOOD AJA

[66] I have had the privilege of reading the judgment of my colleague Cameron JA, and save for one respect, I respectfully agree with his reasons, the conclusion which he reaches and the order which he makes. In my view the applications for the search warrants (paras 30-44 of Cameron JA's judgment) were fatally flawed by the misstatement of the material facts and this, in itself, justified the setting aside of the warrants and the return of the documents and other things seized.

[67] A search and seizure warrant obtained *ex parte* places a formidable weapon in the hands of the Director of IDSEO. It authorises the Director and his staff to enter and search the premises of the person involved without prior notice and to seize and retain documents and other things relevant to the suspected offence. Such an operation is a profound violation of the right of privacy.

[68] In *Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others*: *in re*

Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others 2001 (1) SA 545 (CC) the Constitutional Court considered how the right to privacy is protected by the provisions of the National Prosecuting Authority Act, 32 of 1998 ('the NPA Act') where the director seeks a search and seizure warrant for the purpose of a preparatory investigation. The court identified a number of essential safeguards.

[69] First, a search warrant is to be granted for purposes of a preparatory investigation only if there is 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 (para 56).

[70] Second, the investigating directorate is required to place before a judicial officer an adequate and objective basis to justify the infringement of the right to privacy. The legislation sets up an objective standard that must be met prior to the violation of the right, thus ensuring that search and seizure powers will only be exercised where there are sufficient reasons for doing so (para 55).

[71] Third, there must be authorisation by a judicial officer before a search and seizure of property takes place: an investigating

director may not search and seize property, in the context of a preparatory investigation, without prior judicial authorisation (para 35). It must appear to the judicial officer, from information on oath or affirmation, that there are reasonable grounds for believing that anything connected with the preparatory investigation is, or is suspected to be, on such premises. The judicial officer is required, among other things, to be satisfied that there are grounds for a preparatory investigation and in order to be satisfied the judicial officer must evaluate the suspicion that gave rise to the preparatory investigation as well as the need for a search for purposes of a preparatory investigation (para 36). It is implicit in s 29(5) that the judicial officer will apply his or her mind to the question whether the suspicion which led to the preparatory investigation, and the need for the search and seizure to be sanctioned, are sufficient to justify the invasion of privacy that is to take place. On the basis of the information, the judicial officer makes an independent evaluation and determines 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 (para 37). It is also implicit in the legislation that the judicial officer should have regard to the provisions of the Constitution in making the decision (para 38).

[72] Despite these safeguards the application for the warrant can be made *ex parte* on the strength of what the investigating director chooses to place before the judicial officer. In such a case, before the warrant is executed, the person who is targeted by the warrant does not have an opportunity to contest the facts relied upon by the investigating director or to place his or her version before the court. By then, the sentimental damage and damage to his or her good name and reputation and probably professional and business interests will have occurred. These factors emphasise the necessity for a proper 'adequate and objective basis' to be placed before the judicial officer who is requested to authorise the warrant. All the safeguards referred to in *Hyundai* will be negated if the material facts are misstated to the judicial officer or material facts are withheld. If this occurs the judicial officer cannot properly consider whether the warrant should be authorised or not. These factors also illustrate the necessity for the rules relating to proper disclosure of material facts in *ex parte* applications to be strictly and rigorously applied.

[73] In *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) [21] this court expressly approved of these rules as they are set out in *Schlesinger v Schlesinger* 1979 (4) SA 342

(W) at 348E-349B, concluding with the following three propositions:

'(1) in *ex parte* applications all material facts must be disclosed which *might* influence a court in coming to a decision;

(2) the non-disclosure or suppression of facts need not be wilful or *mala fide* to incur the penalty of rescission;

(3) the Court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.'

[74] In *Schlesinger* Le Roux J also considered when a court will exercise its discretion in favour of a party who has been remiss in its duty to disclose rather than to set aside the order obtained by it on incomplete facts. He concluded (at 350B-C) –

'It appears to me that unless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained *ex parte* on incomplete information and will set it aside even if relief could be obtained in a subsequent application by the same applicant.'

[75] In my view, this approach should apply equally to relief obtained on facts which are incorrect because they have been misstated or inaccurately set out in the application for the order (compare, *Hall and another v Heyns and others* 1991 (1) SA 381 (C) at 397B-C) or, as in this case because they have not been sufficiently investigated. And it should be rigorously applied where

a right in the Bill of Rights has been violated. That is the only way that the courts can ensure that the right to privacy is vindicated after the event.

[76] The purpose of rigorously applying the rule and setting aside the decision to authorise the warrant is not to punish the director as was stated by the court below. It is to maintain the legality of the process. Infringement of the right to privacy by a search and seizure warrant is justifiable only if the correct facts have been placed before the judicial officer in an objective manner so that he can properly apply his mind. The process will be fatally flawed if incorrect facts are placed before him.

[77] In the present case the director's representative, Adv Ferreira, purported to have personal knowledge of the facts. The case which she sought to make out in her affidavits was that Powell and the Master of the Supreme Court, Pretoria, Mr Ben Nell, had a corrupt relationship. According to Ferreira this was demonstrated by the way that Nell regularly ('gereeld') and continually ('voortdurend') deviated from the (by implication invariable) practice which existed in the Master's office of always appointing liquidators and trustees nominated by creditors, by appointing such liquidators and trustees who had not been

nominated; that Nell on many occasions nominated and appointed Powell in liquidations where Powell was not nominated by the creditors and that Nell had done so in a number of large estates such as O'Hagans Special Events (Pty) Ltd; O'Hagans Franchise Marketing (Pty) Ltd; O'Hagans Investment Holdings Ltd; New Age Beverages (Pty) Ltd; Kelvinator Appliances South Africa (Pty) Ltd; Kniehalter Boerdery (Edms) Bpk and MacMed Healthcare Ltd. Ferreira's conclusion was twofold (I translate):

'It is clear that Nell abuses his position and discretion in larger estates in order to appoint liquidators/trustees of his choice as co-liquidators/trustees without the people concerned enjoying the support of the creditors. Powell has been benefited regularly in this way.

The relationship between Nell and Powell is suspect and there is a suspicion of corruption."

[78] Ferreira justified the urgency of the application by referring to the interdict which Powell had obtained against the Sunday Times newspaper that afternoon (23 October 1999) to stop publication of similar allegations by the newspaper, Powell's obvious knowledge of the allegations against him and Nell and accordingly the danger which existed that Powell would attempt to destroy incriminating documents and things. According to Ferreira it was essential to get control of these documents and things to prove the alleged crimes.

[79] It is striking that Ferreira did not attach to her affidavit one document to show that Powell had been wrongly appointed by Nell in one large liquidation or sequestration (let alone a series of them). There was also no attempt, other than the vague and bald statements in the affidavit which really amount to conclusions to demonstrate a pattern of appointments of Powell by Nell which would justify an influence that an improper and corrupt relationship existed between them.

[80] In his affidavits Powell dealt comprehensively with the facts alleged by Ferreira. He showed that she did not have personal knowledge of the facts. He showed that in the appointment of liquidators and trustees a distinction must be drawn between a provisional liquidator and a provisional trustee, who is appointed by the Master, and the liquidator and trustee who is appointed by the creditors at their first meeting after they have proved their claims. He showed that far from there being a practice of appointing as provisional liquidators and trustees persons nominated by creditors, the appointment of provisional liquidators and trustees is a matter for the discretion of the Master and that in exercising this discretion a nomination by a potential creditor is merely one of the factors to be taken into account by the Master. In

this regard Powell referred to a six page circular issued in March 1997 by Nell in his capacity as Master of the High Court, Pretoria. In this circular Nell states clearly and unambiguously, with reference to the relevant statutory provisions and case law, that there is no practice whereby the Master appoints as provisional liquidator or trustee the person nominated by the creditors and that such appointments are made in the discretion of the Master. Powell showed further that Nell had not appointed him as a liquidator in the seven big liquidations referred to by Ferreira. He had not been appointed in the liquidations of O'Hagans Special Events (Pty) Ltd; O'Hagans Investments Holdings Ltd; New Age Beverages (Pty) Ltd or Kniehalter Boerdery (Edms) Bpk. He was appointed as one of the provisional liquidators of O'Hagans Franchise Marketing (Pty) Ltd but he enjoyed the support of some of its trade creditors. He was also appointed in the liquidation of Kelvinator Appliances South Africa (Pty) Ltd. However his appointment was by a Deputy Master and not by Nell and some of the trade creditors of Kelvinator Appliances South Africa (Pty) Ltd had supported his appointment. He showed finally that he was appointed as one of six provisional liquidators in the liquidation of MacMed Healthcare Ltd, that the appointment was made by a committee of three Deputy Masters chaired by Mr Jan Jordaan and

that Nell was not involved in any way in those appointments. This is confirmed by Nell who states that he had been on leave when these appointments were made.

[81] Apart from this evidence Powell showed that Nell appointed provisional liquidators and trustees only in exceptional cases and that in the majority of cases the Deputy Masters, either alone, or in committees, appoint provisional liquidators and trustees. Neither the director nor Ferreira made any attempt to refute Powell's evidence about the practice in the Master's office, Pretoria, relating to the appointment of provisional liquidators and trustees or Powell's appointment or non-appointment in the seven big liquidations referred to in Ferreira's affidavit. It is clear from their answering affidavits, as it is clear from the warrants which were authorised, that they had no specific knowledge about any of these appointments or any other appointments which would show that Nell wrongly preferred Powell when making appointments and that he did this regularly or as a matter of course.

[82] Regarding the necessity for seeking a warrant urgently on a Saturday evening Powell points out that he had been aware of the allegations against him since the beginning of September 1999; that he had consistently denied these allegations and challenged

those who made the allegations to produce proof of the irregular or corrupt practice alleged and that this was not disclosed to the court. None of this evidence is denied by Ferreira and it shows clearly that no grounds for urgency existed. If Powell had wanted to destroy the documents he had already had almost two months in which to do so.

[83] The manner in which Ferreira couched her affidavits was clearly misleading. She misstated the facts and the law regarding the practice in the Master's office. She misstated the facts about Nell abusing his position by appointing Powell contrary to that practice. She misstated the facts about Powell being the regular beneficiary of such misconduct by Nell and she misstated the facts about the appointment of liquidators in the seven big liquidations. Although she did not pertinently allege that Nell had appointed Powell in these liquidations the reference to specific liquidations was clearly to create the impression that he had. Ferreira claims that she did not have all this information when she made the affidavit. If she did not then she should not have couched the affidavit in the manner in which she did. It is no answer that the investigating directorate had not yet checked the facts relating to Powell's appointments. The correct facts could easily have been ascertained simply by referring to the files at the Master's office.

These facts would have destroyed Ferreira's thesis. By not investigating the investigating directorate did not discover the true facts and accordingly the correct facts were not placed before the two judicial officers. I have no doubt that the way in which these bald allegations were made in the affidavit influenced the two judicial officers in authorising the warrants.

[84] In his judgment, Cameron JA accepts Powell's contention that Ferreira's affidavit contains a number of claims regarding the law and practice relating to the appointment of liquidators that are inaccurate and that her assertion that the then head of the Pretoria Masters Office, Mr B C Nell, continuously gave preference to Powell was (on the basis of Powell's analysis of the office data) unjustified (para 32) and he accepts that Ferreira satisfied the requisites of (a) placing before a judicial officer 'an adequate and objective basis' to justify the issue of the warrant and (b) showing that her surmise was not fanciful but grounded in fact; that it was based on sound evidence that was available to her; and that other persons in her position, considering the facts and available evidence, would conclude that the surmise in question was not far-fetched, misguided or patently mistaken (paras 38 and 39). In my view the first finding is destructive of the second. This becomes

clear on a close reading and comparison of Mahole's affidavit with that of Ferreira. Mahole does not allege that there was an (invariable) practice as alleged by Ferreira or that only one person, the Master, appointed liquidators and trustees. In fact it is clear from her affidavit that the Master exercised a discretion when appointing liquidators and trustees; that the Master, his deputies and assistants made such appointments and that in 'big matters' a panel would make the appointments. When it comes to Powell, Mahole's evidence contains no detail whatsoever about the alleged irregular appointments. This lack of particularity should have been a clear indication to Ferreira that the statement was unreliable and should have been checked against the objective facts contained in the files. It was clearly crucial to the director's case that a pattern of irregular appointments be established.

[85] I must emphasise that in considering the contents of Ferreira's affidavits I have confined myself to her central thesis (the frequent irregular appointments of Powell by Nell contrary to the prevailing practice). In my view some of the other statements made by Ferreira are also misleading and were clearly made in support of the central thesis. In view of my conclusion it is not necessary to consider these other statements. I have also not

dealt in detail with the manner in which Ferreira sought to lay a factual basis for the reasonable suspicion. In my view it is not sufficient for her to simply place her interpretation of the information available before the judicial officer. In this regard the comments of Nugent AJA in *National Director of Public Prosecutions v Basson* supra at para [19] are apposite:

'The section requires that it should appear to the court itself, not merely to the appellant or his staff, that there are "reasonable grounds" for such a belief, which requires at least that the nature and tenor of the available evidence needs to be disclosed.'

Leaving aside the question of whether the unsupported affidavit of the Director is sufficient, in my view, the nature and tenor of the evidence available to Ferreira were not sufficiently disclosed to satisfy the court that there were reasonable grounds for the necessary suspicion.

[86] The issue raised before the court below was not simply whether there was sufficient information, other than that attacked by Powell, to justify the grant of the warrants but whether there was a proper disclosure of the material facts in the affidavits. These are discrete issues. If Van der Merwe J and the second respondent were misled into granting the warrants that should have resulted in the warrants being set aside and the granting of

an order that all documents seized pursuant to the warrants be returned to Powell. That should have been decided first as it was fundamental to the question of whether Powell's right to privacy had been infringed without justification. The same considerations apply to both warrants.

[87] In my view the approach of the court below to this issue was wrong both on the law and the facts. The failure to disclose the material facts properly was an additional ground upon which the court below should have granted relief.

B R SOUTHWOOD
ACTING JUDGE OF APPEAL