REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 596/05
Reportable

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **FIRST APPELLANT**

INVESTIGATING DIRECTOR: DIRECTORATE OF SPECIAL OPERATIONS **SECOND APPELLANT**

and

JULEKA MAHOMED **RESPONDENT**

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

HEARD: 27 AUGUST 2007

DELIVERED: 8 NOVEMBER 2007

SUMMARY: Search and seizure – materials seized pursuant to warrant invalidly issued in terms of s 29 of National Prosecuting Authority Act 32 of 1998 – whether appropriate for court setting seizure aside to make order for preservation of copies of materials seized pending possible prosecution of person whose materials were seized – purposes for which such order may be granted.

ORDER OF COURT SET OUT IN PARA 34 IN JUDGMENT OF NUGENT JA.

Neutral citation: **This judgment may be referred to as *National Director of Public Prosecutions v Mahomed* [2007] SCA 138 (RSA).**

JUDGMENT

FARLAM JA

[1] This is an appeal from a judgment of Hussain J, who granted an application for the setting aside of two search and seizure warrants issued in terms of s 29 of the National Prosecuting Authority Act 32 of 1998 and ordered the appellants, the National Director of Public Prosecutions and the Investigating Director of the Directorate of Special Operations, to return forthwith all documents, files, records, notes, data and other property of the respondent, who is a practising attorney, seized under the warrants, as well as the mirror image of the hard drive of her laptop computer which was seized, together with all photographs taken of her office and home during the execution of the warrants and certain other items.

[2] The judgment of the court *a quo* has been reported: see *Mahomed v National Director of Public Prosecutions* 2006 (1) SACR 495 (W).

[3] The warrants which were set aside in this matter were issued by Ngoepe JP on 12 August 2005 and authorised searches and seizures at the respondent's residence and offices in Johannesburg. It appeared from the warrants that the documents sought thereunder related to an investigation being undertaken by the Directorate of Special Operations as to whether Mr Jacob Zuma, who was formerly a client of the respondent, and a group of companies described in the annexure as the 'Thomson–CSF/Thales/THINT group' were guilty of certain offences.

[4] Annexed to the warrants were two annexures, the first of which in the case of both warrants contained 24 paragraphs listing the objects which could be seized.

[5] By agreement between the parties all items seized were sealed and deposited with the Registrar of the Johannesburg High Court. By the time they were deposited with the registrar the respondent had claimed privilege in respect of all but three items.

[6] In the heads of argument filed on their behalf the appellants conceded that the warrants were invalid to the extent that no case had been made out for the search for and seizure of the objects listed in paragraphs 2 to 24 of the annexures to which I have referred. It was contended, however, that these paragraphs could

be severed from the warrants and that the remainder of the warrants could and should be held to be valid.

[7] Some days before the appeal was due to be heard the appellants indicated that they were prepared to concede the appeal with costs, including the costs of two counsel, subject to the parties reaching agreement on a satisfactory arrangement to achieve the following two purposes:

'[a] to preserve for the ongoing investigation into Mr Zuma and the Thint companies and any possible future proceedings against them, the things seized which are covered by paragraph 1 of Annexure A to the warrants or by Annexure B thereto [this was an annexure which set out the manner in which certain computer-related objects could be dealt with]; and

[b] to preserve a reliable record of everything seized because such a record may be necessary if ever it should be contended in the future in any such proceedings that the searches entailed or resulted in an unlawful invasion of legal privilege.'

[8] The respondent indicated that she was not prepared to agree to the variation of the order of the court *a quo* by the addition of a preservation order.

[9] When the matter was argued the only submissions addressed to the court related to whether a preservation order should be inserted in the order granted by the court *a quo.*

[10] On the two days after the appeal in this matter was argued the court heard appeals from a judgment given in the Durban High Court in an application brought by Mr Zuma and his attorney, Mr Hulley, and a judgment given in the Pretoria High Court in an application brought by Thint (Pty) Ltd. Both cases concerned other warrants issued by Ngoepe JP on 12 August 2005, authorising other searches and searches relating to the investigation to which I have referred. The same question as to whether a preservation order should be issued in the event of its being held that the warrants or the actions taken pursuant thereto were invalid was argued. The judgments of this court in those two appeals are being delivered simultaneously with the judgment in this matter.

[11] For the reasons set out in the judgment in the appeal relating to the application brought by Mr Zuma and Mr Hulley I am of the opinion that a

preservation order should also be made in this case.

[12] Mr *Tuchten,* who appeared on behalf of the respondent in this case, submitted that a preservation order should not be made. He argued in the alternative that if a preservation order were to be made it should take the form of a draft which he included in his supplementary heads. The main respect in which his draft differed from the order suggested in the appellants' letter related to the inclusion of a paragraph providing for the parties' attorneys to meet with the registrar of the Johannesburg High Court in an endeavour to identify what were described as 'irrelevant items', which did not have to be retained and could be returned immediately to the respondent.

[13] Mr *Trengove,* who appeared for the appellants, contended that such a meeting would be a waste of time as his clients were of the view that all the documents currently lodged with the registrar are relevant.

[14] In the circumstances there would be no point in providing in the order for the parties' attorneys to meet with the registrar. In my view an order in the following terms would be appropriate in the circumstances:

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

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

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

taken) after the copying process is complete.

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

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

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

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

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

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

(i) any order of any competent court (whether obtained at the instance of the applicant or the respondents);

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

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

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

(i) reasonable prior notice of any application for a search warrant or an order directing the applicant or the registrar to deliver or release any retained or

returned item; and

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

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

[15] I have read the judgments prepared in this matter by my colleagues Nugent and Ponnan JJA. Inasmuch as the order I propose does not carry the support of the majority of the court and as the order set forth in paragraph 16 of Nugent JA's judgment covers to some extent the ground covered by the order I think should be made I am prepared, in the circumstances of this case, to concur in that order.

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IG FARLAM
JUDGE OF APPEAL

CONCURRING
CLOETE JA

NUGENT JA:

[16] I agree with my colleague Farlam that the registrar of the court below should be authorised to retain, under seal, copies of the documents and material that were seized under the apparent authority of the warrants (I will refer to the documents and material collectively as the material) but not for the reasons that he gives and on more limited terms than those that he proposes.

[17] The appellants articulated their request for a preservation order in a letter that was written by the State Attorney and placed before us shortly before this appeal was heard. The request was motivated on two grounds. The first related only to material that falls within the terms of para 1 of the warrants. (That paragraph encompasses a narrow category of material connected with a specific written loan agreement.) The appellants said that they want that material to be

preserved 'for the ongoing investigation into Mr Zuma and the Thint companies and any possible future proceedings against them'. (Mr Zuma, who was formerly a client of the respondent, and the Thint companies, are the appellants under case number 232/07). That means, as I understand it, that the appellants want the material to be available to them, if they are able to obtain lawful access to it (whether by a fresh warrant authorising its seizure, or by the authority of a court order) for the purpose of establishing whether Mr Zuma or the Thint companies have committed offences, or for proving to a court in due course that they have committed offences.

[18] I am not at all persuaded that this court (or any court) has the power in law to make a preservation order for that purpose. The retention by the registrar of the material, or copies of the material, even if that material is not viewed, will in my view be a continuing violation of the respondent's privacy, which is protected against violation by s 14 of the Bill of Rights. I do not think that privacy is violated only when private communications are viewed by or exposed to viewing by another. I think it is violated just as much merely by dispossessing a person of control over material that he or she is entitled to hold in private. As Harms JA said in *National Media Ltd v Jooste*,[1] drawing upon the views expressed by J Neethling and JM Potgieter:[2]

['T]he right to privacy encompasses the competence of a person to determine the destiny of his or her private facts.'

Van der Westhuizen J expressed a similar view in *Prinsloo v RCP Media Ltd t/a Rapport,*[3] in relation to photographic images of matter that was private, when he said that

'possession of such images by someone who is not authorised by the original author or those depicted on them could in principle amount to an ongoing violation or at least a continuing threat of violation of one's privacy'

though I do not share his ambivalence as to whether that amounts to an ongoing violation of privacy or whether it merely threatens that a future violation might occur. In my view a violation occurs when, and for so long as, a person is dispossessed of control over private material.

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[1] 1996 (3) SA 262 (A) 271G.
[2] J Neethling and JM Potgieter: 'Aspekte van die Reg op Privaatheid' 1994 (57) THRHR 703 at 706. See, too, *Neethling's Law of Personality* 2 ed by J Neethling, JM Potgieter and PJ Visser p. 237; J Neethling 'The Protection of the Right to Privacy Against Fixation of Private Facts' (2004) 121 SALJ 519. *Wille's Principles of South African Law* 9 ed 1200 fn 228; *The Bill of Rights Handbook* 5 ed by Iain Currie and Johan de Waal 14.3.
[3] 2003 (4) SA 456 (T) 468G-H.

[19] The power of a court to authorise a continuing violation of protected rights must be found within the four corners of the Constitution if it is to be found at all, for a court has no reservoir of power outside the Constitution. The Constitution allows for the limitation of protected rights (which will be the effect of granting a preservation order) only if that is permitted by law of general application (and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society that is based on human dignity, equality and freedom, taking into account the factors listed in s 36). There are numerous statutory instruments that authorise an intrusion upon rights of privacy and property for the purpose of investigating and prosecuting crime (none of which are material to this case) but I know of no law – whether it be the common law or a statute or a provision of the Constitution itself – that confers a general discretion upon a court to do the same.

[20] My colleague finds the source of this court's authority to make a preservation order for the purpose of investigating and prosecuting crime in the power that is given to it by ss 38 and 172(1) of the Constitution to fashion remedies for constitutional violations. His view, as I understand it, is that those powers authorise a court to deny full redress to the respondent for the violation of her constitutional rights if that will serve the broader public purpose of prosecuting crime. (The views of my colleague are expressed in his judgment in *National Director of Public Prosecutions & Others v Zuma & Another* which is delivered simultaneously with this judgment.)

[21] It seems to me that the power to fashion remedies for constitutional infringements is given to courts to enable them to vindicate rights rather than to deny them. As Ackerman J said in *Fose v Minister of Safety and Security*:[4]

'Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.'

And later:[5]

[4] 1997 (3) SA 786 (CC) para 19.
[5] Para 69.

'[I]t is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.'

[22] I am not persuaded that the power to fashion remedies to redress constitutional violations are capable of being used to deny such redress so as to serve some other purpose. That is particularly so if the purpose that is to be served by denying redress is one that would not have been capable of being achieved by a court had the violation not occurred. For while it is true, as observed by my colleague, that the effective prosecution of crime is an important constitutional objective, that by itself does not confer a general discretion upon a court to augment the panoply of tools that are available to the state to achieve that objective. And if a court has no general authority to make an order that impinges upon a person's privacy only because it is useful to do so in the interests of prosecuting crime then I would find it remarkable that the violation by the state of that privacy somehow creates an authority that would not otherwise exist.

[23] He finds support for his view in two decisions from Canada that have indeed permitted the preservation of unlawfully seized material on similar grounds, but I do not think that we need uncritically adopt those decisions. Neither of those cases do more than assert that a court may make a preservation order but without pertinently considering the question that concerns me and they do not seem to me to take the matter further.

[24] In *Dobney Foundry Ltd v Attorney General of Canada*[6] Esson JA of the British Columbia Court of Appeal (in chambers on an application for an order returning documents seized under a quashed search warrant) relied heavily on pre-Charter cases in support of his decision. With regard to post-Charter decisions to the contrary[7] the learned judge said, as pointed out by my colleague, that those decisions

'rest upon the premise that the purpose and effect of the Charter is to elevate individual rights and freedoms to an absolute which excludes any consideration of competing values such as the desirability that the criminal law be enforced'

[6] Reported under the name *Dobney Foundry Ltd v The Queen (2)* in (1985) 19 CCC (3d) 465. Because those reports are not available to me I have used the judgment issued by Westlaw.
[7] Cited at para 16 of the judgment.

and that that approach

'ignores the reality of the matter [namely that] the interests of the community as a whole require that a reasonable balance be struck between individual rights and community interest'.

The learned judge of appeal seems simply to have assumed that protected rights are capable of being encroached upon if only that meets a desire to enforce the criminal law or because it is considered that community interests are served by doing so. Encroachments of that kind, for those and similar reasons, were once common in this country. It seems to me that the very purpose of the Bill of Rights is to ensure that they do not recur by insisting that they are not permissible unless they meet the criteria of s 36.

[25] In *Re Chapman and the Queen*,[8] referred to by Esson JA in *Dobney*, the question whether the Charter had eclipsed the discretion of a court, in the exercise of its inherent jurisdiction, to order the retention of documents unlawfully seized, was not pertinently considered by the Ontario Court of Appeal. In *Re Commodore Business Machines Ltd and Director of Investigation and Research*[9] the same court found, by a majority, that the judge in the court below had 'properly exercised his discretion derived from s 24(1) of the [Canadian Charter]'[10] by permitting the respondents to retain copies of those documents that had been unlawfully seized that were 'necessary for the prosecution of the offences with which the appellant was charged', but again without pertinently considering whether the judge had such a discretion at all, basing itself rather on the decision of Esson JA in *Dobney*. I derive no assistance from the mere assertion of the proposition in those cases.

[26] But I do not think it is necessary to reach any firm conclusion on that issue. Even if we had a discretion to make a preservation order for the purpose of preserving evidence for a prosecution I would not do so in this case. I have already indicated that the preservation order was sought for that purpose by the appellants only in relation to the limited class of material encompassed by para 1 of each of the warrants, and we have been given no reason why it might now have become necessary to extend the order to the remaining material (which is what the order proposed by my colleague does) that was seized without justification. It is

[8] (1984) 12 CCC (3d) 1.
[9] (1988) 50 DLR (4th) 559.
[10] '24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances'.

not clear that the material that was seized includes anything that falls within the terms of para 1 of the warrants but if there is such material amongst the mass that was seized under the apparent authority of the remaining paragraphs of the warrants I do not think it would be practically possible to now separate the former from the latter with any degree of certainty and without exposing the rights of the respondent to the risk of further violation. On that ground alone I would refuse to order the preservation of that material in isolation.

[27] But there is also another purpose for which the appellants want the material preserved, which applies to all the material, including the material that is covered by para 1 of the warrants, and that purpose seems to me to place them on firmer ground.

[28] The material that was seized under the apparent authority of the warrants related to the affairs of Mr Zuma. The respondent contends that much of the material was protected against disclosure by legal privilege. The present representatives of Mr Zuma have already put the appellants on notice that if their client is ever brought to trial he intends to contest the ability of the state to afford him a fair trial because (so it is alleged) the prosecution has had access to that privileged material.

[29] If that objection is indeed taken at any trial that might yet occur then clearly the correct identification of what was amongst the documents that were seized will be crucial to the just adjudication of the objection. It is in that context that the State Attorney's letter records that a further purpose for which the material should be preserved is

'to preserve a reliable record of everything seized because such a record may be necessary if ever it should be contended in the future in any such proceedings that the searches entailed and resulted in an unlawful invasion of legal professional privilege.'

What is thus sought in that regard is not to preserve the material so that its content may be used as evidence in any future prosecution (a purpose for which I have not been persuaded that a court has authority to grant such an order) but rather to preserve the material (or copies of the material) so that a court may in due course be in a position to identify with certainty what material was seized if the identity of the material becomes contentious in any future trial.

[30] In *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam*,[11] which was decided before the present Constitution took effect, this court drew upon what was then inherent power vesting in the superior courts to hold that a court was entitled to order the preservation of evidence that is vital to substantiate a legal claim.[12] That case was decided in the context of what has become known as an 'Anton Piller order' but the principle upon which it was decided does not seem to me to be confined to an order of that kind. I think the decision in that case reflected no more than an application of a broader principle that allowed a court, in the exercise of its inherent powers, and in furtherance of the proper administration of justice, to preserve evidence that was vital for the just resolution by a court of a potential legal dispute. For earlier, in *Universal City Studios,*[13] the court had said the following (in that case it found it unnecessary to pronounce finally on the matter but it was effectively endorsed by the later decision in *Shoba*):

'There is no doubt that the Supreme court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice…It is probably true that, as remarked in the *Cerebos Food* case,[14] that the Court does not have an inherent power to create substantive law, but the dividing line between substantive and adjectival law is not always an easy one to draw…In a case where the applicant can establish *prima facie* that he has a cause of action against the respondent which he intends to pursue, that the respondent has in his possession specific documents or things which constitute vital evidence in substantiation of the applicant's cause of action (but in respect of which the applicant can claim no real or personal right), that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial, or at any rate to the stage of discovery, and the applicant asks the Court to make an order designed to preserve the evidence in some way, is the Court obliged to adopt a *non possumus* attitude? Especially if there is no feasible alternative? I am inclined to think not. It would certainly expose a grave defect in our system of justice if it were to be found that in circumstances such as these the Court were powerless to act. Fortunately I am not persuaded that it would be. An order whereby the evidence was in some way recorded, eg by copying documents or photographing things or even by placing them temporarily, ie *pendente lite*, in the custody of a third party would not, in my view, be beyond the inherent powers of the Court.[15]

Although expressed in relation to a civil claim I can see no reason why that

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[11] *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg* 1995 (4) SA 1 (A).
[12] The requirements for such an order were set out at p. 15H-I.
[13] *Universal City Studios Inc v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754 G-755E.
[14] *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd* 1984 (4) SA 149 (T) at 173E.
[15] In *Shoba* at p. 16D the court expressly overruled decisions to the contrary in *Economic Data Processing (Pty) v Pentreath* 1984 (2) SA 605 (W), *Cerebos Food* (above) and *Trade Fairs and Promotions (Pty) Ltd v Thomson* 1984 (4) SA 177 (W) (to the extent that they were in conflict with its decision in *Shoba*).

inherent power would not similarly have been available to ensure the proper administration of justice in relation to a potential dispute between parties to litigation of the kind that is now in issue.

[31] Those powers of a court that existed before the Constitution took effect seem to me to be preserved by s 34 of the Constitution. That section accords to everyone (which includes the state) the right, amongst others, to have any dispute that can be resolved by the application of law decided in a fair hearing.[16] I have little doubt that the right to a fair hearing before a court of law includes the right to have factual disputes resolved expeditiously and justly. That seems to me to provide ample authority to a court in appropriate circumstances to order the preservation of evidence so as to achieve that end. Indeed, it seems to me that a court, which is under a constitutional duty to ensure that legal disputes are resolved fairly and justly, may order the preservation of evidence on its own initiative if that will serve the proper administration of justice.

[32] It is not necessary for present purposes to delineate the boundaries within which those powers may be exercised by a court. It is sufficient to say that where the exercise of those powers intrudes upon other protected rights, as the making of a preservation order will do in this case, a court is bound to exercise those powers only within the constraints of s 36. That requires the benefit that will flow from allowing the intrusion upon protected rights to be weighed against the loss that the intrusion will entail, and only if the loss is outweighed by the benefit to an extent that meets the standard that is set by s 36 will it be permitted to order the intrusion.[17]

[33] It goes without saying that the application of those principles in this case amply justifies the grant of a preservation order. The limitation that such an order will place upon the respondent's right to privacy is negligible and ought not to be detrimental in practical terms to the full enjoyment of her right to privacy, bearing in mind that the material is to be held by the registrar under lock and key unless a court orders otherwise. On the other hand the benefit to the expeditious and just

[16] Section 34: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'
[17] See O'Regan J and Cameron AJ in a passage from their dissenting judgment in *S v Manamela (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) para 66 that received the approval of the majority; *Midi Television (Pty) Ltd v Director of Public Prosecutions* [2007] SCA 56 (RSA); [2007] 3 All SA 318 (SCA) paras 10 and 11.

resolution of any dispute that a court might be called upon to resolve concerning the identity of the material that was seized is self-evident and enormous. That benefit to the fair and just resolution of the possible dispute clearly outweighs the loss to the respondent to an extent that meets the standard that is set by s 36.

[34] In my view an order should be made for the preservation of the material that was seized under the warrants (or copies of the material) but only for that narrow purpose. Accordingly the following orders are made:

A. Save as set out in B below the appeal is dismissed with costs that include the costs occasioned by two counsel.

B. The order of the court below is varied by the deletion of paragraphs 3, 4, 5 and 6 and the substitution of the following:

‘3. Subject to paragraph 4 below the material that was seized from the applicant pursuant to the warrants is to be retained under seal in the custody of the Registrar of the High Court at Johannesburg on the terms set out in the remainder of this order until such time as the registrar is notified in writing by the National Director of Public Prosecutions that the material may be returned to the respondent or until a court authorises its return.

4. At the election of the respondent and at the cost of the National Director of Public Prosecutions

(a) the registrar or an independent person acting under the supervision of the registrar may, in the presence of a representative of the National Director of Public Prosecutions and of the respondent, make one copy of all or any of the documents that are in the custody of the registrar pursuant to this order

(b) an independent expert appointed by the registrar may, under the supervision of the registrar, and in the presence of a representative of the National Director of Public Prosecutions and of the respondent, make one image of all or any computer

material that is in the custody of the registrar pursuant to this order

whereupon the documents or material that have been copied shall be returned by the registrar to the respondent, provided that the copies or images are substituted therefor and are retained in the custody of the registrar on the terms contained in this order.

5. Other than for the purpose of enabling copies to be made as set out in paragraph 4 above nobody may have access to the material that is in the custody of the registrar except in the circumstances set out in paragraph 6 below.
6. Any court may in its discretion order that the material in the custody of the registrar pursuant to this order be produced to it but only if the identity of the material that was seized under the warrants is placed in issue in proceedings before it and for the purpose of resolving that issue.
7. Except under an order made pursuant to paragraph 6 the material in the custody of the registrar shall not be liable to be seized from the registrar under any law.
8. The respondent is to pay the costs of the application.'

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R.W. NUGENT
JUDGE OF APPEAL

MLAMBO JA concurs

FARLAM JA and CLOETE JA concur in the order.

PONNAN JA:

[35] I have had the opportunity of reading the judgments of my colleagues Farlam and Nugent and whilst I agree that the appeal must be dismissed with costs including those consequent upon the employment of two counsel, I

regretfully cannot agree that the seized items should be retained in the hands of the Registrar. Ordinarily, once the seizure of goods is unlawful, so no doubt is their consequent retention.[18] And the person to whom the articles must be returned is the person from whom they were seized, provided that she may lawfully possess them.[19] We are called upon to decide whether that rule should in this case be modified so as to preserve, in the hands of the Registrar, the articles so seized.

[36] 'The task of combating crime and convicting the guilty', according to Brennan J, 'will in every era seem of such a critical and pressing concern that we may be lured by the temptations of expediency into forsaking our commitment to protecting individual liberty and privacy.'[20] The right of search, without which all searches are illegal, is a right created by statute.[21] The right to enter premises, search those premises and remove goods therefrom is a significant invasion of the rights of an individual and must therefore be exercised within certain clearly defined limits so as to interfere as little as possible with the rights and liberties of the person concerned.[22] The essence of the constitutional right in question in this case is the right not to be subjected to unreasonable intrusions into the privacy of one's home, papers or effects. The wrong condemned is the unjustified invasion of those areas of an individual's life. And that was accomplished in this case by the original search and seizure, which it is now conceded was unlawful. Seizures are executed principally to secure evidence. The evidence-gathering role of the police is thus directly linked to the evidence-admitting function of the courts. An individual's rights may thus be undermined as drastically by the one as by the other.

[37] The State, whilst now repudiating the search and seizure as illegal, seeks to maintain some right to avail itself of the knowledge obtained by that means which knowledge it otherwise would not have had. It thus derives for itself an advantage from acting unlawfully that it would not have secured had it not acted at all. The right to be free from the initial invasion of privacy and the right to return of articles

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[18] *Ndabeni v Minister of Law and Order* 1984 (3) SA 500 (D) at 503G; *Pullen NO, Bartman NO & Orr NO v Waja* 1929 TPD 838 at 852; *Hertzfelder v Attorney General* 1907 TS 403 at 406.
[19] *Minister van Wet en Orde v Datnis Motors (Midlands) (Edms) Bpk* 1989 (1) SA 926 (A); *Minister van Wet en Orde v Erasmus* 1992 (3) SA 819 (A); *Pullen NO, Bartman NO & Orr NO v Waja* at 852.
[20] Dissenting in *United States v Leon* 468 US 897 (1984) at 929.
[21] *Pullen* at 859 and 862; *Hertzfelder* at 404.
[22] *Pullen* at 861; *De Wet v Willers NO* 1953 (4) SA 124 (T) at 127B-C.

so seized are, to my mind, interlinked components of the central embracing right to be free from unlawful searches and seizures. The effect of recognising the right is to put both seizing authorities as well as courts under limitations and restraints on the exercise of their power and authority. Whence, it must be asked, does a court derive its power to make the order sought by the State in this case? If documents unlawfully seized can be held in the manner postulated by the State, the protection afforded by the right to be secure from unlawful searches and seizures is of little, if any, value. To hold otherwise is to recognise the right in theory, but in reality to withhold its protection and enjoyment. Recognition of the right plainly operates to deter the State from gathering information and securing evidence in certain ways.

[38] It is the duty of a court to attempt to restore the *status quo* that would have prevailed if the constitutional requirement had been obeyed. The conduct of the State in this case amounted to nothing less than a naked invasion of the privacy of the respondent's home and office without the requisite justification demanded by the Constitution. She thus has a right grounded in the Constitution to the return of the articles unlawfully seized from her. The State now admits that the substance as well as the letter of the Constitution was violated. The rule that the parties be restored to the *status ante quo* is designed to prevent violations of the Constitution. Its purpose is to compel respect for the guarantees enshrined in it in the only effectively available way, namely, by removing the incentive to disregard it. For, as stated by Justice Jackson, 'uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government'.[23]

[39] If the courts were to simply escape their responsibility for redressing constitutional violations, people will be secure only in the discretion of the police and the protections of the right would evaporate. After all, the entire point of the police conduct in this case that violated constitutional guarantees was to obtain evidence for use at a possible subsequent criminal trial. The Bill of Rights must not be reduced to a code that the State may abide in its discretion. The Constitution requires more; it demands a remedy for a violation. That remedy, one would have thought, is well-settled. But, says the State in this case, there now

[23] Dissenting in *Brinegar v United States* 338 US 160 (1949) at 180.

exists a constitutional injunction to reconsider existing remedies and to re-fashion them in accordance with the spirit of our new constitutional order. To my mind, there is a fallacy in that approach. It is this: Out of a remedy available to someone wronged by a rights violation, the wrongdoer seeks to fashion for itself a right that it otherwise would not have had.[24] That can hardly be authorised by our Constitution. Moreover, the preservation order is being sought in this case in anticipation of possible criminal proceedings, not against the respondent, but against her erstwhile client, Mr Zuma. How, it must be asked, can the State resist a claim for restoration where the items were illegally seized and where, even at the date of the hearing of this appeal, there has been no firm commitment by it that fresh charges will as a fact be preferred against Mr Zuma in regard to which the seized items might be used by it as evidence?

[40] If the search and seizure in this case are unlawful as invading personal rights secured by the Constitution, those rights would be infringed yet further if the evidence were allowed to be used even to the limited extent postulated by the State. Excluding evidence is more often than not a necessary corollary of the right and affords a means of extending protection to a citizen, particularly - as in this matter - where the State is itself the invader. Moreover, there is usually no way in which a citizen can invoke advance protection because a search and seizure by its very nature is usually perpetrated without prior warning and conducted in haste. The protection afforded by the right would be greatly impaired unless all of the evidence unlawfully obtained from Ms Mahomed were to be returned to her.

[41] In contemplating the novelty of the step urged upon us in this case, I sought, but was unable to derive any assistance from *Shoba.*[25] *Shoba* considered whether an *Anton Piller* order directed at the preservation of evidence should be accepted as part of our practice. That question it answered in the affirmative. One of the basic purposes of that interlocutory measure, the essence of which is the element of surprise, is to preserve for a contemplated trial, evidence in the hands of the prospective defendant. Such an order is applied for ex parte, usually in camera and without notice to the respondent. The requirements for its grant are

[24] See para 7 of Nugent JA's judgment.
[25] Cited in para 12 of Nugent JA's judgment.

fairly stringent.[26] Given its draconian nature it can and often does produce for a litigant, without his/her being heard, damaging and irreversible consequences.[27] In my respectful view, for the reasons that follow, the analogy with *Shoba* is less than perfect. First, in *Shoba,* it was the wronged - not the wrongdoer (as here) - who invoked the assistance of the court. Second, in *Shoba*, a private individual, who asserted a cause of action, sought to preserve by means of an order of court, vital evidence required by him in substantiation of that cause of action. Third, the purpose for which the order was sought in *Shoba* was to redress an asserted civil wrong. To my mind, it is doubtful whether such an order can issue to the police in criminal proceedings.[28] After all, that, it seems to me, is the very purpose for which search warrants issue. Fourth, an *Anton Piller* order operates *pendente lite* and the contemplated action must commence by the issue of summons within a specified time fixed by the order itself, failing which it shall lapse, spawning perhaps an action for damages. In this matter as I have already stated, we are forced to engage in speculation and conjecture as to when and whether criminal charges will in fact be preferred against Mr Zuma.

[42] Legitimate limitations on a constitutional right must occur through and be justified under the prescribed criteria in s 36 of the Constitution and not by giving a restricted definition to the right. Constitutional rights, as far as is possible, must be given a broad and generous interpretation. That is not to suggest that they are unlimited. The limitation of a constitutional right for a purpose that is reasonable and justifiable in an open and democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality.[29] The right here under consideration operates as a powerful bulwark against State excesses. Well what then of the sufficiency of the evidence in this case to justify the limitation? The short answer, I am afraid, is that it falls woefully short of what would ordinarily be required. The thrust of the State case before the court below as encapsulated in paragraph 2 of its answering affidavit, was: ‘At the outset I respectfully submit that the [State] was entirely justified in obtaining the warrants in the manner in which they did. Having regard to the supporting affidavits filed herewith I further respectfully submit that the warrants were executed in a

[26] *Shoba* at 15H-I; *Chappell v United Kingdom* (1990) 12 EHRR 1 para 16.
[27] *Chappell* para 24.
[28] *Chappell* para 18.
[29] *S v Makwanyane* 1995 (3) SA 391 (CC) at para104.

professional and lawful manner in accordance with the requirements of the Act'. The postulated relief thus arose very much as an afterthought and has not in truth therefore been fully and properly ventilated on the papers. At that preliminary hurdle as well, the State must therefore also fail, for absent a full factual matrix, the envisaged proportionality exercise can hardly be undertaken, much less resolved in its favour.

[43] In order to restore both parties to the position they would have occupied had the unconstitutional search not have occurred, it is necessary that the seized items be restored to the possession of the respondent. This finding is of course no bar to the State proceeding duly and regularly when and if so advised.

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V M PONNAN
JUDGE OF APPEAL