IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Thint (Pty) Ltd v National Director of Public Prosecutions, Investigating Director: Directorate of Special Operations and Johan du Plooy; Jacob Gedleyihlekisa Zuma and Michael Hulley v National Director of Public Prosecutions, Investigating Director: Directorate of Special Operations and Director of Public Prosecutions (Durban)

CCT 89/07; CCT 91/07
Medium Neutral Citation [2008] ZACC 13

Judgment Date: 31 July 2008

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in two related applications by Mr Jacob Zuma and his attorney Mr Michael Hulley, and by Thint (Pty) Ltd, for leave to appeal against two judgments of the Supreme Court of Appeal handed down on 8 November 2007. These applications concern the lawfulness of various search and seizure operations that were carried out on 18 August and 8 September 2005 at the offices of Mr Hulley and Thint, and at the residences and former offices of Mr Zuma. The search and seizures were executed on the basis of various warrants issued in terms of section 29 of the National Prosecuting Authority Act 32 of 1998 (the NPA Act) by Ngoepe JP in the Pretoria High Court on 12 and 26 August 2005. Some 250 members of the Directorate of Special Operations of the National Prosecuting Authority were involved and approximately 93 000 documents were seized.

Messrs Zuma and Hulley successfully challenged the lawfulness of the warrants and the search and seizures in the Durban High Court, which held that the state had not proved the need for the warrants, that the warrants were too vague and that the state

had provided insufficient protection for Mr Zuma's right to legal professional privilege. A similar challenge by Thint in the Pretoria High Court failed.

The Supreme Court of Appeal held by a 3-2 majority that, in both cases, the state had shown sufficient need for a search and seizure operation, the warrants were neither too vague nor too broad, and that Mr Zuma's right to privilege had been sufficiently protected. The court ordered that the state could retain the seized documents.

Messrs Zuma and Hulley and Thint then applied to the Constitutional Court for an order for the return of their documents. They argued that Ngoepe JP should not have issued the warrants because the state failed to disclose various material facts. They also argued that the warrants were overbroad and vague and therefore effectively authorised an unbounded search of the relevant premises, contrary to their right to privacy in terms of section 14 of the Constitution. Finally, they asserted that Mr Zuma's right to a fair trial in terms of section 35(3) of the Constitution had been threatened because the warrants did not sufficiently protect his legal professional privilege. The state resisted all these arguments, asserting that the warrants, searches and seizures were entirely lawful. In the alternative, the state asked for an order preserving all the seized documents with the registrar of the High Court for the purposes of the upcoming criminal trials of Mr Zuma and Thint.

In the majority judgment in which O'Regan ADCJ, Jafta AJ, Kroon AJ, Madala J, Mokgoro J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J, concurred, Langa CJ dismissed the appeal. He set out the factual background, summarising the circumstances of the issue of the warrants, their execution, and the subsequent judgments of the lower courts. The Chief Justice held that nine legal issues arose for decision and, after a preliminary analysis of the constitutional and statutory framework, as well as consideration of the proper approach to appeals against discretionary judicial decisions to issue search warrants, dealt with each issue in turn. The Chief Justice also noted in his introduction that since argument in these matters had been heard, the judges of the Court had laid a complaint with the Judicial Service Commission (JSC) against a judge of another court who allegedly sought to influence improperly two judges of the Constitutional Court in relation to this case. That matter is still pending before the JSC. The Chief Justice affirms that the alleged attempt was unsuccessful.

First, the Chief Justice held that it was in the interests of justice to grant leave to appeal, because it was desirable to settle the law regulating over-breadth and undue vagueness of search warrants. It was also desirable to consider the correctness of the conclusions of the Supreme Court of Appeal, which otherwise would have

bound any High Court hearing the criminal trials of Mr Zuma and Thint. However he also held that all courts should discourage litigation preliminary to criminal trials that appears to have no purpose other than to avoid the application of section 35(5) of the Constitution and to delay the commencement of trials contrary to section 35(3)(d) of the Constitution.

Second, Langa CJ held that the procedure for applying to a judge for the issue of search warrants in terms of section 29 of the NPA Act is ordinarily one without notice to the parties whose premises are sought to be searched. That the state did not notify the applicants when it applied to Ngoepe JP for the warrants was accordingly not unlawful, for there was no reason to depart from the ordinary procedure.

Third, the Chief Justice held that the state had complied with the duty of utmost good faith, which obliges ex parte applicants to disclose all material facts to the ex parte judge. In complex cases such as these, there is no crystal-clear distinction between material and immaterial facts, and thus the state must make a difficult judgement concerning what to include. The test of materiality should not be set at a level that renders it practically impossible for the state to comply with this duty in the context of complex criminal cases. On the particular facts of these cases, Langa CJ rejected the applicants' submissions that the state should have disclosed (i) all details relating to Thint's prior co-operation with the investigation; (ii) the fact that Mr Thétard, a former director of Thint, had relocated to Mauritius; and (iii) the risk that privileged documents might be seen by members of the search team during the operation.

Fourth, it was held further that the state had successfully established the need for a search and seizure operation in respect of all three applicants and that Ngoepe JP's exercise of discretion in this regard could not be faulted. The proper test for the need for a search and seizure in terms of section 29 of the NPA Act, as opposed to other operations such as a subpoena in terms of section 28 of the same Act, asks whether a search and seizure is reasonable in the circumstances. Specifically, it is reasonable to conduct a search and seizure operation if there is an appreciable risk, judged objectively, that the state will be unable to obtain the evidence sought by using other means, such as a subpoena. Langa CJ held that this test was met on the facts. There was, in the circumstances of these cases, a real risk, although no certainty, that a subpoena would not have yielded the desired evidence and may even have resulted in its loss or destruction.

Fifth, the Chief Justice held that the fact that the affidavit used in the application for the warrants did not deal expressly with every class of evidence mentioned in the warrants themselves did not render their issue unlawful.

Sixth, it was held, after an analysis of the relevant statutory provisions, that the terms of the warrants were neither overbroad nor unduly vague and were therefore intelligible as the law requires. The test for intelligibility of a warrant was held to be whether its terms are reasonably capable of being understood by the reasonably well-informed person who understands the relevant empowering legislation and the nature of the offences under investigation. On the facts, this test was passed. The warrants' terms, moreover, clearly fell within the four corners of the empowering provisions of the NPA Act.

The Chief Justice then considered what was termed the "catch-all" paragraph which appeared in all of the warrants, and purported to authorise the search for and seizure of any item that "might have a bearing" on the investigation in question. He held that the inclusion of this paragraph was lawful for all of the search warrants at issue except one – the warrant executed at the offices of Mr Hulley, Mr Zuma's attorney. In that context, the "catch-all" paragraph posed too great a danger that privileged documents would be seen by state investigators. However, as the paragraph was not executed in any way, Messrs Hulley and Zuma suffered no prejudice, and given that it was clearly separate to the other portions of that particular warrant, the proportionate remedy was not to declare the entire warrant (and the consequent search of Mr Hulley's offices) unlawful, but rather to sever that paragraph from the warrant.

Seventh, the applicants' submissions that the warrants exhibited a "one size fits all" approach, and that they were an unlawful attempt by the state to discover the prospective defences of Mr Zuma at his upcoming criminal trial, were both rejected.

Eighth, the Chief Justice considered whether the warrants' terms or their execution provided insufficient protection for the applicants' legal professional privilege. He held that there was no statutory or constitutional requirement for the warrants to have referred expressly to section 29(11) of the NPA Act, which provides a mechanism for the speedy resolution of claims of privilege made during a search. It was held, further, that there was nothing untoward in the manner of the state's execution of the warrants, and specifically that the search at Mr Hulley's offices was carried out lawfully. None of the applicants made any claim of privilege during the searches. Moreover, since those searches, the applicants have failed to claim privilege in respect of any particular item or document seized, despite having had adequate time to do so. It was held that in the absence of any evidence of

actual prejudice to them, the applicants' submissions concerning privilege had to be rejected.

Finally, although not strictly necessary for the resolution of the matter, the Chief Justice considered the state's alternative submission that, had the search and seizures been unlawful, the documents should nevertheless have been preserved with the registrar of a High Court so that the trial court judge could decide whether they were admissible as evidence at trial, in terms of section 35(5) of the Constitution. He held that such an order would frequently be just and equitable in terms of section 172(1)(b) of the Constitution, because the possibility of such orders would discourage delaying preliminary litigation and would ensure that the trial court, rather than another preliminary court, would be able to apply section 35(5) by striking a balance between the relevant competing interests, which the trial court is best placed to do.

Accordingly the majority judgment refused the appeal. With the exception of the "catch-all" paragraph in the warrant executed at Mr Hulley's offices – which was held to be severable – all the applicants' challenges to the search and seizure operation failed. Accordingly, the orders of the Supreme Court of Appeal were upheld.

Ngcobo J wrote a dissenting judgment, in which he dealt with three of the issues considered in the majority judgment.

First, he held that it was in the interests of justice to grant leave to appeal on the same grounds as advanced in the majority judgment. However, he left open the question whether courts of first instance should adopt a policy of refusing to consider preliminary challenges to search warrants and expressed concern that such a policy might infringe the rights conferred by sections 34 and 38 of the Constitution which guarantee to everyone the right to approach a court for an appropriate relief where any of the rights contained in the Bill of Rights is infringed.

Second, Ngcobo J held that the state breached the duty of utmost good faith, by failing to disclose various material facts in its application to Ngoepe JP. This duty, Ngcobo J held, imposed an obligation to disclose all potentially relevant facts, including those that might be raised by the target of the warrant had that person had the opportunity to oppose the application, that might influence the judicial officer in coming to a decision whether to issue a warrant. He held that this duty includes the duty to disclose not only those facts that are in favour of issuing a warrant but also those facts that are against the issuing of a warrant which are known to the state as

well as all facts that are known to the state and that might be raised by the target of the warrant, had that person had the opportunity to oppose the application.

Ngcobo J found that the state failed to justify its resort to the more drastic measure of a search warrant on the basis that other less drastic measures such as a section 28 summons would not have been effective in obtaining information from the applicants. In these circumstances, he held that the state was obliged to disclose in full all details relating to Thint's prior co-operation with the state in a previous section 28 summons, as well as the fact that Mr Thétard had relocated to Mauritius. He accordingly held that the failure by the state to disclose these matters constituted a material error which had an impact on whether it was necessary to resort to a search warrant.

Third, Ngcobo J held that the state failed to establish a need for the search and seizure warrants in respect of all three applicants. He agreed with Langa CJ that the basic test for need was whether it was reasonable in the circumstances to conduct a search and seizure. However he held that the state was obliged to show that other less drastic measures would not have been successful. On the facts of these cases, Ngcobo J held that the state had not shown that other less intrusive measures such as a subpoena would not have been effective against Thint, Messrs Zuma and Hulley. In relation to Mr Hulley Ngcobo J expressed grave concern that an officer of the court who is not the subject of an investigation can be subjected to such drastic measures without first being given the opportunity to produce the documentation required.

Finally, Ngcobo J dealt with the suggestion by the state that people who are suspects are less likely to co-operate voluntarily. He held that such a view is inconsistent with the ethos of our Constitution, in particular the right to be presumed innocent, a right which applies to all people who are suspects regardless of the offence with which they are charged.

On these grounds, Ngcobo J would have upheld the appeals and declared the search and seizure operations unlawful.

The appeals were accordingly dismissed.