IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 12756/2014

DATE: 4 AUGUST 2014

In the matter between:

CRAIG SMITH AND ASSOCIATES Applicant

and

THE MINISTER OF HOME AFFAIRS 1st Respondent

THE DIRECTOR-GENERAL – DEPARTMENT OF HOME AFFAIRS 2nd Respondent

KWASINKOSI WILBERFORCE MSIBI 3rd Respondent

MNCEDISI NDLOVU 4th Respondent

THE ADDITIONAL MAGISTRATE – DISTRICT OF THE CAPE 5th Respondent

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J U D G M E N T

DAVIS, J:

INTRODUCTION

In 1964 Professor Herbert Packer wrote a seminal article on the essentials of the criminal justice system (1964 (113) University of Pennsylvania Law Review 1). In it he spoke of

the criminal justice system being located between two poles, a crime control model and a due process model. The crime control model emphasised the greater protection which society required from criminals and criminal activity and therefore mandated swifter and greater punishment of crimes in order to promote the greater good of society.

By contrast, the due process model ensures that each accused will receive the best opportunity to prove his or her innocence. There is therefore a greater emphasis upon accountability of the police in particular, and the entire criminal justice system in general to adhere to due process. In particular, searches and seizures would be required to meticulously comply with these principles in order to ensure that the basic rights of an accused were preserved, even if this outcome might jeopardise the ultimate objectives of crime control.

Packer's binary analysis is brought into sharp focus in this case. It is triggered by an urgent application *inter alia* for the setting aside of two warrants, purportedly issued by the fifth respondent, in terms of section 33(5) of the Immigration Act 13 of 2002 ("The Act") on 18 July 2014 and for the return of files, computers seized during a raid on the applicant's premises. It is common cause that the raid took place upon an attorney's practice on Friday afternoon/evening of 18 July 2014.

The applicant has alleged that not only was the search and seizure operation unlawful under the Republic of South Africa Constitution Act 108 of 1996 ('the Constitution'), but so too were the warrants which justified the operation.

First to fourth respondents have opposed the relief sought and have filed an answering affidavit in which they set out the reasons for this opposition.

It therefore is required of this Court to engage with the considerable body of *jurisprudence*, which has emanated recently with regard to questions of warrants, searches and seizures.

THE LAW RELATING TO WARRANTS

It is now trite law that all search and seizure operations and warrants must take place within the terms of the framework of rights which were entrenched in the Constitution. In Minister of Safety and Security v Van der Merwe and Others 2011 (5) SA 61 (CC) Mogoeng, J (as he then was) said on behalf of a unanimous Constitutional Court at para 21:

"Search and seizure warrants, by their very

nature, implicate at least two constitutional rights, namely the right to dignity and privacy. It follows therefore that constitutional issues of significance arise in this matter".

Section 14 of the Constitution, which has been invoked repeatedly during the present dispute, provides thus:

"Everyone has the right to privacy which includes the right not to have:

(a) Their person or home searched;
(b) Their property searched;
(c) Their possessions seized or;
(d) The privacy of their communication infringed".

In Mystry v Interim-Medical and Dental Council South Africa and Others 1998 (4) SA 127 (CC) at para 25, Sachs, J said:

"The existence of safeguards to regulate the way in which state officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police state. South African experience has been notoriously mixed in this

> regard. On the one hand there has been an admirable history of strong statutory controls over the powers of the police to search and seize. On the other, when it comes to racially discriminatory laws and security legislation, vast and often unrestricted discretionary were conferred on officials and police. Generations of systematised and egregious violations of personal privacy, established norms and disrespect for citizens that seeped generally into the public administration and promoted, amongst the great many officials, habits and practices inconsistent with the standards of conduct now required by the Bill of Rights. Section 13 (the privacy in the 'interim' Constitution) accordingly requires us to repudiate the past practices as repugnant to the new constitutional values, whilst at the same time reaffirming and building on those that are consistent with these values".

Closer to the present dispute, in Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others 2009 (1) SA 1 (CC) at para 76, Langa, CJ said:

> "Section 14 of the Constitution entrenches everyone's right to privacy, including the right not to have one's person, home or property searched, possessions seized or the privacy of his or her communications infringed. These rights flow from the value placed on human dignity by the Constitution. The courts therefore jealously guard them by scrutinising search warrants 'with rigour and exactitude'".

It is manifestly clear from these *dicta* that our courts are keenly cognisant of the due process orientated provisions of the Constitution.; provisions that were designed to proclaim as boldly as possible: never again will our society revert to the jackboot, the unaccountable bureaucrat or the official for whom legal process is nothing more than irritant. Recall for example the dark days of apartheid when the security police were at liberty to conduct themselves with brutal impunity, including in one case searching for documents of a privileged nature from a law firm. See Cheadle Thompson and Haysom and Others v Minister of Law and Order and Others 1986 (2) SA 264 (T).

In that case a search warrant was issued in terms of section 21 of the Criminal Procedure Act 51 of 1997, which authorised seizure of a "written statement made by one M". The

document seized in purported compliance with the warrant was one in respect of which attorney and client privilege manifestly applied. It was a typed transcript of notes made in the course of a consultation between an article clerk employed by a firm of attorneys and a prospective witness. The document was clearly generated in contemplation of legal proceedings. The legal proceedings were instituted by the second applicant who had instructed her attorneys to institute a civil claim arising from the death of her husband against the Minister of Law and Order and any other person who might have been legally liable for the death.

That death, to further record our dark past, had taken place after M's husband had been arrested in terms of section 50 of the Internal Security Act 74 of 1982. He had then suffered injuries which resulted in his being hospitalised. He died shortly thereafter. M was determined to find justice, at least by way of civil proceedings. The security police were determined to subvert these proceedings.

The question that arose before the Court concerned the effect and validity of the warrant. The Court found, upon a narrow construction of the warrant, that the latter had not authorised seizure of the document in question, the transcript not have then been read to the witness and she had not been invited to

check it for accuracy and acknowledge it to be her statement. It could therefore not qualify "as a written statement as set out in the warrant".

The following *dicta* by Coetzee, J are of considerable relevance:

> "To regard the document present in issue as "a written statement by one Anna Mnguni" is to my mind not merely a very liberal interpretation of a search warrant. It is an impossible interpretation. It cannot be described as anything other than simply notes made by an attorney during a consultation with the witness ... when in future the police intend to seize similar material they should, before taking it away, afford the attorney or client concerned the opportunity to apply to Court to set aside the warrant as it is by no means clear that the law is correctly set force in Andresen's case" at 283.

The significance of this conclusion will become apparent later in this judgment. The control of warrants and the *jurisprudence* thereof of course is now governed, as I have mentioned, by the Constitution. In Van der Merwe's case *supra,* the Constitution dealt with this issue in some detail. Of

particular significance is the following passage from Mogoeng, J's judgment:

> "All law abiding citizens of this country are deeply concerned about the scurge of crime. In order to address this problem effectively, every lawful means must be employed to enhance the capacity of the police to root out crime or at least reduce it significantly. Warrants issued in terms of S21 of the CPA are important weapons designed to help the police to carry out efficiently their constitutional mandate of, amongst others, preventing, combating and investigating crime. In the course of employing this too, they inevitably interfere with the equally important constitutional rights of individuals who are targeted by these warrants". Para 35

It is apparent that the learned Judge of the Constitutional Court was acutely aware of the difficulty that courts encounter in balancing Packer's crime control and due process models. In dealing with the safeguards, to which reference had been made, Mogoeng, J said the following at paras 36 to 37:

> "Safeguards are therefore necessary to a

> meliorate the effect of this interference. This they do by limiting the extent to which rights are impaired...These safeguards are first, the significance of vesting the authority to issue warrants in judicial officers; second, the jurisdictional requirements of the issuing of warrants; third, the ambit of the terms of the warrants and; fourth, the bases on which a court may set warrants aside".

Following the earlier judgment in Thint *supra* at paras 91 to 93; 146; 151-152, the Constitutional Court in Van der Merwe further stated in the context of search warrants issued in terms of section 21 of the Criminal Procedure Act, that the safeguards provided by search warrants should require such warrants to be reasonably intelligible. At para 55 the Court found that an intelligible and valid search warrant is one that:

> (a) "States the statutory provision in terms of which it is issued.
> (b) Identifies the searcher.
> (c) Clearly mentions the authority it confers upon the searcher.
> (d) Identifies the person, container or premises to be searched.

(e) Describes the article to be searched for and seized with sufficient particularity.

(f) Specifies the offence which triggered the criminal investigation and known as suspected offender".

In addition the Court said the following at para 56:

"The guidelines to be observed by a Court, considering the validity of the warrants include the following:

(a) The person issuing the warrant must have authority and jurisdiction.

(b) The person authorising of the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts.

(c) The terms of the warrant must be neither vague nor overbroad.

(d) A warrant must be reasonably intelligible to both the searcher and the searched person.

(e) The court must always consider the validity of the warrants with a jealous regard for the searched person's Constitutional rights and;

(f) The terms of the warrant must be construed

with reasonable strictness".

I agree with Mr Katz, who appeared together with Mr Brink on behalf of the applicants, that while these principles referred primarily to section 21 of the Criminal Procedure Act and Thint case to section 29 of the National Prosecuting Act 32 of 1998, there is no reason why the same principles should not apply to warrants issued and executed in terms of the Act. It is to that Act that I must now turn.

THE IMMIGRATION ACT

Section 33 of The Immigration Act, to the extent that it is relevant to these proceedings, provides thus;

"5. In the pursuance of this Act, an immigration officer may obtain a warrant to:

(a) Enter or search any premises for a person or thing or to make enquiries, including the power to:

(i) Examine anything found in or upon such premises;

(ii) Request from the person who is in control of such premises or in whose possession or under whose control

anything is when it was found, or is upon reasonable grounds believed to have information with regard to such thing, an explanation or information; and

(iii) Make copies of or extracts from any such thing found upon or in such premises ...

(b) After having issues a receipt in respect thereof, seize and remove documentation or any other thing which:

(i) Is concerned with or is upon reasonable grounds suspected of being concerned with any matter which is the subject of any investigation in terms of this Immigration Act; or

(ii) Contains or is on reasonable grounds suspected to contain information with regard to such matter, provided that:

(aa) Anything to seize shall be returned in good order as soon as possible after the purpose of its seizure has been accomplished; and

(bb) The person from whom a book or document has been taken shall be allowed reasonable access,

including the right to make copies at his or her expense.

6. A warrant referred to in subsection (5) shall be issued by a magistrate of a court, which has jurisdiction iin the area where the premises in question are situated and only if it appears to the magistrate from information under oath, that there are reasonable grounds for believing that the thing mentioned in subsection (5) is upon or in such premises and shall specify which of the Acts mentioned in subsection (5) may be performed there under by the person to whom it is issued.

(8) Subsection (8) provides a person executing a warrant in terms of the section shall immediately before commencing with the execution:

(a) Identify himself or herself to the person in control of the premises if such person is present and hand to such person a copy of the warrant...; and

(b) Supply such person at his request with particulars regarding his or her authority to execute such a warrant."

Recalling the *dictum* of Coetzee, J in Cheadle's case *supra*, to which I have made reference, subsection 11 is of particular

relevance to these proceedings and to the conduct of searches under the Act in general. It provides:

> "If during the execution of a warrant or the conducting of a search in terms of the section, a person claims that a thing found on or in the premises concerned contains privileged information, and refuses its inspection or removal, the person executing the warrant or conducting the search shall, if he or she is of the opinion that the thing contains information which is relevant to the investigation, and that such information is necessary for the investigation, request a person designated by a Court which has jurisdiction to seize and remove that thing for safe custody until a court has made a ruling on the question whether the information is privileged or not.
>
> Subsection 14 provides in exercising powers under the section, an immigration officer shall clearly identify him or herself as such by means of adequate identification".

So much for the legal position in respect of searches and seizures and the contents of the Act which is the subject of

this dispute. There is a further question raised forcibly in this case. Applicant is an attorney. It was his offices that were raided by the third respondent. Quite obviously in this case the principle of legal privilege loomed large and should have loomed large from the commencement of the proceedings with the issuing of the warrant. I am therefore required, albeit briefly, to examine the law relating to legal privilege.

LEGAL PROFESSIONAL PRIVILEGE AND WARRANTS

Under the common Law, communications between a lawyer and a client may not be disclosed without the client's consent. It has been recognised for a long time as central to the right of a client to consult freely with his legal adviser that privilege of this particular kind should be central to fair legal process. In Euro Shipping Corporation of Monrovia v Minister of Agriculture Economics and Marketing and Others 1979 (1) SA 637 (C) at 643, Friedman, J (as he then was) described privilege as a fundamental right.

The point was taken up further in S v Sefatsa 1988 (1) SA 868 (A) at 886. The then Appellate Division recognised that legal professional privilege is not merely an evidential rule but is a fundamental right derived from the requirements of procedural justice. The right was amplified by Botha, JA in his judgment

in Sefatsa when the learned Judge of Appeal cited from an Australian decision in Baker v Campbell (cited in 885-886) to the following effect:

> "The privilege extends beyond communications made for the purpose of litigation, to all communications made for the purpose of giving or receiving advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence. It is a doctrine which is based upon the view that confidentiality is necessary for proper functioning of the legal system and nor merely a proper conduct of particular litigation ...
>
> Speaking for myself and with the greatest respect I should have thought it evident that communications between legal advisers and their clients are subject to compulsory disclosure in litigation, civil or criminal, there would be a restriction, serious in many cases, upon the freedom with which advice or representation could be given or sought. If a client cannot seek advice from his legal advisor, confident that he is not acting to his disadvantage in doing so, then his lack of confidence is likely to be reflected in

the instructions he gives, the advice he is given and ultimately in the legal process of which the advise forms part".

What bears emphasis, for at various times during these proceedings the import thereof was not entirely grasped: the right is that of the client. It is the client ultimately who is entitled to a right of privilege for without that right the client will never be able to obtain the level and degree of fairness in legal proceedings which the courts have emphasised, particularly described in the judgment of Botha, JA in Sefatsa.

In both Mohammed v National Director of Public Prosecutions and Others 2006 (1) SACR 495 (W) at para 7 and Thint *supra* at para 184 there are further examinations of the legal, professional privilege within the context of the Constitution. In both cases there is an emphasis placed on the importance of this privilege in upholding the right to a fair trial, as guaranteed in terms of section 35 of the Constitution.

There is further enlightment that can be obtained from a reference, albeit, brief, to Thint. Thint concerned the execution of a search warrant in terms of section 29 of the National Prosecuting Act 32 of 1998. In particular, section 29(11) provides that if privilege is claimed in respect of any

item and if the searching official nevertheless believes that the item is relevant and necessary for the investigation, it must be taken to the office of the Registrar of the High Court, that a court can decide whether or not it is indeed privileged.

The Court described the purpose of this section in para 192:

> "To provide the State with a mechanism where privileged is claimed during a search to have that claim speedily determined by a Court without the State running the risk of attaching documents subsequently declared to be privileged".

The Court held further at para 193:

> "The section came into operation whenever a claim of privilege is made during the search and that 'as soon as such claim is made, the investigator is bound to follow the section 29(11) procedure (unless he or she decides to desist from seizing the item)".

With this legal and legislative framework in mind, it is possible to turn to the factual matrix which vexes the present dispute.

THE FACTUAL BACKGROUND TO THIS CASE

Two search and seizure warrants were issued on 18 July 2014. In the first place it was to an entry and search warrant headed with reference to section 7(1)(g) and section 33(5)(a)(b) of the Act and Regulation 27(6) thereto. That is warrant one. There is a further warrant: "a warrant for seizure and removal", headed with reference to sections 7(1)(g) and section 33(5)(c) of the Act and Regulation 27(7), that is warrant two.

A receipt of items seized was completed by third respondent who is described as an assistant director in the Department of Home Affairs in terms of section 7(1)(v) and section 33(5)(c) and what is common cause is at this stage a non-existent Regulation 27(7). Section 7(1)(a) of the Act provides that the Minister may make regulations relating to the powers and duties of The Immigration Act. New immigration regulations came into force on 26 May 2014. It appears that those issued on 18 July 2014 were those included as annexures to the now repealed 2005 immigration regulations, in particular regulation 27(6) and 27(7).

Warrant one empowered the third respondent to enter the premises of applicant during the day, time "during the hours of 9h00 to 17h00" to search for and to:

(1) Interrogate any person found in on such premises.

(2) Examine anything in or upon such premises as per annexure A, and;

(3) Request from the person in charge anything when if found an explanation or information pertaining to that thing and make copies of or extracts from any such thing found upon or in such premises.

Annexure A read:

(1) Any existing or closed files of applicants for work permits.

(2) Any computers including laptops and external hard drives.

Warrant two empowered third respondent to enter the offices of the applicant during the daytime between 09h00 and 17h00 to seize and remove items mentioned in the receipt to be handed to the person from which that documentation or thing has been seized and removed. Respondent's version for why it sought these warrants is contained in the opposing affidavit of third respondent to which I have made reference. It is important for the resolution of this dispute to examine third respondent's affidavit with some care.

Third respondent informs the Court as follows: during September/October 2013 the Department of Home Affairs was approached by an investigative journalist team of Carte Blanche (I am advised that this is a television program) with information pertaining to fraudulent and unlawful activities of applicant which were performed in his capacity as an attorney operating as Craig Smith and Associates. Pursuant to this information, third respondent informs the Court that the Department of Home Affairs launched an investigation into the unlawful activities of Smith, that is the applicant.

The investigative journalist team of Carte Blanche, according to third respondent, cooperated and shared information with the Department insofar as the investigation was concerned. According to third respondent, the investigation against the applicant revealed that he would obtain general work permits for his client on the basis of false and fraudulent documentation which he would prepare and submit to the Department of Home Affairs.

According to third respondent, the applicant placed adverts in newspapers for non-existent job vacancies, manufactured false qualifications for his clients, submitted false bank statements and produced employment letters on a company letterhead of Oxen Information Technologies. Third respondent avers that

all of this activity was done in order to mislead the Department into believing that applicant's clients were employed by Oxen.

Third respondent informs the Court that applicant would then submit the names of certain people, together with their *curriculum vitaes*, which he alleged had applied unsuccessfully for the job vacancies which he advertised in newspapers. He did this, according to third respondent, to create the false impression that certain persons had unsuccessfully applied for the particular job whilst his client was a successful applicant.

He would source these *curriculum vitaes* from online recruitment sites without knowledge, permission or consent to the owners of these *curriculum vitaes*. Third respondent avers further that all of these fraudulent documents, false newspaper adverts, false qualifications, false employment letters, false bank statements and falsely filed applications, together with the *curriculum vitaes* would then be attached to his client's applications for general work permits.

Third respondent claims that, by using the names of these persons without their knowledge, permission or consent applicant, beside from violating these people's rights to privacy, acted fraudulently with respect to the Department, in order to create the impression that his clients had met the

requirements as prescribed by the Act and which would then enable them to be issued with general work permits.

Third respondent specifies, to some extent, the nature of the investigations that third respondent then undertook. He informs the Court that he obtained the company registration printout of Oxen. He then visited an address at Century City and found the office from which Oxen was allegedly operating to be vacant.

During his investigations he retrieved three applications prepared by applicant for general work permits and in each of these applications a general work permit was issued to the applicant on condition the applicant takes up employment at Oxen. He also informs the Court that he enquired from other offices in the same business park as Oxen had allegedly operated about the identity of this business but none of them knew anything about the company.

He states further that he obtained statements from the allegedly unsuccessful applicants in which they advised that they had never applied for job vacancies at Oxen nor had they attended any job interviews with the company. After establishing that Oxen was not operational, he then identified 13 persons who were granted general work permits by the

Department, subject to the condition that they take up employment at Oxen. He is still, according to this affidavit, in the process of retrieving the relevant files relating to these persons.

On 16 July 2014 he arrested one of the persons who was issued with a general work permit on condition that he was employed at Oxen. This person's application for a general work permit was prepared, according to the third respondent, by applicant. Although this person was granted a general work permit to work as an IT specialist, he informed third respondent that he was not qualified as an IT specialist. He further indicated that he did not apply for the post of an IT specialist nor was he interviewed at Oxen. He stated further that his lawyer, being applicant, obtained the employment letter from Oxen and that the applicant said that he knew the director of Oxen. He concludes by stating that all this information has been verified by his independent investigations and by statements obtained from other witnesses, including the person arrested on 16 July 2014.

Insofar as the warrants are concerned, third respondent informs the Court that the warrant was issued at approximately 15h45 on 18 July 2014. Most regretably, and I cannot emphasise this strongly enough, fifth respondent who issued

the warrants failed to depose to an affidavit, which would have greatly assisted the Court. This is most unfortunate. Magistrates who issue warrants are accountable and I would have expected, at the very least, to have been furnished with an affidavit which would have assisted the Court considerably in these proceedings. Regrettably it was not made available.

Third respondent provides the following information regarding the warrants. There are 13 various types of temporary residence permits the Department may issue to foreigners. As the information at third respondent's disposal indicated that applicant was involved in fraudulent activities pertaining to general work permits, the seizure and the removal warrant was limited to this type of temporary residence permit. He further states that he had no information as to when applicant commenced with this fraudulent activities and he could not therefore limit the search to a specific time period.

Furthermore, as he did not know the names of all the persons under whose behalf applicant had applied for general work permits, he could not limit the seizure and removal warrants to individual files. He was able to identify and seize the files as a result of having been informed by a confidential source where to look for these files. As a result, some 160 files were seized from the offices of applicant.

Insofar as the seized computers are concerned, third respondent informs the Court as follows: from the information at his disposal, he avers that it was clear that applicant was using computers to generate false company letterheads, job advertisements and applications and curriculum vitae qualifications in respect of the applications for work permits.

Information at his disposal indicated that applicant has a template of the letterhead of Oxen on his computer. The nature of the investigation as well as the variety of documents, which it is alleged applicant had fraudulently produced, are such that he could not limit the search to a particular folder or computer. Even if the warrant had been more specific with regard to electronic data to be searched and confiscated, this would have had no different practical effect from what had transpired when the applicant's offices were searched.

The electronic data which is required is a class of information in relation to the application for work permits. This class of data is contained amongst all the other electronic data and will have to be identified, according to third respondent. Even if the warrants did not authorise the attachment of the computers but it specified the electronic data to be searched for and confiscated this would not have availed, given applicant's

allegedly obstructive attitude. He would not have identified the relevant information for downloading and printing.

Hence the confiscation of the computers was required pending further direction of the Court as to how the matter should be further managed. He also makes the following claim:

> "I may mention that all the seized files and computers have been sealed and have been placed in the custody of the Cape Town Central SAPS under SAP13/325/2014 under Cape Town Central CAS 1007/07/2014".

Significantly, I did not take Mr Albertus, who appeared together with Ms Slingers on behalf of the respondents, notwithstanding the averments which I have set out in detail, to contest applicant's argument that the warrants were invalid. It was a concession wisely made because there are at least three, possibly more, legal problems with the warrants and the execution thereof that are fatal to respondents justification for the search, its conduct and the seizure.

In the first place, the two sets of warrants as I have set them out, failed to satisfy the intelligibility requirement as set out in Van der Merwe *supra*, read together with Powell NO and

Others v Van der Merwe NO 2005 (1) SACR 317 (SCA) at para 59. In this case Cameron, JA (as he then was) captured the core of the legal position thus:

"These cases establish this:

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

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

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

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

(e) If a warrant is too general or if its terms go beyond those the authorising statute permits, the courts have refused to

recognise it as valid and it will be set aside.

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

Approached on the basis of these dicta the warrants failed to describe the articles to be searched for and seized with sufficient particularity, certainly insofar as the open-ended reference to "computers" is concerned. Further, the warrants failed to specify clearly the offences which triggered the investigation. In summary, the warrants were vague and overbroad. See in this particular connection Sinai Films (Pty) Ltd and Others v Commissioner of Police and Others 1972 (2) SA 254 (A); Divisional Commission of South African Police Witwatersrand Area and Others v South African Associated Newspapers Limited and Another 1966 (2) SA 503 (A) at 512.

The warrants were not reasonably intelligible to either the searchers or the applicant. For example could it possibly have been that all the information on the applicant's computers constituted part of the search?

In addition, as I have already indicated, the warrants failed to protect professional, legal privilege.

That brings me to the second difficulty which respondents encounter. Section 33(11) of the Act specifically deals with the problems of privilege as encountered, for example in Cheadle's case *supra*. As I indicated earlier, it is regrettable that fifth respondent did not depose to an affidavit explaining why, for example, there was no consideration given to the consequences of a search that was to take place at an attorney's office and why there was no recourse to the clear implications of section 33(11) of the Act, when it was common cause that the search would take place at an attorney's office and it was obvious that these were dangers of breach of legal privilege.

Given that the benefit of the right of privilege resides with the client, it had not behove the respondents to claim that applicant's conduct at the search may have been tantamount to a waiver. I do not need to parse the respective affidavits of applicant and third respondent to determine this particular question. It is manifestly clear that legal privilege was compromised as a result of the search. As applicant informed the Court in his own affidavit, he is the attorney for clients in proceedings still pending before this Court. See paragraph

17.2 of the founding affidavit.

Thirdly, the warrants only identified third respondent as the person who was authorised to do the search, yet clearly, as set out in the founding affidavit, there were other participants in the search. According to applicant's affidavit, despite his repeated protests and later protests by Mr Brink, junior counsel to applicant in this case, regarding the privileged nature of client files, persons executing the warrants took client files out a cabinet and proceeded, according to his affidavit, to read through these files.

As Mr Katz pointed out, in terms of section 33(5)(a), read with section 1, section 33(2) and Regulation 32(1) of the Act, the provision makes it clear that the search and seizure powers under the section are limited to "immigration officers"; that is persons who fulfilled the training requirements as listed in Regulation 32(1). The presence of non-immigration officers as described in the founding affidavit, also constituted unlawful activity.

These three reasons, as I have outlined them (and there may be more, but here is no need for me to go further), result in a conclusion that the raid conducted at the applicant's offices was in violation of his constitutional rights and hence unlawful

and invalid. Of that I have little doubt.

Earlier I had mentioned that the third respondent suggested that all the seized files and computers have been sealed. The suggestion was that, at this stage of proceedings, none of these documents had been read, notwithstanding averments which are contained in the applicant's affidavit. However, when third respondent dealt with the question of professional privilege, a curious passage appears in the affidavit. It reads thus:

> "I respectfully submit that the search and seizure process is not in any way infringed upon professional, legal privilege to Smith and/or his clients. I say this for the following reasons; all of the seized and confiscated files are not litigious matters and/or matters pertaining to pending legal proceedings in respect of which advice was sought and gained".

The obvious question arises: how did he know they were not privileged unless he had examined the files? Thus itself provides room for consternation with regard to respondent's conduct.

What now to do, becomes the critical question.

CONSEQUENCES OF THE FOUNDING OF INDIVIDUALITY

Mr Katz submitted that the arbitrary and what he described as "clearly uncontrolled nature of the raid" conducted at applicant's offices cannot in any way be condoned. As he stated, the State must surely set an example for adherence to constitutional values. See Mohammed and Another v President of the Republic of South Africa and Others 2001 (3) SA 893 (CC) at para 69:

> "South Africa is a young democracy still finding its way to full compliance with the values and ideas enshrined in the Constitution. It is therefore important that the State lead by example".

Invoking *dicta* in Reuters Group, PLCB Viljoen 2001 (12) BCLR 1265 (C) at paras 43 and 44 that "The Constitution creates an ethos of accountability" and that the rule of law and thus the principle of legality powers the principle that executive action cannot be arbitrary. Mr Katz submitted that what he considered to be the arbitrary and contentious attitude of third respondent and others during the raid as described in the

founding affidavit, together with the presence of members of television media, who were already present upon respondents arrival at applicant's offices on 18 July 2014 constituted conduct reminiscent of "the rampant triumphalism" which had been condemned in no uncertain terms by the Supreme Court of Appeal in Pretoria Port and Cement Company Ltd and Another v Competition Commission and Others 2003 (2) SA 385 (SCA) at para 66.

In his view, the conduct of the respondents could pass the level of that which the applicant and other South Africans were entitled to expect from a public administration committed to adherence to our Constitutional ethos.

This set of submissions compels a careful consideration of what should be the consequences visited upon the founding of unlawfulness in respect of the warrants and therefore the search. It brings us back to Packer's analysis of the criminal justice system.

Applicant has shown that his rights to privacy and underlying right of dignity had been breached as a result of invalid warrants and the consequent search. He has also shown that, notwithstanding the Act's recognition of privilege in terms of section 33(11), respondents had breached legal privilege by

the manner in which third respondent comported himself pursuant to the search together with a balance of the search party.

There is, as I have already indicated, a clear apprehension that third respondent's conduct has compromised the fundamental right of privilege. The conclusion that respondents have violated applicant's clients rights to legal privilege by virtue of the warrants, and particularly in respect of the seizure of computers, which makes no reference to any criminal offence or violation of the Act, is coupled to a breach of applicant's rights to privacy.

But as was recognised in Thint *supra* at para 220, there are important public interest considerations with which a Court must engage earnestly. To ignore the serious allegations made by third respondent which I have set out in detail, and to adopt an overly rigid approach to the consequences of a breach of a right, however important, no matter the seriousness of the allegations of criminal behaviour, is to ignore the role that Courts play in respect of crime control, particularly in a country where the scourge of crime threatens the very fabric of our Constitution ambitions.

It is for this reason that Langa, CJ found in Thint *supra* at para

216-223 that section 172(1)(b) of the Constitution empowers a Court to grant a preservation order. In the case the Chief Justice had in mind, this would require the State to hand over to the Registrar of the High Court all the items seized and require the Registrar, to make and retain copies of all such items, to return the originals to the applicant and to keep the copies accessible, safe and intact under seal until the State permitted their return, the conclusion of criminal proceedings against the applicants and envisaged, or the date the State decided not to institute such proceedings.

Langa, CJ concluded:

> "It seems to me that it is only if an applicant can identify specific items the seizure of which constitutes a serious breach of privacy and reflects the inner core of the personal intimate sphere or where there has been, particularly egregious conduct in the execution of the warrant, that a preservation order should not be granted". para 223.

I accept that the present dispute triggers significant concerns regarding the conduct of third respondent and indeed fifth respondent as well as the nature of the search and seizure

operation. But were this Court to order the status quo to be restored without more, as urged upon me by Mr Katz, and the allegations contained in third respondent's affidavit were then to prove to be accurate, a significant danger would arise pursuant to the possible destruction of the kind of evidence necessary to curb what would then have been proved to have been a egregiously criminal practice which would compromise the very purpose of the Act itself.

On the other hand, it is clear to me that the applicant must also be afforded relief, to vindicate his privacy and to restore the privileged nature of all documents and files as soon as possible. Thus the balancing exercise indicated by Langa, CJ in Thint *supra* must give meaningful protection to the applicant, while exploring whether the important public interests in respect of crime control cannot also be afforded protection. The essence of applicant's case is to suggest that the conduct was so egregious that a preservation order should not be granted.

There is a dispute on the papers as to precisely how egregious third respondent and his colleagues' were during the search in question. There is no doubt that any search which takes place as a result of unlawful conduct may be described as egregious, but clearly the Chief Justice had in mind in his careful

assessment a particular excessive form of conduct. I cannot simply ignore the detailed and serious allegations set out by third respondent in his affidavit as a justification of respondent's conduct and thus suggest that no Court should take account thereof in this particular exercise of balancing.

Public interest concerns are important. The order I propose making seeks to find a way to achieve a balance of exercise, to restore the *status quo ante* where there can be no proven or more accurately *prima facie* breach of the public interest whilst divining a reasonable means of safeguarding the public interests in dealing with crime control.

Proportionality, itself, is a difficult exercise for courts. Aharon Barak in Proportionality: Constitutional Rights and their Limitations at 543 captures the point which is exercised my mind in this connection:

> "The principled balancing formula must first and foremost fulfil the basic balancing rule. That basic rule of balancing compares the marginal social importance of the benefit gained by the limiting law and the marginal social importance preventing the harm to the Constitutional right. The principle balancing formula would translate

> this abstract notion into a formula comparing the marginal social importance of the specified limited right on the one hand and the marginal social importance of specific legislative purpose on the other".

It is this exercise that I have sought to undertake in the crafting of the order that I propose to make. The effect of the order can perhaps be summarised thus: within a maximum of 72 hours from the granting of this order applicant shall be restored into possession of all the files which had been seized and within the maximum of 5 days be restored to possession of all of his computers.

While this is not a perfect solution, it does not preclude the applicant from pursuing further relief against the respondent in the event that the allegations set out in third respondent's affidavit prove to be unjustified and false which, in turn, would trigger a potential claim for significant damages which would then have been suffered by the applicant. That however, as I emphasised repeatedly during the proceedings, is not a matter before this Court.

I have given considerable consideration to Mr Katz's submission as to the appropriateness of an order of punitive

costs against the respondent, given my finding that the warrants should be set aside. My difficulty is the absence of an affidavit from fifth respondent and accordingly the problem of determining whether the respondents in this case acted in bad faith. I cannot make a determination on these papers. I have already accepted that the averments in the affidavit are of so serious a nature that they are deserving of some protection which I have recognised in this order.

I am also comforted by the possibility that should the applicant be able to show that none of the justifications, which are set out in the third respondent's affidavit, be based on fact or law, there are clear alternative remedies available for him to recoup any damages that he may have been suffered.

The order that I will therefore make is as follows:

(1) THE ENTRY AND SEARCH WARRANT AND THE SEIZURE AND REMOVAL WARRANT ("THE WARRANT") ISSUED UNDER THE HAND OF FIFTH RESPONDENT ON 18 JULY 2014 ARE HEREBY DECLARED INCONSISTENT WITH THE PROVISIONS OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA AND AS SUCH ARE DECLARED INVALID AND ACCORDINGLY SET ASIDE.

(2) THE TWO LAPTOPS, ONE EXTERNAL HARD DRIVE AND ONE CPU AND 160 FILES ("THE MATERIAL") ATTACHED AND REMOVED PURSUANT OF THESE WARRANTS SHALL NOT BE RETURNED TO THE APPLICANT BUT THE SAID ATTACHMENT AND REMOVAL SHALL BE PRESERVED. THE MATERIAL SHALL WITHIN 24 HOURS OF THIS ORDER BE PLACED BY THE FIRST TO FOURTH RESPONDENTS IN THE POSSESSION OF THE REGISTRAR OF THIS COURT WHO SHALL KEEP THE MATERIAL IN SAFE CUSTODY SUBJECT TO THE DIRECTIONS OF THIS COURT EXCEPT THE PROPOSED 4 TO 19 HEREUNDER.

(3) TO THE EXTENT REQUIRED BY THE APPLICANT, FIRST AND FOURTH RESPONDENTS SHALL CAUSE WITHIN 24 HOURS OF THIS ORDER A COMPLETE INVENTORY OF THE MATERIAL REFERRED TO IN PARAGRAPH 2 TO BE MADE AVAILABLE IN WRITING TO THE APPLICANT.

(4) THE FILE COVERS AS WELL AS THE CONTENTS OF THE 160 FILES SHALL BE COPIED BY THE REGISTRAR OR HIS OR HER DULY AUTHORISED DELEGATEE WITHIN 48 HOURS OF RECEIPT OF THE MATERIAL, THAT IS WITHIN 72 HOURS OF THE GRANTING OF THIS ORDER. BOTH PARTIES ARE

ENTITLED TO APPOINT A REPRESENTATIVE TO BE PRESENT DURING THE COPYING OF THE FILES.

(5) AFTER COPYING THE FILES THE REGISTRAR SHALL IMMEDIATELY RETURN OR CAUSE TO BE RETURNED THE ORIGINALS THEREOF TO THE APPLICANT, WHO SHALL ACKNOWLEDGE RECEIPT THEREOF IN WRITING.

(6) WITHIN 5 DAYS OF THE RECEIPT OF THE ORIGINAL FILES FROM THE REGISTRAR THE APPLICANT SHALL IN WRITING ADDRESS TO THE RESPONDENTS' ATTORNEY OF RECORD AND TO THE REGISTRAR IDENTIFY EACH AND EVERY DOCUMENT IN THIS FILES IN RESPECT OF WHICH HE CLAIMS LEGAL PRIVILEGE AND / OR PRIVACY AND CLEARLY SET OUT THE GROUNDS ON WHICH HE CLAIMS SUCH PRIVILEGE AND / OR PRIVACY.

(7) THE REGISTRAR SHALL WITHIN 24 HOURS OF THE EXPIRATION OF THE PERIOD AFFORDED THE APPLICANT IN PARAGRAPH 6 ABOVE DELIVER OR CAUSE TO BE DELIVERED TO THE RESPONDENTS' ATTORNEYS ALL DOCUMENTS IN RESPECT OF WHICH NO PROFESSIONAL, LEGAL PRIVILEGE HAS BEEN CLAIMED BY THE APPLICANT, NO PRIVACY RIGHTS HAVE BEEN BREACHED AND KEEP IN SAFE CUSTODY ALL SUCH DOCUMENTS IN

RESPECT OF WHICH THE APPLICANT CLAIMS LEGAL PRIVILEGE OR PRIVACY SUBJECT TO THE FURTHER DIRECTION IN RESPECT THEREOF AS SET FORTH HEREUNDER.

(8) SHOULD THE RESPONDENTS DISPUTE THE PROFESSIONAL, LEGAL PRIVILEGE OR PRIVACY CLAIMS CLAIMED BY THE APPLICANT IN RESPECT OF ANY DOCUMENTS THEY SHALL WITHIN 7 DAYS OF RECEIVING THE WRITTEN CORRESPONDENCE REFERRED TO IN PARAGRAPH 6 ABOVE, IN WRITING, ADDRESS TO THE APPLICANT'S ATTORNEYS OF RECORD AND TO THE REGISTRAR, IDENTIFY SUCH DOCUMENTS AND CLEARLY SET OUT THE GROUNDS ON WHICH THEY DISPUTE THE CLAIMS OF PROFESSIONAL, LEGAL PRIVILEGE IN RESPECT THEREOF.

(9) ANY CHALLENGE TO THE APPLICANT'S CLAIM OF PROFESSIONAL, LEGAL PRIVILEGE SHALL BE BY MUTUAL AGREEMENT BETWEEN THE PARTIES AND WITH THE PRIOR APPROVAL OF THE JUDGE PRESIDENT BE PLACED ON THE URGENT ROLE FOR DETERMINATION.

(10) WITHIN 24 HOURS OF THE GRANTING OF THIS ORDER, THE PARTIES SHALL IN WRITING ON THE APPOINTMENT OF A COMMON, CYBER FORENSIC

EXPERT WHO SHALL MAKE FORENSIC IMAGES OF THE ELECTRONIC DATA CONTAINED ON THE COMPUTERS.

(11) IN THE EVENT THAT THE PARTIES ARE UNABLE TO AGREE ON THE APPOINTMENT OF A COMMON CYBER FORENSIC EXPERT AS FORESAID, THEN EACH OF THE PARTIES SHALL WITHIN 48 HOURS OF THE EXPIRATION OF THE PERIOD SET FORTH IN PARAGRAPH 10 ABOVE APPOINT A CYBER FORENSIC EXPERT OF THEIR CHOICE WHO SHALL TOGETHER DEAL WITH THE COMPUTERS AS SET FORTH FURTHER HEREIN.

(12) THE APPOINTED CYBER FORENSIC EXPERT SHALL WITHIN 24 HOURS OF THE EXPIRATION OF THE PERIOD SET FORTH IN PARAGRAPH 11 ABOVE IMMEDIATELY MAKE ARRANGEMENTS WITH THE REGISTRAR TO BE GRANTED ACCESS TO THE COMPUTERS AND SHALL AS SOON AS REASONABLY, PRACTICALLY POSSIBLE THEREAFTER (NOT EXCEEDING 72 HOURS) AND UNDER THE SUPERVISION OF THE REGISTRAR OR HIS OR HER DULY AUTHORISED DELEGATEE MAKE A CYBER FORENSIC IMAGE OF ALL THE ELECTRONIC DATA CONTAINED ON EACH OF THE COMPUTERS, WHERE AFTER THE REGISTRAR

SHALL IMMEDIATELY RETURN THE COMPUTERS TO THE APPLICANT WHO SHALL ACKNOWLEDGE RECEIPT THEREOF IN WRITING.

(13) THE CYBER FORENSIC IMAGES SHALL AT ALL TIMES BE KEPT IN THE SAFE CUSTODY OF THE REGISTRAR, SAVE WHEN REQUIRED BY THE CYBER FORENSIC EXPERT FOR ACCESSING THE DATA THEREON AS FURTHER REGULATED HEREUNDER.

(14) WITHIN 48 HOURS OF MAKING THE FORENSIC IMAGES AS REFERRED TO IN PARAGRAPH 12 ABOVE THE CYBER FORENSIC EXPERTS SHALL, UNDER THE SUPERVISION OF THE REGISTRAR OR HIS OR HER DULY AUTHORISED DELEGATEE, IDENTIFY, ISOLATE AND DOWNLOAD ONTO AN EXTERNAL HARD DRIVE ALL DATA PERTAINING TO THE APPLICATION BY THE APPLICANT FOR GENERAL WORK PERMITS WHICH SHALL INCLUDE BUT NOT BE LIMITED TO APPLICATIONS FOR JOB VACANCIES PLACED IN NEWSPAPERS, WRITTEN RESPONSES THERETO, LETTERS AND LETTERHEADS PURPORTING TO EMANATE FROM OXEN INFORMATION TECHNOLOGY ("OXEN"), PURPORTED FAILED JOB APPLICATIONS SUBMITTED TO OXEN AND TO OTHER BUSINESS

ENTRIES, INCLUDING THE CURRICULUM VITAES OF SUCH APPLICANTS, BANK STATEMENTS RELATING TO JOB APPLICATIONS AND ALL EMAIL CORRESPONDENCE EXCHANGED BETWEEN THE APPLICANT AND ANY PERSONS APPLYING FOR GENERAL WORK PERMITS.

(15) IMMEDIATELY AFTER DOWNLOADING THE DATA ONTO AN EXTERNAL HARD DRIVE AS REFERRED TO IN PARAGRAPH 14, THE REGISTRAR SHALL DELIVER OR CAUSE TO BE DELIVERED TO THE APPLICANT'S ATTORNEYS, WHO SHALL ACKNOWLEDGE RECEIPT THEREOF IN WRITING, ALL THE CYBER FORENSIC IMAGES MADE IN PARAGRAPH 12 ABOVE BY THE APPOINTED CYBER FORENSIC EXPERTS.

(16) IMMEDIATELY AFTER DOWNLOADING THE DATA ONTO AN EXTERNAL HARD DRIVE AS REFERRED TO IN PARAGRAPH 14 ABOVE, ONE COPY OF SUCH HARD DRIVE SHALL UNDER THE SUPERVISION OF THE REGISTRAR OR HIS OR HER DULY AUTHORISED DELEGATEE, BE MADE TO THE APPOINTED CYBER FORENSIC EXPERTS WHERE AFTER THE REGISTRAR SHALL IMMEDIATELY DELIVER THE COPY OF THE HARD DRIVE OR CAUSE TO BE DELIVERED TO THE APPLICANTS

WHO SHALL ACKNOWLEDGE RECEIPT THEREOF IN WRITING. THE REGISTRAR SHALL KEEP IN SAFE CUSTODY THE ORIGINAL OF THE EXTERNAL HARD DRIVE, SUBJECT TO THIS COURT'S FURTHER DIRECTIONS AS SET FORTH HEREUNDER.

(17) THE APPLICANT SHALL WITHIN 7 DAYS OF THE RECEIPT OF THE COPY OF THE HARD DRIVE FROM THE REGISTRAR IDENTIFY IN WRITING, ADDRESSED TO THE RESPONDENTS ATTORNEYS OF RECORD AND TO THE REGISTRAR, THE DATA IN RESPECT OF WHICH HE CLAIMS PROFESSIONAL, LEGAL PRIVILEGE AND / OR PRIVACY AND CLEARLY SET OUT THE GROUNDS ON WHICH HE CLAIMS SUCH PROFESSIONAL, LEGAL PRIVILEGE AND / OR PRIVACY.

(18) WITHIN 24 HOURS OF THE EXPIRATION OF THE PERIOD AFFORDED THE APPLICANT IN PARAGRAPH 17 ABOVE, THE CYBER FORENSIC EXPERT SHALL, UNDER THE SUPERVISION OF THE REGISTRAR OR HIS OR HER DULY AUTHORISED DELEGATEE, DOWNLOAD ALL DATA FROM THE EXTERNAL HARD DRIVE IN RESPECT OF WHICH THERE IS NO CLAIM OF PROFESSIONAL, LEGAL PRIVILEGE NOR PRIVACY, ONTO A SEPARATE EXTERNAL HARD DRIVE AND DELIVER SAME TO

THE REGISTRAR WHO IN TURN SHALL DELIVER OR CAUSE TO BE DELIVERED THE EXTERNAL HARD DRIVE TO THE RESPONDENTS' ATTORNEYS WHO SHALL ACKNOWLEDGE RECEIPT THEREOF IN WRITING.

(19) SHOULD THE RESPONDENTS DISPUTE THE APPLICANT'S CLAIM OF PROFESSIONAL, LEGAL PRIVILEGE AND / OR PRIVACY IN RESPECT OF ANY DATA, THE RESPONDENTS SHOULD IN WRITING ADDRESS TO THE APPLICANT'S ATTORNEYS OF RECORD AND TO THE REGISTRAR, IDENTIFY SUCH DATA AND CLEARLY SET OUT THE GROUNDS ON WHICH THE RESPONDENTS DISPUTE THE APPLICANT'S CLAIM OF PROFESSIONAL, LEGAL PRIVILEGE AND / OR PRIVACY IN RESPECT THEREOF.

(20) ANY CHALLENGE TO THE APPLICANT'S CLAIM OF PROFESSIONAL, LEGAL PRIVILEGE AND / OR PRIVACY IN RESPECT OF ANY DATA SHALL BY MUTUAL AGREEMENT BETWEEN THE PARTIES AND THE PRIOR APPROVAL OF THE JUDGE PRESIDENT BE PLACED ON THE URGENT ROLL FOR DETERMINATION.

(21) THESE TIME LIMITS WHICH ARE SET OUT IN PARAGRAPHS 3 AND FOLLOWS CAN EITHER BE

AMENDED BY AGREEMENT OR THE PARTIES ARE GRANTED LEAVE TO APPROACH THE COURT TO AMEND THESE TIME LIMITS ON CAUSE BEING SHOWN.

(22) THE COSTS INCURRED IN RESPECT OF COPYING THE FILES BY THE REGISTRAR OR HIS OR HER DULY AUTHORISED DELEGATEE, TOGETHER WITH THE COSTS INCURRED BY THE CYBER FORENSIC EXPERTS IN CARRYING OUT THEIR DUTIES AND FUNCTIONS AS DESCRIBED THEM, SHALL BE PAID BY THE RESPONDENTS, JOINTLY AND SEVERALLY, THE ONE PAYING THE OTHERS TO BE ABSOLVED.

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DAVIS, J

CORAM	**:**	**DAVIS J**
JUDGMENT BY	**:**	**DAVIS J**
FOR THE APPLICANT	**:**	**ADV A KATZ SC & ADV A BRINK**
INSTRUCTED BY	**:**	**BISSET BOEHMKE McBLAIN ATTORNEYS**

FOR THE RESPONDENTS SC &	**:**	**ADV A ALBERTUS**
		ADV H SLINGERS
INSTRUCTED BY	**:**	**STATE ATTORNEY**
DATE OF HEARINGS	**:**	**24 & 25 JULY 2014**
DATE OF JUDGMENT	**:**	**4 AUGUST 2014**