**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

***"REPORTABLE"***

**CASE NO. 20444/2010**

In the matter between:

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| **AVONTUUR & ASSOCIATES INC.** | **FIRST APPLICANT** |
| **C.A.S AVONTUUR** | **SECOND APPLICANT** |

And

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| **THE CHIEF MAGISTRATE, OUDTSHOORN** | **FIRST RESPONDENT** |
| **MAGISTRATE'S COURT** | **SECOND RESPONDENT** |
| **INSPECTOR FRANK TOLKEN** | **THIRD RESPONDENT** |
| **THE MINISTER OF SAFETY & SECURITY** | |

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| **Coram** | : | **DLODLO, J** |
| **Judgment by** | : | **DLODLO, J** |
| **For the Applicants** | : | **ATTOR. C AVONTUUR [IN PERSON]** |
| Instructed by | : | Avontuur & Associates<br>Middle Floor, Allied Building<br>Church Street<br>OUDTSHOORN<br>(REF. C Avontuur/mva)<br>TEL. NO. (044) 272 4351 / 073 953 1249<br>C/o Brink & Thomas<br>107 On St. Georges Mall<br>Equity House, Riboville, 2nd Floor<br>CAPE TOWN<br>TEL. NO. (021) 424 1564 |
| **For 2nd & 3rd Respondents** | : | **ADV. A ERASMUS**<br>**[021] 424 5051/082 442 5491** |
| Instructed | : | State Attorney<br>C/o 4th Floor Liberty Life Centre<br>22 Long Street<br>CAPE TOWN<br>(REF. 0394/12/P25)<br>TEL. NO. (021) 441 9200 |
| **Date(s) of Hearing** | : | **08 MAY 2012** |
| **Judgment delivered on** | : | **06 JUNE 2012** |

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| **INSPECTOR FRANK TOLKEN** | **SECOND RESPONDENT** |
| **THE MINISTER OF SAFETY & SECURITY** | **THIRD RESPONDENT** |

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**JUDGMENT DELIVERED ON WEDNESDAY, 06 JUNE 2012**

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**DLODLO, J**

[1] On 20 February 2012 members of the South African Police Service under the command of Inspector Frank Tolken conducted a search at the premises of a law firm practicing as such under the name and style as Avontuur and Associates Incorporated. They sought to find and seize a certain number of files apparently belonging to Oudtshoorn Municipality which had been handed over by the latter to the First Appellant with express instructions to do collections on its behalf. The police were armed with two search warrants which had been issued on 17 February 2012 by the chief magistrate of the Oudtshoorn Magistrate's Court, one Mr JS

Lambrechts (the First Respondent in these proceedings who is from henceforth referred to as "the chief magistrate").

[2] These search warrants were issued pursuant to the provisions of section 21 read with sections 20 (a) and (b) of the Criminal Procedure Act 51 of 1977 as amended ("the Criminal Procedure Act"). It is important to mention that the first search warrant authorized a search at the Second Applicant's residence, namely 14 Van Rhede Hof, Oranje Street, Oudtshoorn whilst the second authorized a search at Room 102, Allied Building, Church Street, Oudtshoorn which is the premises which then housed the law firm, the First Applicant in these proceedings. These two search warrants had similar features in that each specified the particulars of the members of the South African Police Services authorized to execute the warrant as well as a list entitled *"Boedels en Deernisse Interim Rekeningstaat Fase 1 & 2" dated 17 November 2011 which identifies "al die kliënte leers...oorhandig deur Munisipaliteit, Oudtshoorn, vir die invordering van agterstallige fooie en/of al die leers van kliënte wat verskyn op die rekening"* ("the list of names"). The search warrant that was executed on 20 February 2012 is in fact the second one which authorized search at the First Applicant's practice premises. The first search warrant does not appear to have been executed at all. The two Applicants in these proceedings are challenging and/or contesting the validity of these two search warrants and seek to have them set aside and the goods seized in terms thereof returned to the First Applicant. In order to better understand the current application I find that I should first set out the background thereto in summary form and briefly set out the contents of the Affidavits deposed to. Some interlocutory applications namely to amend the Notice of Motion and to admit a Supplementary Affidavit deposed to prior to the hearing of the matter on merits. It is not necessary

to overburden this judgment with the contents of the interlocutory applications. The Supplementary Affidavit and the reply thereto merely dealt with explanation why Zondi J's order was not complied with. Mr Avontuur and Ms Erasmus appeared for the Applicants and Respondents respectively.

**BACKGROUND**

[3] It would appear that there must have been serious allegations of financial mismanagement at the Municipality of Oudtshoorn. I say so because on 4 February 2011 the President of the Republic of South Africa issued Proclamation R6 of 2011. See Government Gazette 34001. This Proclamation authorized the Special Investigation Unit to conduct an investigation into various issues at the Oudtshoorn Municipality. In the schedule portion of the Proclamation the issues that fell to be investigated were (a) the procurement of and contracting for goods, works or services by or on behalf of the Municipality and payment made in relation thereto; (b) losses or prejudice suffered by the Municipality as a result of unlawful conduct or irregular practices; (c) losses or prejudice suffered by the Municipality as a result of the mismanagement of its assets, finances or other resources which allegedly took place between 1 January 2004 and 4 February 2011. I gather from the papers in this matter that it was through the Special Investigation Unit's investigation of the Oudtshoorn's Municipality's affairs that evidence emerged which pointed to the possible commission of offences by the two applicants who had on or during 2005 been awarded a tender to do debt collection on behalf of the Municipality. Investigations resulted in dockets being opened. See MAS Number 36/08/2011 and MAS Number 33/02/2012.

[4] On 2 February 2012 Jan Abraham Celliers, an investigator with the Special Investigation unit in Oudtshoorn contacted Inspector Tolken and reported evidence already collected and his report included a statement by Mr Bjorn Henrique Clayton Metembo ("Mr Metembo") which had Annexures numbered "BM1" and "BM6". The list of names which forms part of Annexure "BM1" is the same list entitled "Boedels en Deernisse Interim Rekeningstaat". There was a statement by Ms Mari Roux, an Attorney practicing as the director of Mari Roux Attorneys in Groot Brak River ("Roux") with two annexures. Mr Celliers had summarized the evidence gathered as at that stage and made reference to Mr Metembo and Ms Roux's statements' contents. From these statements the following scenario appeared:

On 17 November 2011 the First Applicant submitted an invoice in the amount of R313 267.09 to the Municipality for "Deernisse & Boedels (750 gevalle @ R424.36 bedrag in verskil.)" The invoice is Annexure "BM1" to Mr Metembo's statement. Attached thereto was a list of names entitled "Boedels en Deernisse Interim Rekeningstaat" which is Annexure "FT3" to the Answering Affidavit by Inspector Tolken. The list of names has six columns, the most important of which are column four, five, and six. Mr Celliers established in his investigation that:

(a) Column four entitled "Bedrag (Taksasie)" referred to the amounts allegedly allowed by the taxing master of the Oudtshoorn Magistrate's Court, Ms Barenda Struwig ("Struwig"); (b) Column five entitled "Bedrag (Mari Roux)" referred to the amounts allegedly calculated by the Applicants' cost consultant, Roux, whom Applicants had appointed to verify the amounts as taxed as it was Applicants' opinion that the taxing master had used the wrong scale to tax the bills, viz. the tariff allowed in the tender as opposed to the attorney-client scale; (c) Column six entitled "Verskil" was

the difference in the amounts set out in columns four and five. The total of column six was what the Applicants demanded from the Municipality in their invoice referred to above; and (d) Many of the names contained on the list were the same as the names on an invoice the Applicants had submitted to the Municipality on 6 October 2011.

[5] It became clear to Inspector Tolken that there was a reasonable suspicion that the Applicants had committed the offences of fraud and theft by unlawfully and with the intention to fraudulently mislead the Municipality, submitting an account which was not due and payable. That led Inspector Tolken to register an investigation under Police Case Number 33/02/2012. On 9 February 2012 Inspector Tolken went to the Applicants' premises in order to speak to the Second Applicant (Mr Avontuur). It appears that in the discussion that ensued Inspector Tolken told Mr Avontuur about the investigation he was busy with against him and he even obtained a warning statement from him. This is filed of record as Annexure "FT9". Of importance is paragraph 2 of the said warning statement it is recorded that Mr Avontuur was informed that the alleged charges were *"Bedrog/Diefstal – Deurdat u 'n bedrieglike dokument of rekening op 17 November 2011 voorgelê het aan Munisipaliteit, Oudtshoorn wat hul beweeg het om 'n bedrag van R313 267.09 in die rekening van Avontuur en Genote oor te betaal."* At page 3 of the said warning statement Mr Avontuur indicated that he was not prepared to make a statement until he had been given copies of the Police docket. Inspector Tolken had refused to give him copies of the docket the reason being that he had not been charged with the alleged offences and was at that stage only a suspect. Inspector Tolken correctly advised Mr Avontuur to apply to the State Prosecutor for copies of the

Police docket and that the Prosecutor would then decide what portion/part of the Police docket he was allowed to be supplied with.

[6] According to Inspector Tolken (this appears to be common cause) later on the same day (9 February 2012) he asked Mr Avontuur if he could interview his employee, Mrs Petronella Prins as she had been working with the files and had prepared the alleged fraudulent invoice and the list of names. Mr Avontuur forbade that interview prompting Inspector Tolken informing him that he would then apply for a subpoena in terms of section 205 of the Criminal Procedure Act because he regarded her statement as important to the investigation he was busy with. Eventually Mrs Prins' statement was obtained on 14 February 2012 in the presence of her Advocate. On 17 February 2012 when Inspector Tolken presented a typed version of Mrs Prins' statement to her for her signature, she then told him that Mr Avontuur had instructed her not to hand over any correspondence between Avontuur and Roux because such documents were privileged. It is common cause that Inspector Tolken was aware that numerous meetings had been held between the Municipality and Mr Avontuur for the former to obtain copies of the relevant files. Inspector Tolken stated that he hoped that these meetings would result in the Municipality gaining access to these files but that (in his view) Mr Avontuur kept on postponing the due dates with the Municipality even when the latter had offered to make its resources available for the copying of the files.

**FOUNDING AFFIDAVIT**

[7] This was deposed to by Clyde Alex Shaun Avontuur ("Mr Avontuur" referred to above), an admitted Attorney who practices as such at 102, Allied Building, Church Street, Oudtshoorn. He is cited as Second

Applicant in these proceedings. He describes himself in this Affidavit also as the sole director of Avontuut & Associates Incorporated, a company and a firm of Attorneys at Oudtshoorn. Before dealing with the merits of the application, Mr Avontuur raised what he termed a preliminary point and pointed out that the Second Respondent, Inspector Tolken, applied for the issuing of a warrant in terms of section 205 of the Criminal Procedure Act and that instead of ordering a section 205 subpoena, the chief magistrate issued a warrant in terms of section 21 of the Criminal Procedure Act. Mr Avontuur contended that because of the aforegoing procedural defect the warrants became materially so defective that it ought to be set aside on this basis alone.

[8] Mr Avontuur contended that he objects to the admissibility of any communication between himself, the First Applicant and Mari Roux, Costs Consultant. He asserted that all such communications are privileged and are protected from disclosure. He explained that he consulted Ms Roux in confidence pertaining to a dispute with the Municipality and that neither himself nor the First Respondent had given consent, expressly or otherwise that the privilege be lifted. He stated that in fact he had maintained his stance to Inspector Tolken that such communication is protected and asserted the privilege. He averred that he further objects to the admissibility of what he calls hearsay evidence contained in the supporting Affidavit by Jan Celliers annexed to Inspector Tolken's Affidavit. Mr Avontuur on being confronted by Inspector Tolken and other members of the Police at his practice and having been shown a search warrant issued by the chief magistrate, had proceeded to the latter's offices in order to obtain copy of the application on the strength of which the search warrant was authorized and subsequently issued. He mentioned that in the meantime Inspector Tolken and his team began in

earnest to execute the search warrant and that he also assisted them by indicating where they could find the files sought to be found. Mr Avontuur made his staff members available to Inspector Tolken and the team. The reason Mr Avontuur wanted a copy of the application on the strength of which the search warrants had been authorized was that he intended to make an application seeking to set these warrants aside.

[9] Indeed Mr Avontuur reiterated that on 20 February 2012 at 12h30 Inspector Tolken and his team had finished their seizure and that he (Avontuur) pertinently informed them that as far as he was concerned, the files seized were all privileged as his client (the Municipality) had not given its permission to disclose it to anyone. Mr Avontuur averred that since he was informed about the investigation he and his firm gave the investigation his full co-operation and support. According to him he was informed verbally by Inspector Tolken about the investigation and charges against himself *inter alia* that he fraudulently submitted claims or documentation to the Municipality. However, when Mr Avontuur requested to have sight of the Affidavits and documents in the Police docket, Inspector Tolken turned down the request and advised him that the request can and must only be made when he was officially charged. Mr Avontuur confirmed that on 14 February 2012 Inspector Tolken obtained a witness statement from Mrs Petronella Prins employed at the First Applicant's offices as a collections officer. The statement was taken from her in the presence of Advocate Stephen Lourens. Mr Avontuur in the Founding Affidavit briefly set out the contents of Mrs Prins' statement, thus:

> *"She never made any representation to Metembo or anyone else at the Municipality that all the phase 1 and 2 accounts had been taxed; she explained in detail that only some of the accounts had*

*been taxed to provide a bench mark for all the other accounts; she had never represented to Metembo or anyone else that Mari Roux had drawn all the accounts. She explained that she used the different columns not to convey that all the accounts in fact had been taxed or drawn by Mari Roux, but only for our internal office purposes to draw the distinction between what the Taxing Master had allowed and what was drawn according to the formula provided by Roux. Roux's first nine accounts were to serve as concept accounts to see what we were entitled to and what the Taxing Master will allow. It was to serve as the basis for the drawing of all other accounts."*

[10] According to Mr Avontuur Mari Roux in fact drafted nine (9) accounts and the First Applicant used it as the basis for drawing all other accounts. Mr Avontuur hastened to add that Ms Roux also informed them that prior to her drafting the accounts, she phoned the Taxing Master to enquire whether she (Ms Roux) was on the mark with what would be allowed and that based on her discussion with the Taxing Master, she drew up the accounts. Mr Avontuur had telephonic discussion with Inspector Tolken wherein the former explained to the latter that he (Mr Avontuur) was concerned in that all communications with Ms Roux were privileged and he implored Inspector Tolken to respect that – in the same way as he (Mr Avontuur) respected their right not to provide him with copies of their docket. Mr Avontuur also averred that during the conversation he had with Inspector Tolken, he informed the latter that they (1st and 2nd Applicants) were in the process of providing the Municipality with all their documents and files to go through and verify. Mr Avontuur opined that the Municipality never doubted that the work had in fact been performed on all their files. According to Mr Avontuur, the only dispute

which existed since 2008 had been on what scale the First Applicant was entitled to be compensated. According to Mr Avontuut his firm had undertaken to provide the Municipality with a host of documentation including copies of all monthly statements, invoices and files where matters had been finalized. Mr Avontuur stipulated that there was an agreement between his firm and the Municipality that all the files would be provided to the latter. The only challenge that then existed was that the First Applicant wanted to retain copies of all files for future reference and they waited for advises in this regard from the Municipality. Mr Avontuur mentioned that their copy machine presented some challenges and it was not possible to make the 6000 plus copies but that on 19 February 2012 the Municipality gave permission that its infrastructure could be used for purposes of making copies. This was scheduled to take place on 13 February 2012 but it did not materialize as Mr Avontuur experienced some crisis at his office and he requested an extension. He added that despite all that he did provide the Municipality with copies of all monthly statements pertaining to the Municipal collections. Strangely he also mentioned that apparently all those monthly statements went missing at the Municipality offices and the new manager requested that he be provided with copies of statements previously submitted.

[11] Mr Avontuur stated that he then requested a meeting with the Municipality and this was necessitated by the concerns he had and the questions of handing over the files. The meeting took place on 17 February 2012. The Municipality was represented by Advocate Human. It was, according to Mr Avontuur, in this meeting that a firm arrangement was made regarding the handing over of the files. Mr Avontuur then arranged to see one Warren Muller on Monday, 20 February 2012 the purpose being to obtain the First Applicant's memory stick and to finalize

arrangement made by Advocate Human pertaining to where the copies would be made and who in the Municipality would be responsible. Mr Avontuur concluding on this aspect stated the following:

*"I am informed by both advocate Human and Muller that they had pertinently informed Tolken of the fact that a meeting had been scheduled with the Municipality on 20 February 2012 and that arrangements had been made to hand over the files. It was when I came back from the meeting that I was confronted by Tolken and his team at my office. I tried to contact Mr Muller and Advocate Human, but to no avail."*

[12] Responding allegations contained in Inspector Tolken's Affidavit Mr Avontuur contended that reference to MAS 36/8/2011 was highly irrelevant and was included with sole purpose of influencing the chief magistrate. He denied that he represented that Roux made a "Koste bapaling" on the files and that accounts had been taxed. In his view, there is no factual basis for that averment in that he never represented anything than the scale upon which the accounts had been drawn were provided by Mari Roux. He had explained to the Municipality that they (Avontuur & Associates) only used her concept accounts as the basis to draw the other accounts. Mr Avontuur emphasized that at the time of the 84 taxation, the only issue in dispute with the Municipality was the scale that was supposed to be used in compensating them – and by obtaining an opinion on the matter from an independent consultant they tried to persuade the Municipality to pay on the higher scale, namely attorney and client.

[13] According to Mr Avontuur everybody in the Municipality, including Lesley Swanepoel and Lin Meiring knew that only 84 accounts had been taxed whereupon the Taxing Master's decisions were taken on review and that the review Court referred the matter to action proceedings. Mr

Avontuur added that their firm's competitor, Coetzee & Van der Bergh who also did collections on behalf of the Municipality was paid on attorney-client scale and the Municipality did not go through any of their files to verify whether they are entitled to the payment. Mr Avontuur took issue with Inspector Tolken averring that the latter was lying under oath in saying that no taxation took place. Mr Avontuur referred to 84 matters in which each file was subjected to taxation and contended that Inspector Tolken's misrepresentation of the facts in this regard was a deliberate attempt calculated to mislead the chief magistrate and that it appears that he was successful in doing so. Mr Avontuur dealt with the further assertions contained in paragraph 4 of Inspector Tolken's Affidavit filed in support of his application for search warrants and labeled it as misleading and fraudulent. He contended that to say that he refused to co-operate with the Municipality cannot be supported by any evidence under oath or otherwise. On the contrary, according to Mr Avontuur, Inspector Tolken had been informed by Messrs Human and Muller that the First Applicant was in the process of providing all the documentations, including the files that he was looking for. He (Avontuur) also accused Mr Celliers of non-disclosure in that he did not inform the chief magistrate about the Affidavit by Mrs Prins which ran contrary to the assertion made by Mr Celliers.

[14] As far as urgency is concerned, Mr Avontuur merely commented that he had wanted to hand over these files to the Municipality and that the only reason it took some time to do so was that they (the Applicants) wanted to retain copies of each and every file and its contents in order to ensure that proper record would be kept of each and every file (and the contents thereof) and obtain acknowledgement of receipt in the proper way because previously documents submitted went missing which present

serious problems for the Applicants. Even though all these files were closed and finalized, according to Mr Avontuur, it remained of vital importance to them (the Applicants) that they retain copies thereof. What constitutes urgency, according to Mr Avontuur is that the nature and extent of the intrusion into his rights to privacy justifiably should be treated as urgent. In conclusion Mr Avontuur contended that the chief magistrate hardly gave sufficient consideration to the question whether documents sought would be obtained by less invasive means. Mr Avontuur accuses the chief magistrate in these proceedings of not being alive to the inherent contradictions contained in Inspector Tolken's application as supplemented by the various affidavits. Further accusations heaped on the chief magistrate are inter alia that he did not request copies of all the various and material annexures that were party to the Affidavits of Mr Metembo and Ms Roux; that he too readily accepted the word of Inspector Tolken that the Applicants had refused to co-operate.

[15] There are Confirmatory Affidavits filed together with the Founding Affidavit *inter alia* that of Advocate Stephan Lourens and Mrs Petronella Prins, that of Magda van Aswegen, as well as that of Francois Human. These Confirmatory Affidavits need not be summarized for purposes of this judgment. They merely confirm certain assertions made in the Founding Affidavit. Mr Avontuur also filed of record a short Supplementary Affidavit wherein he merely confirmed that the chief magistrate had personal knowledge of the fact that he (Mr Avontuur) did in fact undertake eighty four (84) taxations during the course of 2010. He (Mr Avontuur) reiterated that he has a distinct recollection that shortly before the second taxations involving approximately thirty six (36) bills of costs, the chief magistrate had a long meeting with the Taxing Master, apparently advising her on the taxations which were set to be argued.

According to Mr Avontuur, the chief magistrate is also the magistrate that allocated the review of taxation proceedings emanating from the Taxing Master's ruling to Ms Venter, the Additional Magistrate who presided over the review proceedings in 2010.

**THE ANSWERING AFFFIDAVIT**

[16] Inspector Tolken deposed to the Answering Affidavit. He also deposed to an Affidavit in support of an application for the authorization and issue of the search warrants before the chief magistrate Oudtshoorn. The latter Affidavit is attached as Annexure "FT11" to the Answering papers. Inspector Tolken emphasized that Annexure "FT1" which is the list entitled *"Boedels en Deernisse Interim Rekeningstaat"* dated 17 November 2011 was attached to the papers before the chief magistrate. Annexure "FT2", a statement signed on 15 February 2012 by Mr Warren Marco Muller, Acting Manager: Contracts and Legal Services at the Municipality with Annexure numbers "WM1" to "WM6" were also attached to the Founding papers before the chief magistrate. According to Inspector Tolken the other documentation before the chief magistrate were (a) Celliers' statement (Annexure FT5"); (b) Metembo's two statements (Annexures "FT6" and "FT7" respectively; (c) Roux's statement (Annexure "FT8"). Inspector Tolken mentioned in the Answering Affidavit that it was on Wednesday 15 February 2012 that he first approached the chief magistrate to apply for the search warrants. In his possession he had the Police docket. As the Inspector further elucidated he gave his Supporting Affidavits and its annexure to the chief magistrate and proceeded *"to talk him through the investigation and the statements that had been taken from various people during the investigation, including Prins."* According to Inspector Tolken the chief

magistrate would ask him for a copy of a statement if it was not part of his Supporting Affidavit which the magistrate read.

[17] Inspector Tolken stated that with regard to the question of whether the 750 bills had been taxed or not, the chief magistrate called Ms Struwig into his office to tell him what had happened. According to Inspector Tolken, Ms Struwig told the chief magistrate that 85 matters had been taxed by her in relation to cases which Mr Avontuur had handled on behalf of the Municipality. Inspector Tolken obtained a statement from Ms Struwig the next day which was 17 February 2012. Inspector Tolken stated that it was before 09h2012 on 17 February 2012 that he took Ms Struwig's statement along with all the other documentation to the chief magistrate who then authorized the issue of the two search warrants. Inspector Tolken elucidating further on this aspect mentioned that as he was aware that there was a meeting between Mr Avontuur and the Municipality he did not execute the warrant as he wanted to allow further time and an opportunity for Mr Avontuur to hand over the files to the Municipality.

[18] It was only on 29 February 2012 that Inspector Tolken telephoned Mr Muller in order to confirm whether Mr Avontuur had handed over the requested files to the Municipality. He received confirmation that Mr Avontuur had not handed over the files nor could Mr Muller confirm the outcome of the meeting between Mr Human and Mr Avontuur which was supposed to have taken place the preceding Friday afternoon, on 17 February 2012. According to Inspector Tolken, it is only then that he decided to go ahead with the search because of the lengthy delays which had been caused in this matter by Mr Avontuur not providing the original files or copies of the original files to the Municipality. He stated that he

was of the opinion that it was not in the interests of justice to wait any longer. He opined that the investigation was dragging and the files to be seized were required for the matter to be further investigated and would be required as evidence in Court if the matter proceeded to trial. Inspector Tolken stated that he was concerned about what he heard, namely that Mr Avontuur wanted to scan the contents of the files and save it on a flash-drive for the Municipality. This, according to Inspector Tolken, was not acceptable to the Municipality and the police required to have access to the original files and consequently Inspector Tolken was also concerned that not everything would be scanned or that documents would be manipulated. According to Inspector Tolken at the time he made his decision to search he did not know of the existence of the e-mail correspondence dated 20 February 2012 sent at 8h38 from Mr Muller to Mr Avontuur (Annexure CA1 to the Founding Affidavit) which said that as per the agreement between Mr Human and Mr Avontuur *"kan...die leers vanoggend bring sodat fotostate gemaak kan word."* Inspector Tolken brought it to the notice of the Court that between the time it took him to drive from George to Oudtshoorn, Mr Muller did not contact him to inform him of any arrangements he had made with Mr Avontuur, despite him knowing that Inspector Tolken was about to execute the search warrants. Nonetheless, Inspector Tolken added, when the search warrants were executed the files were still found to be at the First Applicant's premises.

[19] Inspector Tolken stated categorically that it was about 09h15 that he and his colleagues, Warrant Officer C Truter and Constable EC Dean (all having been expressly authorized by the chief magistrate) went to execute the search warrants at the First Applicant's business premises. On arrival they found Mrs Prins and other First Applicant's employees. According

to Inspector Tolken he showed the relevant search warrant to them and explained what documents were being sought. Mrs Prins then telephoned Mr Avontuur who arrived within two minutes. When Mr Avontuur arrived, according to Inspector Tolken, he wanted to stop the search and he started making calls on his phone. Inspector Tolken added that he became aware that Mr Avontuur tried to call the chief magistrate, Mr Muller and Mr Human but that he was unsuccessful. Inspector Tolken in order to break the impulse told Mr Avontuur that he would continue with the search until he had obtained a Court order setting aside the search warrants. Again the Inspector explained the purpose of the search and the files he was looking for to Mr Avontuur and he even showed him the list of articles to be seized and asked him to hand over the files appearing on the list in order to make the search easier and quicker. Mr Avontuur then asked Mrs Prins (according to the Inspector) who apparently worked with these files to point out the relevant files and to give these files to the Police and to remain present throughout the search and seizure. The Inspector hastened to add that he gave a copy of the search warrant to Mr Avontuur. However, Mr Avontuur then left the First Applicant's premises and whilst the search was still ongoing, he came in and left again a few times. The Inspector hastened to mention that at no stage during the execution of the search warrants did Mr Avontuur assert privilege over any of the files on the list of articles to be seized annexed to the search warrant.

[20] Indeed, according to Inspector Tolken, Mrs Prins pointed out the files listed on the list of articles to be seized, the majority of which were laying spread out in a front room at the First Applicant's premises whilst the rest was in her office. A total of 736 files of the listed 750 files were seized from the First Applicant's premises. An inventory or receipt of all the

files taken from the First Applicant's premises signed for on behalf of Mr Avontuur by Mrs Prins is attached to the Answering Affidavit as Annexure "FC14". According to the Inspector the numbers of the files on Annexure "FC14" – the inventory, correspond with the numbers of the files on the list of articles to be seized. A copy of the inventory was given to Mrs Prins. According to the Inspector, surprising at the end of the search just as the team was leaving the premises, Mr Avontuur told the Inspector that he should know that the items seized were privileged, without specifying any particular documents. Inspector Tolken stated that he also completed a report on the execution of the warrants – he completed information of who had been present and what had happened during the search and that 736 of the 750 files had been seized. Mrs Prins signed the report and the report also confirmed that no damage had been caused during the execution of the search warrant. The latter report is attached to the Answering Affidavit and is marked Annexure "FC15". These files were packed into 13 evidence bags with seal numbers and the 13 bags were registered on SAP13 as SAP 13/400/2012 at Oudtshoorn Police station. Inspector Tolken, stated that on 28 February 2012 as per the order of Zondi J dated 22 February 2012, he took the 13 evidence bags to the Sheriff of Oudtshoorn. Acknowledgment to this effect by the Sheriff is attached to the Answering papers as Annexure "FC16".

[21] Responding to paragraph 7 of the Founding Affidavit, Inspector Tolken stated that while it is correct that in the heading of his Founding Affidavit that served before the chief magistrate he mistakenly referred to section 205 of the Criminal Procedure Act, he in fact intended and did make the application for a search warrant under section 21 of the Criminal Procedure Act. He contended that the incorrect reference in the Affidavit supporting the application does not make the search warrants issued

pursuant to section 21 materially defective. In any event, stated Inspector Tolken, the documents for which seizure was sought and which were seized related to files in the Applicants' possession that belonged to the Municipality. He added that there is no reference to notes made by Ms Roux or correspondence between Ms Roux and Mr Avontuur and Associates being seized. The Inspector emphasized that at no stage during the execution of the search warrants did Mr Avontuur or Mrs Prins assert that any such documents, i.e. the taxation notes prepared by Ms Roux or correspondence between Ms Roux and Mr Avontuur were subject to privilege and should be placed to one side despite the fact that Mr Avontuur had asserted privilege when these documents were attached to Mrs Prins' statement.

[22] However, Inspector Tolken hastened to add, that as he had not had sight of any of the files seized, he was in no position to confirm whether any such documentation was even seized. The Inspector placed emphasis on the fact that the only privilege Mr Avontuur asserted was done in the most cursory manner and without reference to any specific items and certainly not with regards to these documents he is now claiming are privileged. Inspector Tolken boldly stated that in his view there is no privilege attaching to the taxation notes and communications between Ms Roux and Mr Avontuur for the following reasons:

*"(a) The list of names attached as annecure "FT3" in column five prepared by the Applicants refers to "Bedrag (Mari Roux)" which is a deliberate disclosure of the advice which Ms Roux is allegedly to have given the Applicants which constitutes an express waiver of the confidentiality in the alleged amounts she is said to have advised on; and (b) whatever advice Ms Roux gave Mr Avontuur was not given in preparation of litigation; taxation not being litigation."*

[23] Inspector Tolken vehemently denied that what Mr Celliers said in his statement is or amounts to hearsay. He added that Mr Celliers' statement was a summary of the signed and affirmed statements made by Mr Metembo and Ms Roux and both statements were placed together with Mr Celliers' statement before the chief magistrate. Responding to paragraph 8.6 of the founding Affidavit the Inspector contended that the privilege *vis-à-vis* the files is not for Mr Avontuur to assert but for the Municipality to assert and to do so would be inimical to its interests. As to the averments made by the Applicants in the Founding papers (paragraph 9 of the Founding Affidavit) the Inspector reiterated that there was sufficient information before the chief magistrate to show that there were reasonable grounds to believe that there were items in the Applicants' possession that were concerned in or that there were reasonable grounds to believe that these items were concerned in the commission or suspected commission of an offence. The Inspector denied that he intended to or did mislead the magistrate in his supporting Affidavit which was drafted on the basis of the statement he already had in the police docket i.e. Mr Celliers, Mr Metembo and Ms Roux. He added that the chief magistrate did not make his decision to issue the search warrants only on the Inspector's Supporting statement.

**REPLYING AFFIDAVIT**

[24] As would be expected Mr Avontuur deposed to this Affidavit on behalf of the two Applicants. He premised his reply on an averment that the averments contained in the Answering Affidavit are irrelevant to the issues in this application, particularly any reference to the merits of the charges. In Mr Avontuur's view, the version of Inspector Tolken contained in paragraphs 20 and 21 of the Answering Affidavit constitutes

a fresh ground of gross irregularity which is of such a nature that it should lead to the setting aside of the entire proceedings before the chief magistrate. Mr Avontuur insisted that he considers the evidence relating to Mr Celliers as hearsay. He also averred that the Special Investigation unit (SIU) has no authority to investigate the current matter since it clearly falls outside the scope of the enabling proclamation. He reiterated that the Taxing Master only taxed 84 accounts and that the remainder of the 735 accounts was drawn using the same scale as that allowed by the Taxing Master. He denied that Ms Roux drew all the accounts as shown in the invoice.

[25] Replying to paragraph 10 of the Answering Affidavit, Mr Avontuur stated the following:

*"...Tolken lies under oath when he asserts that Applicants had committed theft. Nowhere in his application for the warrant, or his answering affidavit are there any objective factual grounds that established a prima facie case or reasonable suspicion that Applicants stole from the Municipality. The inclusion of the crime of theft in its application was made with the apparent attempt to persuade the 1st Respondent to grant the warrant."* Mr Avontuur contended that it was clear that Inspector Tolken acknowledge that there was an alternative, less intrusive way of obtaining the files in that he was aware of a meeting scheduled for 17 February 2012, the purpose of which was to arrange for the handing over of the files in question. Mr Avontuur was quite concerned that by saying that Mr Metembo's second statement was also presented before the chief magistrate, Inspector Tolken is attempting to mislead this Court in that he is knowingly and falsely representing that such statement served before the chief magistrate. Mr Avontuur is quite concerned that Inspector Tolken stated that he talked the chief magistrate through statements taken

from various people during the investigation. About the chief magistrate, Mr Avontuur had the following to say:

*"1st Respondent actively and pertinently drove the application for the Applicant and descended into the arena by calling a material state witness to this office, interviewing her and receiving information from her, extrinsic to the application before him. 1st Respondent therefore had information before him that was not under oath.....1st Respondent irregularly drove the case for the warrant applicant by calling for and receiving evidence not part of the papers before him. He irregularly decided the application on information that was not on oath and not part of Tolken's papers."*

Mr Avontuur contended that there was a positive legal duty on Inspector Tolken to call and contact either himself (Mr Avontuur) or Advocate Human to confirm whether the Municipality was in receipt of the files or how far the process was. Mr Avontuur denied that there were lengthy delays in providing the files and or that the delays were occasioned by Mr Avontuur himself. He stated that he relocated from Lichtenburg during the first week of January 2012 and his practice only reopened on/about 27 January 2012 – the first meeting with the Municipality was, according to Mr Avontuur, towards the end of January 2012 to discuss a whole range of issues, including the provision of a host of documentation and information to the Municipality by the First Applicant. Concluding in this regard, Mr Avontuur stipulated that the statement by the Inspector that he was concerned that everything would not be scanned or that documents would be manipulated is unfounded and was not part of his motivation for the warrant. In Mr Avontuur's view, this is clearly an afterthought conjured up to persuade this Court.

[26] Mr Avontuur insisted that he did assert privilege. According to him the files were privileged and his client, the Municipality had not given its consent to the lifting of the privilege. In Mr Avontuur's view, the fact that the Municipality has no problems that the files be seized does not mean it consented to parting ways with the privilege. Dealing with an averment of waiver contained in the Answering Affidavit, Mr Avontuur stated categorically that there was never ever any waiver, expressly, impliedly or otherwise given by either himself or the First Applicant which has the effect of defeating the privilege. He further denied that taxation is litigation. Mr Avontuur also disputed the averment that nothing eventuated from the discussions he had with the Municipality maintaining that he did provide the latter with hundreds of documents as per discussion held and undertakings made. Dealing with paragraph 64 of the Answering Affidavit, Mr Avontuur explained as follows:

*"Tolken's denial about what induced the Municipality to pay 1st Applicant is unsupported by any evidence, nowhere in the State's case up to now does anyone lay the factual foundation that any official at the Municipality had been mislead (sic), deceived and/or induced to make payment as a result of any misrepresentation. The only reference in the State's case as to what motivated the Municipality to pay is contained in Mr Metembo's first statement and his handwritten notes. At paragraph 8 (of his notes) he asserts that he and Mr Swanepoel had in principle decided to make payment, on the ground that 1st Applicant was entitled to be paid on the same scale as Coetzee & van Der Bergh."*

**THE CHIEF MAGISTRATE'S REASONS (IN TERMSOF RULE 53 (1) (b))**

[27] The chief magistrate herein cited as the First Respondent gave reasons for his decision to authorize the issue of the two warrants. He premised this

by mentioning that Inspector Tolken applied for a search warrant in terms of section 21 of the Criminal Procedure Act and emphasized that although the heading on the Affidavit of Inspector Tolken indicates "Visenteringslasbrief ingevolge artikel 205", it was never the intention to issue a subpoena. Indeed the search warrant by the chief magistrate is issued in terms of section 21 read with sections 20 (a) and (b) of the Criminal Procedure Act.

[28] The chief magistrate states that the Affidavits presented to him when the application was made are the following:

(a) Frank Jacques Tolken (with Annexure "FJ1"); (b) Warren Marco Muller (with Annexures "WM1-5"); (c) Jan Abraham Celliers; (d) Brenda Struwig (with Annexures "BS1-2"; (e) Mari Roux; (f) Bjorn Henrique Clayton Metembo (with Annexure "BM1 – same as Annexure "FJ1"). According to the chief magistrate he thoroughly scrutinized the Affidavits with annexures to ensure that the warrant provides clarity as to which offence has been committed or is suspected of having been committed. The chief magistrate in his reasons states that after consideration of the Affidavits and annexures, he was in terms of section 21 (1) (a) read with section 20 (a) and (b) satisfied that there are reasonable grounds for believing that the files are in the possession or under the control or on the premises of the Applicants. He says he was further satisfied that the files were the articles as referred to in section 20 (a) and (b). The chief magistrate states in his reasons that it was clear from the evidence presented before him that a fraudulent misrepresentation was made to the Municipality in order to convince them to pay over R313 267.99 to the Applicants and he concluded that the files were needed for investigation. The chief magistrate stipulates that it was clear from the

evidence that the Respondents (the present Applicants) were not prepared to hand over the files. The chief magistrate expressed a view that there were no contradictions in the papers presented to him by Inspector Tolken. Importantly the chief magistrate although cited as the First Respondent has indicated that he abides with the Courts decision herein.

**DISCUSSON**

[29] As it appears in the Founding papers, the Applicants seek relief setting aside the warrant and the documents seized returned on the basis that (a) the communications between the Applicants and Mari Roux (the tax consultant) is privileged and the files themselves are privileged; (b) the magistrate decided the application on information that was not on oath and not part of Inspector Tolken's papers; (c) the magistrate failed to exercise his discretion when deciding whether or not to authorize the warrants in that:

(i) Inspector Tolken who had a legal duty to do so did not inform him that a less invasive means than the search and seizure existed to obtain the files; he had been able to secure relevant information from the Applicant; Applicants had given their full support and co-operation to his investigation; and he deliberately and purposefully misled the chief magistrate by representing that no taxation had been done; (ii) There is no jurisdictional basis on which to authorize a warrant to search Mr Avontuur's home; the Special Investigation Unit was not authorized to investigate the charges against the Applicants; and lastly the admissibility of hearsay in motion proceedings.

**PRIVILEGE (the Attorneys' files)**

[30] The broad principle is that only confidential communications and material integral thereto between attorney and client made for the purpose of obtaining legal advice are privileged. Among the multitude of documents usually contained in an attorney's file there would invariably be documents and information which in the ordinary course may be presumed not to be privileged. The examples would be statements of account reflecting the amount received by the attorney from the Defendant, particulars of the attorney's fees and disbursements and what the nett amount that was paid over to the client. See ***Bogoshi v Van Vuuren NO and Others; Bogoshi and Another v Director, Office for Serious Economic Offences and Others ("Bogoshi A")*** 1996 (1) SA 785 (A) at 791 B-C; 792 J to 793 A-D. Such unprivileged documents can in terms of this authority be seized. See ***Bogoshi A*** at 793 D-E. I have no quarrel with the fact that it remains the duty of the Applicants to claim the privilege because in any event privilege is the right of the attorney's client. But in claiming privilege the attorney must act not in his own interests or on his own behalf, but always for the benefit of the client. Unless the attorney does so, his claim to privilege may be regarded as not genuine at all. In the latter event a Court would be entitled to disregard the claim to privilege and permit its seizure. This occurred in ***Bogoshi v Van Vuuren NO and Others; Bogoshi and Another v Director for Serious Economic Offences, and Others*** *supra* where the attorney claimed the privilege ostensibly on behalf of his client but in truth in order to frustrate an investigation into his own alleged criminal conduct. See ***Bogoshi A*** at 793 H-J to 794 A. The latter case also involved the seizure of documents. At 1213-14 the Court reasoned as follows:

*"It is not apparent to us what interest is truly served by permitting an attorney to prevent this type of investigation of his own alleged criminal*

*conduct by asserting an innocent client's privilege with respect to documents tending to show criminal activity by the lawyer. On the contrary, the values implicated, particularly the search for the truth, weigh heavily in favour of denying the privilege in these circumstances."*
I fully agree with Ms Erasmus that the Applicants' claim to privilege over the files in the instant matter is not genuine as it is inimical to the Municipality's interests. In the alternative Ms Erasmus submitted that there is an impugned waiver of any privilege over the files by the Municipality. This alternative argument assumes (does not, however, admit) that there is or may be confidential advice on the files. I add though, nowhere in the papers is it mentioned that there is confidential advice on the files.

[31] Imputed waiver (or deemed waiver) takes place when – irrespective of what the holder's intention may have been – his conduct reached a point of disclosure that considerations of fairness require that the privilege must cease. Imputed waiver was found to have occurred in ***S v Tandwa and Others*** 2008 (1) SACR 613 (SCA) paras [14] to [20], where it was held that *"when a client alleges a breach of duty by the attorney, the privilege is waived as to all communications relevant to that issue."* Importantly in the instant matter a municipal official, Mr Muller, submitted a sworn statement wherein he has alleged that the Applicants have breached their duties and as a result the Municipality must be deemed to have waived any privilege in regard to the files relevant to this issue. It is perhaps prudent to quote the relevant paragraphs in Muller's statement:
*"8. Ek is van mening, op grond van die faktuur en die ondersteunende dokumentasie daartoe, dat A & G met die faktuur (WM) aan die Munisipaliteit voorgehou het dat hul kostes vir dienste gelewer van toepassing is op fase 1 & 2 van die deernishuishoudings, teen wie die*

*Raad lank terug reeds besluit het dat vorderings gestaak moet word, A & G ingelig was daarvan, en hul kostes R313 267.99 beloop het. (Met die verwisseling van personeel by die Munisipaliteit het ander amptenare as die in aanhangsels WM2 & WM 3, [met die uitsondering van Mnr Leslie Swanepoel], die aangeleentheid gehanteer). A & G het verder voorgehou dat 750 leêrs foutiewelik deur die takseermeester getakseer was, en dat hul firma die 750 leêrs aan 'n koste consultant, ene Mari Roux, voorgelê het vir ondersoek. A & G het ook beweer dat Mari Roux die kostes vasgestel het op 'n prokureur/kliënt skaal of tarief, en A & G daarop geregtig was. Die tariewe wat Mari Roux na bewering bepaal het is heelwat meer as die soos (na bewering) deur die takseermeester vasgestel. A & G het daarna die verskil tussen die skale van die takseermeester en die van Mari Roux, aan die Munisipaliteit gefaktureer. Die Munisipaliteit het op 9 Desember 2011 die bedrag aan A & G betaal. Geen gespesifiseerde rekeningstate of enige leers was egter deur A & G aan die Munisipaliteit oorhandig of voorsien nie, soos versoek."*

*"12. Die leers is uiters belangrik vir die Munisipaliteit aangesien die Munisipaliteit nie weet of A & G wel gelde gevorder het op die leers nie, en of die leers wel getakseer was soos A & G in hul faktuur voorgee nie, en of die koste consultant wel die tariewe vasgestel het soos vermeld in die faktuur nie."*

**COMMUNICATION WITH MS ROUX**

[32] All of the accounts drawn by Ms Roux do appear on the list of names. Indeed Annexure "CA4" to the Founding papers is a list of all the accounts (they are eight in number) drawn up by M Roux that appear on the list of names. The relevant accounts that were drawn by Ms Roux are attached to the Founding papers as Annexure "CA55". The accounts attached as "CA55" corresponded with the names on the list but for

"Scholtz C and Daniels V". It is common cause that Ms Roux did not check every file. This was never her instruction anyway. It is common cause that the First Applicant submitted an invoice in the amount of R313 267.99 as already shown earlier on in this judgment. The list of names thereon attached has six columns, the importance of which lies in column four (4), five (5) and six (6): (a) Column 4 entitled "Bedrag (Taksasie)" referred (I am told) to the amounts allegedly allowed by the Taxing Master of the Oudtshoorn Magistrate's Court. According to the Applicants only 84 accounts were taxed whilst the remainder (735) accounts....was drawn using the same scale as that allowed by the Taxing Master; (b) Column 5 entitled "Bedrag (Mari Roux)" allegedly referred to the amounts neither determined by Ms Roux in the case of the eight accounts or by the First Applicant by applying the formula worked out by Ms Roux; (c) Column 6 entitled "Verskil" was the difference in the amounts set out in columns 4 and 5. The total of column 6 was what the Applicants demanded from the Municipality in the invoice.

[33] In the light of the fact that on the Applicants' own admission only eight (at the most nine) files may contain communications between the Applicants and Ms Roux, Ms Erasmus correctly submitted that this matter should be approached on the basis that only those files listed in Annexure "CA4" may contain some confidential privileged documents. The important thing to mention is that there are no allegations in the papers that any documentation other than the files as listed on the lists of names (for example, correspondence between Ms Roux and Mr Avontuur) was seized. The submission that with regard to these eight files at least the Applicants have waived their privilege, cannot be faulted. In ***Bogoshi (A)*** case *supra* the following authoritative formulation appears with which I am in full agreement:

*"It follows from what has been said that the matter must be approached on the basis that each of the files seized contained some privileged documents. But privilege is not cast in stone; it has its limitations. It may be waived. Or it may be destroyed (see R v Barton [1972] 2 ALL ER 1192 (Crown Ct) and the comments of Botha JA on that case in S v Safatsa and Others 1988 (1) SA 868 (A) at 883E-F). There is also the possibility, referred to in Safatsa (at 886I), that the Court has the power to relax the rules of privilege."*

It is trite that legal professional privilege may be lost by the person holding it, by a waiver, which may be express or implied, or by imputation of law irrespective of the person's intention. The distinction between implied waiver and imputed waiver, and the principles governing imputed waiver are described by **Wigmore – Evidence in trials at Common Law** (revised by McNaughton) (1961 Volume 8 paragraph 2327). The author first posed a question:

*'What constitutes a waiver by implication?'* He then proceeded to supply the answer to his own question as follows:

*'Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicted in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his immunity shall cease, whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.'*

I fully agree with this passage. In any event, the same passage has featured prominently in cases decided by various Courts in this Country. See for instance:

***Ex parte Minister van Justisie: In re S v Wagner*** 1965 (4) SA 507 (A) (*'Wagner'*) 514; ***Msimang v Durban City Council and Others*** 1972 (4) SA 333 (D) (*'Msimang'*) 337; ***Euroshipping Corporation of Monrovia v Minister of Agricultural Economics & Marketing and Others*** 1979 (1) SA 637 (C) (*'Euroshipping'*) 645H-646A; ***S v Nhlapo and Others*** 1988 (3) SA 481 (T) (*'Nhlapo'*) 482D-H; ***Peacock v SA Eagle Insurance Co. Ltd.*** 1991 (1) SA 589 (C) (*'Peacock'*) 590I-591C; ***Bank of Lisbon and South Africa Ltd v Tandrien Beleggings (Pty) Ltd And Others*** (2) 1983 (2) SA 626 (W) (*'Bank of Lisbon'*) 628A-C and 629H?; ***Harksen v Attorney-General of the Province of the Cape of Good Hope and Others*** 1999 (1) SA 718 (C) (*'Harksen'*) para 62; ***Kommissaris van Binnelandse Inkomste v Van der Heever*** 1999 (3) SA 1051 (SCA) (*'Van der Heever'*) para 24.

[34] General principles have crystalized from the above cases *inter alia* the following:

(i) Where an intention to waive is expressed or can be inferred on the facts, the person holding the privilege will be found to have waived the privilege expressly or impliedly (See ***Peacock*** at 591 C-F). (ii) As regards implied waiver, the requisite intention to waive will be inferred only if the privilege-holder had full knowledge of his rights and his conduct is such that it can be inferred that he intended to abandon those rights (***Harksen*** at para 60; See the finding to this effect in ***Van der Heever*** at paras 29-35). (iii) Legal professional privilege may be imputedly waived where the conduct of the privilege-holder is such that, whatever his subjective

intention might have been, the inference must in fairness be drawn that he no longer relies on his privilege (***Van der Heever*** at para 23; ***Harksen*** at para 61). Hence an imputed waiver may be found even if the privilege-holder did not intend to waive. (iv) The conduct must include publication or publication of "*'n deel daarvan wees wat as grond kan dien vir die afleiding dat die litigant of aanklaer nie meer die inhoud van die stuk geheim wil hou nie.*" Without publication of privileged material, there can be no implied or imputed waiver of the privilege (***Wagner*** at 514 D-E). (v) The question whether such publication will amount to an imputed or implied waiver depends on the facts of the particular case (***Msimang*** at 338D-E; ***Harksen*** at para 66). (vi )The intention to waive and the extent and the effect of such waiver should be objectively determined in the circumstances from the conduct of the case and of the evidence led, without recourse to what counsel may or may not profess in argument to have intended (***Bank of Lisbon*** at 627). (vii) A partial publication of privileged material (eg the partial publication of a privileged document) may result in an implied or imputed waiver of all the privileged material (eg the whole document) (***Wagner*** at 514G; ***Van der Heever*** at paras 24 and 30). (viii) The basis of privilege is confidentiality. When confidence ceases, privilege ceases (***Bank of Lisbon*** 629).

## RELEVANT CASE LAW INCLUDING CASES OF FOREIGN JURISDICTIONS

[35] It may be helpful to briefly refer to cases where partial publication of privileged material resulted in a waiver of all the privileged documents. I do this *infra*. In ***Great Atlantic Insurance Co v Home Insurance Co and Others*** [1981] 2 ALL ER 485 (CA) ('Great Atlantic Insurance Co v

Home Insurance Co'), the second English decision relied on by Preiss J in ***Nhlapo***, in the course of discovery before a trial the plaintiffs' solicitors disclosed the first two paragraphs of a memorandum from their American attorneys relating to the action, which consisted of an account of a discussion between the attorneys and a third party. The solicitors intended to claim privilege for the remainder, but omitted to do so in their discovery. During the trial itself the two paragraphs were read out by plaintiffs' counsel in open Court. Thereupon defendants' counsel asked for disclosure of the rest of the memorandum on the ground that, even if the whole document was privileged, disclosure of part of it to the court amounted to a waiver of privilege. The Court of Appeal affirmed the trial judge's decision granting the application. Templeman LJ, who delivered the judgment of the Court, said the following:

*'...Once it is decided that the memorandum deals with only one subject-matter, it seems to me that it might be, or appear dangerous or misleading to allow the plaintiffs to disclose part of the memorandum and to assert privilege over the remainder. In the present case the suspicions of H which have not unnaturally been aroused by the disclosure of only part of the memorandum, can only be justified or allayed by disclosing the whole. It would be undesirable for severance to be allowed in these circumstances. In my judgment the simplest, safest and most straightforward rule is that, if a document is privileged, then privilege must be asserted, if at all, to the whole document, unless the document deals with separate subject-matters so that the document can in effect be divided into two separate and distinct documents, each of which is complete.'* (At 490h-j).

*'But in my judgment the plaintiffs deliberately chose to read part of the document which dealt with one subject-matter to the trial Judge and must disclose the whole. The deliberate introduction by the plaintiffs of part of*

*the memorandum into the trial record as a result of a mistake made by plaintiffs, waives privilege with regard to the whole document. I can see no principle whereby the Court could claim or exercise or could fairly and effectively exercise any discretion designed to put the clock back and to undo what has been done.'* (At 491j-492a).

*'In my judgment, however, the rule that privilege relating to a document which deals with one subject-matter cannot be waived as to a part and asserted as to remainder, is based on the possibility that any use of part of the document may be unfair or misleading, that the party who possesses the document is clearly not the person who can decide whether a partial disclosure is misleading or not, nor can the Judge decide without hearing argument, nor can he hear argument unless the document is disclosed as a whole to the other side. Once disclosure has taken place by introducing part of the document into evidence or using it in Court, it cannot be erased.'* (At 492h-j).

[36] In ***Bank of Lisbon*** (1983) *supra*, during the course of a trial, the plaintiff's attorney was called for the plaintiff and testified to what he had been told by another of the plaintiff's witnesses (one 'P') during a consultation. This evidence was led in an attempt to clarify discrepancies between P's evidence and parts of the plaintiff's reply to a request for further particulars, which had been drafted by the attorney on the basis of information supplied by P during the consultation. At the conclusion of the attorney's evidence-in-chief counsel for the defendant applied for an order that the attorney produce the notes made by him during consultation. The plaintiff's counsel opposed the application, emphasizing that the attorney did not have the notes with him when he gave evidence and had not referred to the contents of the notes. He also

stated that there had been and was no intention to waive privilege in respect of the notes. Van Dijkhorst J upheld the application, saying, amongst other things:

*'In my view a waiver of privilege in respect of a consultation between attorney and client or attorney and witness is a waiver of privilege in respect of the communications between them. This means that these communications may be made public. Surely, there can be no logical reason for the prevention of the disclosure of the record of such communications where their contents are already disclosable. Why should the veil of secrecy which was lifted from the communication shroud the contemporaneous documentation thereof? The basis of privilege is confidentiality. When confidence ceases, privilege ceases.'* (At 629F-G)

*'Fairness dictates that, when a witness testifies about privileged discussions and this amounts to a waiver of the privilege, the notes reflecting the matters which have become subject to disclosure should also be disclosed.'* (At 629H).

[37] In ***Nhlapo*** (1988) *supra*, during the course of a criminal trial, the prosecutor had put to one of the defendants that a material portion of his testimony was a fabricated afterthought, because it had not been put to one of the State witnesses when she first gave evidence. In an attempt to rebut the suggestion of fabricated evidence, in the course of re-examination the defendant was invited by his counsel to waive privilege in regard to a single page of a lengthy statement prepared by him long before the trial had commenced. The single page was handed in as an exhibit. After re-examination had ended the prosecutor applied for the whole of the statement to be handed over, on the ground that there had been an implied waiver of privilege in respect of the entire document.

Preiss J granted the application, subject to one reservation, on the ground that fairness and consistency required that the whole of the statement be disclosed (at 484C-E). The reservation was that if the statement dealt with separate subject-matters, the privilege was waived in relation to the part constituting the subject-matter of the disclosed portion only, a matter to be determined by the judge's examination of the entire statement (at 484F-A).

[38] In ***Ampolex Ltd v Perpetual Trustee Co (Cranberra) Ltd*** (1996) 40 NSWLR 12 ('***Ampolex*** No 2'), Rolfe J held that the following statement waived the privilege because it disclosed the substance of legal advice:

*'There is a dispute about the conversation ratio. Ampolex maintains that the correct ratio is 1:1 and has legal advice supporting this position.' Rolfe J said (at para 19): 'In my opinion the substance of the advice may well be disclosed if the ultimate conclusion, without the supporting reasoning process, is revealed. At that stage there has been, in my opinion, a disclosure of the substance of the advice, that is, what the advice is. Further the ultimate conclusion, whilst it may be a 'result' or 'consequence' of the reasoning is* more than that: in its own right it is the essence or vital part of the advice.'

In ***Ampolex Ltd v Perpetual Trustee Co (Cranberra) Ltd*** (1996) 137 ALR 28 ('Ampolex No 3'), Kirby J, in dismissing an application for a stay pending an application for a special leave to appeal Ampolex No 2, said (at para 34):

*'I agree that mere reference to the existence of legal advice would not amount to waiver of its contents. Rolfe J appears to acknowledge this distinction by later rulings to which I was taken during the course of argument. But at least in respect of the substance of the legal advice supporting Ampolex's assertion about the correct ratio, which is in*

*contest here, it is strongly arguable that the public reference to the supporting legal advice, waived the privilege as to the precise content of the legal advice on that point.'*

[39] ***Bennett v Chief Executive Officer of the Australian Customs*** (2004) 140 FCR 101 (FCA ('Bennett') arose from a letter written by the defendant's solicitors to the plaintiff's solicitors which referred to an opinion given to the defendant by its solicitors. The plaintiff applied for disclosure of the opinion. In an appeal against the decision of a single judge, the Full Court of the Federal Court of Australia (Tamberlin and Gyles JJ, Emmett J dissenting) upheld the application. Gyles J (with whose reasons Tamberlin J concurred), said the following:

*'The primary judge...drew a distinction between the conclusion expressed in legal advice on the one hand and the reasons for that conclusion on the other and took the view that disclosure of the conclusion does not involve disclosure of the reasons. In my opinion, that is an error on a question of law. It is contrary to established authority to which the primary judge was apparently not referred.'* (At para 62).

*'The voluntary disclosure of the gist or conclusion of the legal advice amounts to waiver in respect of the whole of the advice to which reference is made including the reasons for the conclusion. The primary judge was in error in drawing a distinction between conclusion and reasoning in the context of such a disclosure.'* (At para 65).

*'The reasoning in [Mann] casts no doubt as to the principles applicable to a situation where disclosure is made by one party to a dispute to another party to that dispute and in the absence of any special arrangements as to confidence.'* (At para 66).

*'The test looks to inconsistency between the disclosure that has been made by the client on the one hand and the purpose of confidentiality that underpins legal professional privilege on the other. It is not a matter simply of applying general notions of fairness as assessed by the individual judge. The authorities to which I have referred show that it is well established that for a client to deploy the substance or effect of legal advice for forensic or commercial purposes is inconsistent with the maintenance of the confidentiality that attracts legal professional privilege.'* (At para 68).

[40] In his judgment, Tamberlin J added, amongst other things, the following reference to the letter in question:

*'In the present case it is evident from the letter of 28 September 1999, which was written by the Australian Government Solicitor to the solicitors for Mr Peter Bennett, that the substance of the advice for the Australian Government Solicitor was conveyed in a context which did not attract an obligation of confidentiality in relation to the letter. It is apparent that the substance and effect of the advice was being communicated in order to emphasise and promote the strength and substance of the case to be made against Mr Bennett.'* (At para 5).

In ***Rio Tinto Ltd v Commissioner of Taxation*** [2005] FCA 1336 ('Rio Tinto'), during proceedings relating to an income tax assessment, in response to a notice to produce the Commissioner discovered an audit report. The report contained an outline of the grounds on which he was relying and referred to legal advice he had received from the Australian Government Solicitor and counsel, as follows:

*'The Commissioner will be relying on the following grounds which have been confirmed by Senior Tax Counsel (Mr John Evans) and supported by AGS (Mr Jonathan Todd) and opinions obtained from counsel.'* (This

statement and the grounds themselves, which are similar to those in the summary in the present case, are quoted in para 15 of the judgment of Sundberg J). The taxpayer sought the production of the opinions on the ground that by disclosing the gist or substance of the documents in the audit report the Commissioner had impliedly waived legal professional privilege over them. Sundberg J agreed (at paras 54-62), referring to, amongst others, Ampolex Nos. 2 and 3 and the judgments of Tamberlin and Gyles JJ in Bennett.

[40] In ***Switchcorp Pty Ltd and Others v Multimedia Limited*** [2005] VSC 425 (***'Switchcorp'***) the defendant had made an announcement to the Australian Stock Exchange about an action instituted against it by the plaintiffs in the Supreme Court of Victoria. The statement included the following:

*'The Board's lawyers have been instructed to vigorously defend the claim and have advised that the plaintiffs' claim will not succeed.'* The plaintiffs applied for inspection of all documents constituting or recording the legal advice referred to in the announcement, including all documents which revealed the process of reasoning and factual assumptions or instructions lying behind the advice. They contended that the defendant had waived the privilege attaching to the advice by deliberately and for a commercial purpose disclosing the substance of its lawyers' advice to the world at large. The defendants answered the application by saying, amongst other things, that a distinction is to be drawn between, on the one hand, disclosing the existence of legal advice or revealing a general conclusion as to the legal advisors' opinion on the ultimate outcome of litigation and, on the other hand, disclosing its substance and content or revealing a conclusion reached by legal advisors on a particular specific issue. They suggested that the defendant's statement fell into that

category of statements which are to the effect that legal advice had been obtained and contained the lawyers' general conclusion as to prospects of success, rather than that category of statements which disclose the content or substance of the advice on specific issues. In granting the application Whelan J said the following:

*'The majority judgment in Mann v Carnell [(1999) 1 CLR 1 (HCA) at para 29] explained that disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which privilege is intended to protect. It is this inconsistency which the courts, where necessary informed by consideration of fairness, perceive between the conduct and the maintenance of confidentiality which brings about the waiver. The majority judgment emphasized that fairness plays a role in assessing whether there is inconsistency, but there is "no overriding principle of fairness operating at large."* ' (At para 11).

*'...[T]he cases which have dealt with like circumstances to those existing here seem to me to support the following general propositions:*

1. *A statement which reveals the contents of legal advice, even if it does so in a summary way or by reference only to a conclusion, will, or probably will, result in a waiver...*
2. *A statement which referes to legal advice, even if it associates that advice with conduct undertaken on a belief held by the client, will not, or probably will not, result in a waiver...* ' (At para 11).

   *"I do think that the general distinction sought to be drawn between a conclusion on an issue and a conclusion as to the outcome is tenable. Sometimes an issue must determine the outcome...* '. (At para 15).

*'The trial Judge in Bennett [Bennett v Chief Executive Officer of the Australian Customs (2003) FCA 53 at para 33] erroneously based his conclusion that there had been no waiver on the fact that the disclosure did "no more than state the conclusion from or logical result of the legal advice". The Full Court of the Federal Court held this to be an error [(2004) 140 FCR 101, especially Tamberlin J at paras 13-14 and Giles J at paras 62 and 65]'* (At para 16).

*'The issue is inconsistency. As Justice Emmett observed in Bennett [2004) 140 FCR 101 at para 35]:*

*"It does not matter why the disclosure has occurred, it may even be for the purpose of explaining or justifying the client's actions or for some other purpose. However considerations of fairness will be relevant to a determination of whether there is such inconsistency."*

*Returning to the statement in issue here it seems to me that there was a clear and deliberate disclosure of the gist or the conclusion of legal advice received by Multimedia from its lawyers about the outcome of the proceeding. I do perceive inconsistency between this statement and the maintenance of confidentiality of the advice to which it refers. If fairness has a role to play it seems to me that the relevant unfairness arises from the inconsistency. It is unfair in this sense to permit Multimedia to cast aside confidentiality of the advice in making the statement to the world at large so as to explain or justify its position and then to insist upon confidentiality when in section is sought of an otherwise discoverable document.'* (At paras 20-22).

[42] The case of ***Mann v Carnell*** [(1999) 1 CLR 1 (HCA) ***('Mann')*** referred to by Whelan J in ***Switchcorp*** arose from the confidential disclosure by the head of a state government to a member of the state legislature of

copies of documents containing legal advice to the government about certain litigation. The disclosure was made in response to a complaint about the government's conduct of the litigation that the member had received and passed on to the head of the government. The complainant, who was the other party to the litigation, applied for the production to him of the copies to ascertain whether they were defamatory. He contended that the privilege had been lost by their having been shown to the member. The majority of the High Court of Australia (Gleeson CJ, Gaudron, Gummow and Callinan JJ, McHugh J dissenting) held (especially at paras 28, 29, 34 and 35) that the application should fail because the disclosure to a member of the state legislature, to enable him to consider the reasonableness of the conduct of the government of the state, was not inconsistent with the maintenance of the confidentiality which privilege is intended to protect. For present purposes the key passages in the judgment of the majority are the following (paras 28-29):

*'... a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege ...It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and the maintenance of confidentiality which effects a waiver of the privilege....Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law". This means that the law recognizes the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege...What brings about the waiver is the inconsistency, which the*

*courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.'*

[43] The following principles relating to the effect of the partial publication of privileged material on the legal professional privilege (especially in respect of legal advice), emerge from these cases:

(a) When a party waives privilege in respect of a privileged communication, any document embodying or forming part of that communication should also be disclosed (***Bank of Lisbon***). (b) A waiver of legal professional privilege is effected by conduct of the privilege-holder which is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect (***Mann***). (c) Mere reference by a party to the existence of legal advice, even if it associates that advice with conduct taken on belief held by the party, does not amount to a waiver of its contents (***Amoplex No. 3, Switchcorp***). (d) Disclosure of the substance of legal advice, i.e. what the advice is, amounts to a waiver of the privilege in respect of the whole of the advice (***Ampolex Nos. 2 & 3***).

Disclosure of the substance of the advice will occur if the ultimate conclusion, without the supporting reasoning process, or if a summary of the advice, is revealed, especially if that is done for forensic or commercial purposes (e.g. to emphasize the strength and substance of the case to be made) and in the absence of any special arrangements as to confidence (***Amoplex Nos. 2 & 3; Bennett; Switchcorp***).

I fully understand Ms Erasmus' submission that on the basis of the circumstances of the instant case the ultimate conclusion of Ms Roux's advice was disclosed in the list of names attached to the invoice submitted to the Municipality and details of her advice were attached to the

Applicants' Affidavits for forensic purposes. I agree and find that such actions are most certainly inconsistent with a desire to maintain confidentiality. The conclusion is thus inescapable that there is no privilege attaching to the communications between the Applicants and Ms Roux. Maybe it is necessary to emphasize that privilege does not arise automatically. It must be claimed. See: ***Bogoshi (A)*** 793 G-I; ***Thint (Pty) Ltd v NDPP; Zuma v NDPP*** 2009 (1) SA 1 (CC) ("Thint"), paras [171], [184], [185], [193] and [214]. The common-law right to legal professional privilege must be claimed by the right-holder or by the right-holder's legal representative. See also ***Minister of Safety and Security and Others v Bennett*** [2008] (2) ALL SA 26 (SCA) paras [20] to [21].

[44] In the Founding papers the Applicants claim privilege over *"...any communications between myself, our firm and Mari Roux Cost Consultant." The Applicants also assert that when Inspector Tolken sought to obtain such communications from an employee of the First Applicant, Mr Avontuur "...refused to give consent for the disclosure ...because I was of the opinion that it was privileged."*

Importantly, at the time of the search and seizure operation no privilege was claimed (save of course in respect to the Municipality's privilege to the files) by the Applicants. It is rather strange that the Applicants have done nothing to demonstrate that the representatives of the Respondents who participated in the search of the premises in fact gained any access to any privileged material. They (the Applicants) have not identified a single document which could actually qualify as "privileged document", i.e. any communication between Mr Avontuur and Ms Roux. Ms Erasmus presented submissions in the alternative should the Court hold a different view. It is not necessary to set out the submissions in the alternative nor to even consider them (in view of my finding).

**DID THE CHIEF MAGISTRATE FAIL TO EXERCISE HIS DISCRETION?**

[45] It would appear that another angle of attack taken by the Applicants is that Inspector Tolken failed to disclose material facts which ought to have been disclosed to the chief magistrate (at the stage of the *ex parte* application for the search warrants). As shown in the summarized Founding Affidavit *supra* Inspector Tolken is alleged to have failed to satisfy his "duty of utmost good faith" by not disclosing that the Applicants had voluntarily provided documentation on request and had been co-operative and that there was a less invasive means to obtain the files than by authorizing a warrant. Another issue referred to concerned taxation or no taxation of the matters. It is on this basis that the Applicants contended that the magistrate failed to exercise his discretion when deciding whether or not to authorize the warrants. It is of course trite law that in motion proceedings, the Affidavits constitute both the pleadings and the evidence and the issues and averments in support of the parties' cases should appear clearly therefrom. See: ***Transnet Ltd v Rubenstein*** 2006 (1) SA 591 (SCA) at para [28]. Parties must observe and adhere to the principle that no new grounds are to be raised for the first time in the Heads of Argument. The chief magistrate in his reasons as shown earlier on in this judgment, asserted inter alia, "I cannot find in the application that the Applicants aver that I didn't apply my judicial discretion or that the elements of sections 21 (1) read with sections 20 (a) and (b) were not satisfied. Nor is there an allegation that the warrant is not legal." This can hardly be faulted.

[46] It is perhaps necessary to say something about alleged misrepresentations to taxation and less invasive means. The Applicants conveniently omit to

mention that the chief magistrate did not make his decision to issue the warrants only on the basis of information on oath contained only in Inspector Tolken's supporting Affidavit. There was the host of sworn statements by various persons some of which were contained in the Police docket. On taxation the magistrate spoke to the Taxing Master, Ms Struwig and independently obtained confirmation that 85 taxations had in fact been done. There was nothing wrong that the chief magistrate directed that the statement be obtained from the Taxing Master. It would be irresponsible not to so direct. That hardly can be said to be partisan at all.

On the less invasive means issue, it suffices to mention that while it remains correct that Inspector Tolken was informed by Mr Muller that there was a process underway the Municipality had still not been given the files. It is important that I add that Mr Muller's statement confirming what was conveyed to Inspector Tolken was simultaneously filed. I have difficulty in comprehending the hearsay issue raised in this regard. It was precisely because of this process (underway) that Inspector Tolken held back on executing the warrants authorized by the magistrate on 17 February 2012 until 20 February 2012 because he was aware that there was a meeting between Mr Avontuur and the Municipality on 17 February 2012. He clearly wanted to allow further time and an opportunity for the Mr Avontuur to hand over the files to the Municipality. The question of whether or not it is a reasonable inference to be drawn from Mr Muller's statement that the Applicants *"weier egter samewerking"* is weakened by the fact that it is common cause that at the time that the search warrants were executed, the files had not been handed over to the Municipality.

[47] Our law most certainly requires an Applicant in an *ex parte* application to satisfy its duty of utmost good faith in placing all the relevant material facts before the Court. Mr Avontuur is certainly correct in this regard. However, an investigation officer (Inspector Tolken) cannot be expected to disclose facts unknown to him. He obviously would be unaware of such facts at that time. See: ***Thint*** para [102] *supra*. The duty of utmost good faith is limited to the disclosure of facts that are material, that is, a material "*which might influence a Court in coming to its decision*". See: ***NDPP v Basson*** 2002 (1) SA 419 (SCA), para [21]. In ***Thint*** matter *supra* at paragraph [104], the Constitutional Court specifically emphasized the requirement of causation – it also has to be established that it is likely that the outcome of the application would have been different had these disclosure been made. I hold that no case has been made out on the strength of which it can be found that Inspector Tolken acted in breach of his duty of utmost good faith. In any event, it is highly unlikely that the outcome of the application would have been any different had the Inspector told the chief magistrate of the process underway which had, according to Mr Muller, been underway since 2009 and the Municipality had still not gained possession of the files. The magistrate had formed an opinion that the Applicants were not prepared to hand over the files.

[48] The real question is whether the State needs to go as far as establishing that no other, less invasive means will produce the documents it sought. In ***Thint*** *supra*, the Constitutional Court said that the judicial officer should determine whether it is appropriate to issue a search warrant by asking the following question: is it reasonable in the circumstances for the State to seek a search warrant and not to employ other, less invasive means? This would not require the State to prove that less invasive means

will not produce the document, something which may be well-nigh impossible to do. Rather, it will require a judicial officer to consider whether there is an appreciable risk, to be judged objectively, that the State will not be able to obtain the evidence by following a less invasive route. See: ***Thint*** at paragraph [126]. On the basis of the contents of Mr Muller's statement, it can be objectively judged that the files in question would not be obtained by following a less invasive route. Even after the authorization of the search warrants, Inspector Tolken did not immediately execute the warrants as authorized to do so, but he waited for the Applicants to voluntarily hand over the files on the occasion known to the Inspector that is the meeting of 17 February 2012. As the files were not handed over on that date, it was therefore reasonable for Inspector Tolken to assume that such process would continue to be strung out by the Applicants.

[49] This was never raised in either the Founding or Replying Affidavits. It is raised in the Heads of Arguments. The important thing is that Inspector Tolken only went to the First Applicant's premises where 736 of the 750 files were seized. Thus the suspensive condition on which the warrant to search Mr Avontuur's private home was applied for did not eventuate. It was only in the Replying Affidavit that Mr Avontuur questioned the competence and/or authority of the Special Investigation Unit to investigate this matter. The Second and Third Respondents are correctly perturbed at the introduction of this new matter in reply. The well-known principle which has become an adage in motion proceedings is that an Applicant stands or falls by his Founding Affidavit and the facts alleged therein and that it is not permissible to make out new grounds for the application in the Replying Affidavit. See: ***Titty's Bar & Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd*** 1974 (4) SA 362 (T) at 368; ***Shepard v***

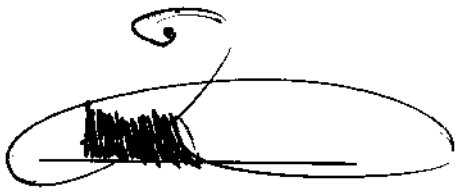
***Tuckers Land & Development Corp (Pty) Ltd*** (1), 1978 (1) SA 173 (W) at 177G-H' ***Director of Hospital Services v Mistry*** 1979 (1) SA 626 (AD) at 635H-636B; ***Triomf Kunsmis (Edms) Bpk v AE & CI Bpk*** 1984 (2) SA 261 (W) at 269H-270B; ***Associated Instituions Pension Fund v Van Zyl*** 2005 (2) SA 302 (SCA) para [35].

What the Applicants are seeking to achieve by means of the new matter, without amending its Notice of Motion, is to advance a completely new cause of action. Whereas the stated purpose with the institution of the proceedings was to set aside the search warrants on the basis of various grounds relating to the documents seized and information before the magistrate, the Applicants now seek to launch an attack against the original authorization to investigate the accounts in relation to Phases 1 and 2. Such a decision was necessarily antecedent to the decision to authorize and the execution of the search warrants and is entirely discrete from the decision being assailed in the Notice of Motion. The effect of this is that the Court is now being asked to set aside the decision of the magistrate by means of an attack on a separate and antecedent decision, which is not sought to be set aside. A collateral attack on decisions in the manner inherent in the new matter in reply is impermissible. If the Applicants intended to attack the magistrate's decision to authorize the search warrants through an external mechanism, they should have done so directly and not in the present indirect manner. See: ***Wasteman Cape (Pty) Ltd v George Municipality and Another***, unreported decision per Griesel J (Western Cape case number 4082/05 dated 17 June 2005) at para [40]. I am not at all inclined to deal with the admissibility of hearsay in motion proceedings because this is wrongly raised. It can hardly be said that there is hearsay admitted in the instant matter.

**ORDER**

[50] In the result I make the following order:

(a) The Applicants' application is dismissed with costs.



**DLODLO, J**