IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case No 64/2001

In the matter between

Pretoria Portland Cement Company Limited	First Appellant
Slagment (Proprietary) Limited	Second Appellant

and

The Competition Commission	First Respondent
Menzi Simelane	Second Respondent
Ahmore Burger	Third Respondent
Astrid Ludin	Fourth Respondent
Wimpie Britz	Fifth Respondent

Before: Nienaber, Howie, Schutz, Zulman and Nugent JJA

Heard: 7 May 2002

Delivered: 31 May 2002

Search and seizure under the Competition Act 89 of 1998 – warrant issued by judge in terms of s46 – whether acts judicially or administratively – in any event judge not to be cited as a party – dicta to the contrary wrong – refusal to hand over affidavit on which warrant obtained – denial of right to know accusation faced - insinuating uninvited television crew – serious invasion of privacy – either an abuse of court process or a wrongful or unconstitutional act under s49 (1) of the Act or the Constitution – warrant set aside.

JUDGMENT

SCHUTZ JA

[1] This appeal is concerned with the validity of a search and seizure operation conducted in terms of a warrant issued under s46 of the Competition Act 89 of 1998 (the Act) on 3 and 4 August 2000. The search was conducted by the Competition Commission (the Commission) established in terms of the Act. The premises searched were those of the first appellant, Pretoria Portland Cement Co Ltd (PPC), and the second appellant, Slagment (Pty) Ltd (Slagment). PPC is a major producer of cement. Slagment processes blast furnace slag which is used as an 'extender' in some cements. It was owned in equal shares by PPC and two other cement producers, known as Alpha and Lafarge. PPC managed and controlled it.

[2] Four court orders were made by four different judges, sitting in the Transvaal Provincial Division. The first was granted *ex parte* and *in camera* by Spoelstra J on 2 August 2000 under case no 9803/2000. He directed that warrants be issued against PPC and Slagment in terms of s46, mentioned above, and that the proceedings not be made public 'until the execution of the order.' The order did not include a return day (as perhaps it should have done) nor did it make express provision for opposition by the appellants. On the same day Spoelstra J signed a s46 warrant authorizing the Commission to enter, inspect, search and make enquiries at the appellants' premises. Attached to the warrant was a list of the classes of documents which might be sought. The order was signed by the registrar and in signing the warrant Spoelstra J described himself as a judge sitting in chambers. The search

commenced on 3 August and proceeded on 4 August.

[3] That evening the second order was granted by Bertelsmann J under case no 19803/2000. It was signed by the registrar. Bertelsmann J ordered that '[p]ending the determination of final relief' to set aside the warrants and have returned what had been seized, the Commission was to place all seized materials in the hands of the registrar for safe keeping and was to be restrained from having access to or reading them. An interdict restraining further execution of the warrant was also granted. This order had been obtained on the strength of oral evidence. Accordingly, the appellants were required to file their notice of motion and founding affidavit within a week. This was done on 11 August. Dates for the filing of an answer and a reply were also stipulated and the matter was postponed *sine die*. Although the Commission had been given notice of the urgent application before Bertelsmann J it did not appear to oppose the relief sought. In fact it consented to the relief being granted.

[4] The third order was made by Roux J on 24 August 2000 under case no 19803/2000. It arose out of an allegation in the founding affidavit of the appellants that they had been advised, as a matter of law, that Spoelstra J, whose original order was under attack, had to be cited as a respondent. Accordingly he was so cited, even though no relief was sought against him. As s25 (1) of the Supreme Court Act 59 of 1959 states that no summons (which includes a notice of motion) in a civil action may be issued against a

judge out of a court without the consent of that court, leave was sought from Roux J to give such consent. He refused to do so, stating that whereas the appellants had elected to rely on a review 'or a quasi-review', Spoelstra J as a matter of law acted as a judge and not in an administrative capacity, and, since a judge's decisions are not subject to review, he could not be subjected to review. Hence there was no basis for his joinder.

[5] Accordingly the appellants proceeded to the stage of the fourth order without Spoelstra J in effect having been cited as a respondent. The application which had been launched on 11 August 2000 came before Daniels J. He made his order on 20 September 2000 under case no 19803/2000. It is his decision, adverse to the appellants, that is before us. Leave to appeal to this court was granted by him. He also ordered that pending the appeal the holding order made by Bertelsmann J was to stand. The substance of Daniels J's judgment was that the appellants' claims for the 'setting aside' of the warrants, for the return of materials seized, for an interdict forbidding disclosure of any information obtained and for the punishment for contempt of the Commission and various persons involved in the search at PPC's premises on 3 August (that is the first to fifth respondents), were all dismissed.

[6] The non-joinder of Spoelstra J, having come about in the way I have described, then becomes the subject of a point *in limine* taken by the Commission. The point in brief is that in issuing the warrant Spoelstra J was acting, not as a judge, in the sense of a court, but in an administrative capacity,

that both the substance and the form of the appellants' application was a review, that joinder of the decision-maker had not been effected as is required by law, and accordingly that the application was fatally defective. Before dealing with this point it is necessary to set out some relevant parts of the Act, as it was before amendment by Act 39 of 2000 in December 2000, both for purposes of the point *in limine* as also for some of the subsequent questions which arise.

The Act

[7] Section 45 empowers the Commissioner (the head of the Competition Commission – the second respondent in this case, Mr Menzi Simelane) to direct an investigation of a complaint initiated by itself or received from an outsider. Persons questioned by an inspector conducting the investigation must answer questions truthfully and to the best of their ability but do not have to incriminate themselves. Section 45 (4) deals with the issuance of a summons in these terms:

> '(4) At any time during an investigation, the Commissioner may summon any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject-
>
> (a) to appear before the Commissioner or a person authorized by the Commissioner, to be interrogated at a time and place specified in the summons; or
>
> (b) to deliver or produce to the Commissioner, or a person authorized by the Commissioner, any book, document or

other object referred to in paragraph (a) at a time and place specified in the summons.'

[8] Section 46, aforementioned, deals with the authority to enter and search under warrant. It requires quotation in full:

'46(1) A judge of the High Court, a regional magistrate or a magistrate may issue a warrant to enter and search any premises that are within the jurisdiction of that judge or magistrate, if, from information on oath or affirmation, there are reasonable grounds to believe that-

(a) a *prohibited practice* has taken place, is taking place or is likely to take place on or in those *premises*;

(b) that anything connected with an investigation into that *prohibited practice* is in the possession of or under the control of, a person who is on or in those *premises*.

(2) A warrant to enter and search may be issued at any time and must specifically-

(a) identify the *premises* that may be entered and searched; and

(b) authorize an inspector or a police officer to enter and search the *premises* and to do anything listed in section 48.

(3) A warrant to enter and search is valid until one of the following events occurs:

(a) the warrant is executed;

(b) the warrant is cancelled by the person who issued it or, in that person's absence, by a person with similar authority;

(c) the purpose for issuing it has lapsed; or

(d) the expiry of one month after the date it was issued.

(4) A warrant to enter and search may be executed only during the day, unless the judge, regional magistrate, or magistrate who issued it authorizes that it may be executed at night at a time that is reasonable in the circumstances.

(5) A person authorized by warrant issued in terms of subsection (2) may enter and search *premises* named in that warrant.

(6) Immediately before commencing with the execution of a warrant, a person executing that warrant must-

(a) if the owner, or person in control, of the *premises* to be searched is present-

(i) provide identification to that person and explain to that person the authority by which the warrant is being executed; and

(ii) hand a copy of the warrant to that person or to the person named in it; or

(b) if none of those persons is present, affix a copy of the warrant to the *premises* in a prominent and visible place.'

[9] Section 47 provides for entry and search of certain premises even without a warrant, if the person in control consents, or if the inspector has reasonable grounds for believing that a warrant would be granted under s46, if sought, but that the delay in obtaining it would defeat the object of the entry and search.

[10] Section 48 deals with powers of entry and search. It provides:

'48.(1) A person who is authorized under section 46 or 47 to enter and search *premises* may-

(a) enter upon or into those *premises*;

(b) search those *premises*;

(c) search any person on those *premises* if there are reasonable grounds for believing that the person has personal possession of an article or document that has a bearing on the investigation;

(d) examine any article or document that is on or in those *premises* that has a bearing on the investigation;

(e) request information about any article or document from the owner of, or person in control of, the *premises* or from any person who has control of the article or document, or

from any other person who may have the information;

(f) take extracts from, or make copies of, any book or document that is on or in the *premises* that has a bearing on the investigation;

(g) use any computer system on the *premises*, or require assistance of any person on the *premises* to use that computer system, to-

(i) search any data contained in or available to that computer system;

(ii) reproduce any record from that data; and

(iii) seize any output from that computer for examination and copying; and

(h) attach and, if necessary, remove from the *premises* for examination and safekeeping anything that has a bearing on the investigation.

(2) Section 45(5) applies to an answer given or statement made to an inspector in terms of this section.

(3) An inspector authorized to conduct an entry and search in terms of section 46 or 47 may be accompanied and assisted by a police officer.'

[11] Section 49 deals with the manner in which an entry and search is to be conducted. It reads in part:

'49(1) A person who enters and searches any *premises* under section 48 must conduct the entry and search with strict regard for decency and order, and with regard for each person's right to dignity, freedom, security and privacy.

(2) During any search under section 48(1) (c), only a female inspector or police officer may search a female person, and only a male inspector or police officer may search a male person.

(3) a person who enters and searches *premises* under section 48, must before questioning anyone-

(a) advise that person of the right to be assisted at the time by an advocate or attorney; and

(b) allow that person to exercise that right.

(4) A person who removes anything from *premises* being searched must-

(a) issue a receipt for it to the owner of, or person in control of, the *premises*; and

(b) return it as soon as practicable after achieving the purpose for which it was removed.

(5) During a search, a person may refuse to permit the inspection or removal of an article or document on the grounds that it contains privileged information.

(6) ……'

Section 46 (3) (b) Out Of The Way

[12] Much argument in the Heads was devoted to a contention by the Commission that the appellants' application amounted to one for 'cancellation' under the subsection, that it was a necessary 'jurisdictional fact' that the person issuing the warrant was 'absent' before another was approached and that this had not been alleged, so that the application was bad. During argument Mr Gauntlett, for the Commission, abandoned this argument, conceding that the subsection was not exclusive as to the form in which relief may be sought. I consider that this concession was rightly made. The purpose of the subsection, as it was put in another context, is 'to aid an applicant, not to shackle him' – per Kriegler AJA in *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 661F-G.

Non-suiting For Non-joinder Of Spoelstra J?

[13] The Commission's point *in limine*, described in para [6] above, presents a stultifying conundrum. Unless the appellants are to pursue the rather dubious course of an appeal against Roux J's order, they are left without a

remedy, a distasteful result.

[14] It may be possible in *this particular case* to avoid such a result by holding that the process was in fact judicial, regardless of what s46(1) contemplates. Thus the Commission first approached the court by notice of motion, through its registrar, in order to go before a judge, in the normal way. The judge would then have weighed up the information placed before him in his official capacity on oath or affirmation, in order to decide whether there were reasonable grounds to believe in the existence of the jurisdictional facts set out in the subsection. Then he had to exercise a discretion – a judge 'may' issue a warrant. In the course of exercising his discretion he would no doubt have had regard to the relative degrees of prejudice to the applicant for the warrant, which represented the public, if he should refuse to issue a warrant yet in truth its suspicions were well-founded, or to the respondent if it should emerge that the belief on which its issuance was based was ill-founded. Apart from reaching a decision on the merits of the application the judge also made decisions such as that the matter could be brought *ex parte*, that it could be heard *in camera* and that its order should not be made public. Then he issued a court order before signing the warrant. When the appellants did succeed in offering resistance, they came to court, and so forth and so on. All of this has the appearance and substance of judicial process.

[15] But even if it is open to us to reach a decision on this narrow ground, on the facts of this case, I do not think we should do so. The first reason for not

so doing is that it would avoid the real question, what does s46(1) contemplate? The second is that such a decision would offer little guidance when other sections contained in different legislation have to be considered.

[16] That being my conclusion it seems that there are two avenues to explore. The first, much argued before us, is whether in the contemplation of s46(1) Spoelstra J was to act as a court, that is judicially, and not as an administrative officer subject to review, so that his joinder would be inappropriate for that reason. The second is whether, even if he did act in an administrative capacity, it was not in any event inappropriate to join him, because of his being a judge.

Judicial Or Administrative

[17] That it is dangerous invariably to classify a warrant issued by a judge as having been issued in a judicial or an administrative capacity is illustrated by the judgment of Wessels JA in *Prinsloo and Another v Newman* 1975 (1) SA 481 (A) at 505, in which he contrasted s42 of the old Criminal Procedure and Evidence Act of 1955 (warrant for the search of a person or of premises) with s28 of the same Act (warrant for the arrest or further detention of a person). The learned judge suggested that s42 conferred a discretion of a judicial nature on a judicial officer, one not justiciable save in very exceptional circumstances, whereas the decision to be made by a judicial officer under s28 was not of a judicial nature. These sections are quoted in two cases cited in *Prinsloo*, s42 in *Divisional Commissioner of SA Police, Witwatersrand Area*

and Others v SA Associated Newspapers Ltd and Another 1966 (2) SA 503 (A) at 510D-F and s28 in *Groenewald v Minister van Justisie* 1973 (3) SA 877 (A) at 882C-D.

[18] Although *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) was concerned with a different issue, namely the constitutionality of a law allowing a judge to perform what might be perceived as executive functions, the judgment of Chaskalson P at 901G – 902A recognizes that the granting of a search warrant which authorizes the invasion of someone's privacy may be of a 'non-curial' character (at 900H). This passage was relied on by Mr Gauntlett as supporting his submission that a judge acting under s46 acts in an administrative capacity.

[19] Mr Gauntlett also relied upon a passage in *Hunter et al v Southam Inc* (1984) 9 CRR 355. The question at issue was whether it was constitutional for legislation to allow a search to be authorized by a member of the Canadian Restrictive Trade Practices Commission. In holding that it was not Dickson J said (at 369):

> 'While it may be wise, in view of the sensitivity of the task, to assign the decision whether an authorization should be issued to a judicial officer, I agree with Prowse J.A. that this is not a necessary precondition for safeguarding the right enshrined in s. 8. The person performing this function need not be a judge, but be must at a minimum be capable of acting judicially.'

[20] The emphasis in this judgment is on the person authorizing a search being neutral and unbiased. However it recognised that not only judges have

these attributes, so that it is permissible to nominate a non-judge, provided he also exhibits these attributes. Then it is said that such a person must behave 'judicially'. I do not think that this case provides the answer either.

[21] Then the Commission relies on *Ferela (Pty) Ltd and Others v Commissioner for Inland Revenue and Others* 1998 (4) SA 275 (T) at 285D-I, *Deutschmann NO and Others v Commissioner For The South African Revenue Service; Shelton v Commissioner For The South African Revenue Service* 2000 (2) 106 (E) at 121F-G and *R v Msweli and Another* 1947 (1) SA 216 (N). These cases are cited as showing that the issuance of a warrant is an administrative and not a judicial act. *R v Msweli* is so patently distinguishable that I shall not trouble to distinguish it. The judgments in *Ferela* and *Deutschmann* do contain statements supportive of the Commission's argument. But *Ferela* went off on the basis that the section there in question provided a procedure for the challenge of a warrant issued by a judge, and *Deutschmann* was concerned with whether notice of an application for a warrant had to be given, not with the manner of challenging a warrant. Moreover, it all depends on the section in question and its context. In any event we are not bound by these decisions, which, if the sections with which they were concerned are directly comparable with s46, are wrongly decided in the respect with which I am concerned, for the reasons set out below.

[22] Mr Brassey, for the appellants, relies on *Investigating Directorate:*

Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC). In issue was the validity of a warrant in terms of s29 of the National Prosecuting Authority Act 32 of 1998. The scheme of s29 is broadly similar to that of the s46 now under consideration. Section 29(4) provides that entry, search, inspection, copying and seizure may only be effected 'by virtue of a warrant issued in chambers by a magistrate, regional magistrate or judge …', and he 'may' issue it only if 'there are reasonable grounds for believing that …'. In the course of the judgment of Langa DP there is a repeated emphasis on the fact that only a judicial officer may authorize a search. See for instance 'The nature of the judicial officer's function …' at 554E, in connection with the constraints on the powers of the investigating authority; 'a judicial officer' at 563C-D, in connection with the legislature's concern for constitutional rights in interposing a judicial officer between the inspector and the citizen and 'the judicial officer' at 567C-D, in connection with the safeguards in the legislation justifying a limitation of a citizen's right to privacy. But this case, also, is, in my opinion, not decisive of the question under consideration. The emphasis is upon the fact that a judicial officer issues a warrant (as the section under consideration in that case also provided) not upon the nature of the capacity in which that officer acts or the question whether he must be joined.

[23] Some light, some little further light, is thrown on the subject by those

textwriters who deal with the question whether a tribunal operating outside the court structures acts in a judicial capacity, such that its decisions are final, absent some higher appellate tribunal or special legislative provision. Wiechers in the section *Administrative Law* in Joubert (ed) *The Law of South Africa First Reissue* Vol 1 para 67 points out that there are formal characteristics of judicial action, the accessibility of the organ to the general public, the holding of an open hearing, the possibility of legal and factual argument and the requirement that judicial officers must have legal qualifications. The fact that the application made to Spoelstra J was heard *ex parte* and *in camera* does not necessarily detract from the requirement of openness, because in exceptional circumstances judges do hear matters on this basis. As to the requirement of legal and factual argument, when the various applications are viewed as one, as they should be, as I shall explain below, the requirement is satisfied, in that both parties were ultimately entitled to place their cases before a judge. Wiechers proceeds:

> 'A judicial act is the final and binding solution of a legal dispute or uncertainty between two or more parties by an application of the law to a given set of facts whereby the rights and duties of the parties to the dispute or legal uncertainty are authoritatively determined.'

[24] These requirements had all been met by the time that Daniels J made his order. Viewing the proceedings as a whole his decision was final, subject only to an appeal. On these matters see also Burns *Administrative Law Under the 1996 Constitution* 99-101 and Devenish, Govender and Hulme

Administrative Law and Justice in South Africa 97-99. But even these things having been said, it is still not clear that for the purpose under consideration Spoelstra J is to be treated as having acted in a judicial capacity.

[25] As one proceeds with the trawl through the cases cited and the textbooks the impression grows that one is getting further and further from the answer. Perhaps the reason for this is provided by Baxter *Administrative Law* 344:

> 'Once an administrative act has been labelled, the legal rules and principles applicable to it are supposedly clear. But the scheme of classification which has been adopted is in truth simplistic and misleading. It reflects more accurately attitudes of judicial activism or restraint than *the relevant characteristics of the act in question*, and the process of classification has led to a form of sterile conceptualism in which categories and concepts which were originally adopted as convenient descriptive labels have come to be regarded as the original data themselves: the labels approximately describing particular characteristics have been mistakenly adopted as complete descriptions of all the characteristics of the act in question. It has been forgotten that classification is simply a method by which complex data is organized for the purpose of analysis and comprehension, and that no more than limited assistance is to be derived from the classificatory labels. A brief consideration of how the labels have been employed will demonstrate the resulting confusion.' (Emphasis supplied.)

[26] The judicial/administrative debate threatens to become the legendary fifth wheel on the coach. Far more productive I think it would be to have regard to the 'characteristics of the act in question', as Baxter puts it. As Schreiner JA said in *Pretoria North Town Council v A1 Electric Ice-cream Factory (Pty) Ltd* 1953 (3) SA 1 (A) at 11B-C:

> '[O]ne must be careful not to elevate what may be no more than a convenient classification into a source of legal rules. What primarily has to be considered in all these cases is the statutory provision in question, read in its proper context.'

Judges Not To Be Joined

[27] These considerations lead me on to the second avenue of exploration, whether, even if Spoelstra J in a technical sense did act in an administrative capacity, it is inappropriate to join him, because of his being a judge.

[28] It is instructive to see how Rose Innes *Judicial Review of Administrative Tribunals in SA* 11 handles the matter:

> 'There is no procedure, other than in the form of an appeal, whereby the proceedings of the Supreme Court may be brought on review. There is no right of review from the decision of a judge of the Supreme Court, either by statute or at common law. *Conceivably*, if a judge in chambers or the court makes an administrative decision or makes an administrative order, i.e. if the judge sits as an administrative officer and not as a judicial officer and the proceedings before him are proceedings of an administrative nature and not civil or judicial proceedings [53], review will lie on proper grounds.' (Emphasis supplied.)

[29] The authority cited for the first sentence in this passage (there is no review) is *Ex parte Scott* (1909) 26 SC 520. See also *Gentiruco A G v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 600E – 603H esp at 601E-F, *R v Mans* (1867) 5 Searle 285, *Junker v The Queen* (1884) 3 SC 46, Roux J's judgment in this case, referred to above, and J L Taitz *The Inherent Review Jurisdiction of the Supreme Court*, a thesis presented to the University of Cape Town for the degree of Doctor of Laws in July 1983. The learned author

Rose Innes significantly uses the word 'conceivably' when saying that there may be situations where a judge making an administrative order may be open to review. This means, if the author is correct, and I think that he is, that there are situations, readily conceivable, where he is not open to review. Footnote 53 is also instructive. It reads:

> 'For example, in Southern Rhodesia an application by an alien for naturalization is referred by statute for decision by the High Court, and in such proceedings the Court performs, it seems, an administrative function – *Ex parte Zelter*, 1951 (2) S.A. 54 (S.R.) at 55; but cf. *Ex parte Buffenstein*, 1952 (1) S.A. 429 (S.R.) at 430. In such cases, however, in the absence of legislative provision to the contrary, the court does not abandon its ordinary practices, more particularly the fundamental principles of its ordinary procedures; e.g. it will not permit the consideration of a matter not adduced in open court and available to all interested in the proceedings – *Ex parte Zelter, supra*, at 55.'

[30] The judgment of Tredgold C J (Morton and Beadle J J concurring) in *Ex parte Zelter* 1951 (2) SA 54 (SR) reads in part (at 55A-F):

> 'The application by an alien for naturalisation is referred by the Act for decision by the High Court, and the normal procedure of the High Court does not permit the consideration of a matter not adduced in open Court and available to all interested in the proceedings.
>
> It is clear that in making a grant of naturalisation, the High Court is performing an administrative function. The question is whether this fact justifies so radical a departure from its usual practice. There are indications in the Act that the Legislature contemplated that in considering naturalisation applications the High Court might take cognisance of matters brought to its notice in a manner which it would ordinarily regard as irregular. But we are nevertheless faced with the cardinal consideration that the applications are referred to the High Court, not to a Judge of the Court sitting as a Commissioner of Naturalisation but to the Court itself. There is

> an important distinction between the setting up of an administrative tribunal and the reference of an administrative matter to an existing judicial body. In the latter case the intention that the judicial body is to abandon the first principles of its ordinary practice is not lightly to be inferred. We feel that if the Legislature intended this it would have said so in express terms and not left it to be effected by regulations made under the general terms of an empowering clause. We hold therefore that the proviso to sec. 13 is *ultra vires*. Having so decided, we do not feel that we can accept a report which is laid before us on condition that we do not disclose it to the applicant.'

[31] The legislation referred to in this case was the Southern Rhodesian Citizenship and British Nationality Act 13 of 1949, particularly sections 10 to 14 and 39. The Registrar of Citizenship who had received an application for citizenship which had been advertised, so as to allow of objections, would transmit to the Registrar of the High Court the application, any opposition made thereto and other relevant papers. The applicant would then have to provide the High Court with such evidence as it might require. He would also have to appear personally before the Court, which would decide on the naturalisation application and transmit its decision to the Registrar of Citizenship. Section 39 empowered the Chief Justice and other judges to make rules regulating matters to be dealt with by the Court under the Act. The provisions of s4 of the High Court Practice and Procedure Act (chapter 9) would apply to these rules. *Zelter's* case therefore differs from the one before us in that in that case the application was to be addressed to the High Court itself and not to a judge of that Court, and further in that the form of the procedures to be adopted before the Court were, to an extent, specifically

prescribed.

[32] An example of a South African statute conferring on the High Court the power to order seizure of property is afforded by s38 of the Prevention of Organised Crime Act 121 of 1998. There the National Director of Public Prosecutions is empowered to apply to the High Court *ex parte* for an order prohibiting a person from dealing with any property and for its seizure. Before granting such an order the Court must be satisfied that there are 'reasonable grounds to believe' either that the property concerned is an instrumentality of a scheduled offence or that it is the proceeds of unlawful activity.

[33] Are we to accept that there is a fundamental difference between a statute that refers to a judge and one referring to the High Court? If the one expression is used, is the decision to be open to review with the necessity for joinder, whereas if the other is used, it is not? Before answering these questions I would observe that by whichever name he is named a judge would surely be as little prepared to 'abandon the first principles of its ordinary practice', meaning *audi alteram partem* in the *Zelter* case, as was Tredgold CJ. In my opinion there should be no difference in result depending upon the expression used, that is, in the case of a judge of the High Court. A judge will behave like a judge should.

[34] The reason behind this conclusion is to be found in the history of review procedure. The pattern of review may be fairly complicated today and is to a

considerable extent governed by statute. But the essential nature of review is simple. It is a means by which those in positions of authority may be compelled to behave lawfully. As Bell J put it quite early in our South African jurisprudence, in *Central Road Board v Meintjies* (1855) 2 Searle 165 at 176:

> '[I]t is quite new to me to hear that, even in such a case [where a road board empowered to raise a rate for one purpose proposed using it for another], the subject cannot be protected in this Court from the illegal exactions of the Government.'

[35] Review is not directed at correcting a decision on the merits. It is aimed at the maintenance of legality, at the administration of 'the law which has been passed by the Legislature' as Bell J put it on the same page of *Meintjies's* case. And throughout it has been the High Court, and only the High Court, acting through its judges, that has enjoyed the general, inherent jurisdiction to entertain reviews. It is not itself the subject of review – see the cases cited in para 29. There are other means, quite sufficient means, to which I shall come, by which the judgment of a judge may be corrected.

[36] The primary means of correction of judicial error is appeal to a higher court, which is appropriate where a judge has reached a final decision. But if an *ex parte* order has been granted, that may be corrected by another single judge through the ordinary processes of the court. (I shall explain the processes relevant to this case below.) Once this is so all need for the joinder

of a judge falls away. In an appeal or a rehearing of a matter in which an *ex parte* order has been made, grounds which before other tribunals may be raised as review grounds may equally be raised in the appeal or rehearing. But that does not make such a proceeding a review.

[37] It follows that in so far as there are statements to be found to the effect that there should be joinder when a judge's decision is 'reviewed', in *Jinnah v Laattoe and Others* 1981 (1) SA 432 (C) at 434E-F, *Ferela's* case (above) at 285F-G, *Deutschmann's* case (above) at 114F, *Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 (2) SA 934 (T) at 943G-H, 946H–947F and *Kolbatschenko v King NO and Another* 2001 (4) 336 (C) at 343H, 344D, I disapprove of such statements and consider them to be wrong.

[38] There are good reasons of policy why judges should not be joined. In the first place there is no need for it. Judges know perfectly well that their decisions may be upset by a higher court on appeal, or even by another single judge in the case of an *ex parte* order. If one's order is set aside one's vanity may be pricked but one's function is finished. Perhaps the judge will be consoled by the reflection of Ulpian, contained in D 49.1.1, that an appeal sometimes alters a well-delivered judgment for the worse, as it is not necessarily the case that the last person to pronounce judgment judges better. It is not for judges to participate in any stage subsequent to their judgments in order to defend their decision. Indeed it would be improper to do so, except in those rare cases when an obligation to provide information arises.

Secondly, on grounds of convenience, I do not think that the time of judges should be wasted filing affidavits in support of their decisions. The place to explain a decision is in a judgment. Once given it is given. Nor should the court have its time wasted considering invidious applications for leave to sue a judge under s25 (1) of the Supreme Court Act. Thirdly, and most importantly, it is not in the public interest that judges should become embroiled in disputes between parties who have appeared before them. It is a matter of the utmost importance that judges should be seen as impartial and, in the kinder sense, aloof.

[39] My conclusion is therefore that in the context of a High Court judge the debates in which judicial is contrasted with administrative and a judge with a court are essentially sterile. For argument's sake I am prepared to accept that Spoelstra J acted administratively and I accept that s46 (1) nominated a judge and not the Court. For all that he did not need to be cited, indeed should not have been cited, which means the end of the non-joinder point.

[40] It needs to be emphasized, however, that the essential function of a judge is to decide disputes between citizen and citizen and between citizen and state. The temptation for politicians and the executive to cloak their actions with the respectability attaching to the judicial name seems to prevail throughout the world and there have been times when judges have allowed themselves to be misused. But in the *Heath* case the Constitutional Court has made it clear that there are strict constitutional limits to the judiciary being

employed for non-judicial purposes, and rightly so. That case should serve as a warning that judges should not unnecessarily be drawn into matters which do not properly fall within their sphere. Judges should not be called upon to perform administrative functions, and where their services are properly engaged I would suggest that legislation should refer to a court and not a judge. A judge is a judge, not a functionary of convenience.

[41] The conclusion I have expressed as to judges not being joined does not mean that a judge will never be engaged in disputes between others. Where a decision has nothing to do with judicial duties (as where a judge acts as a commissioner in a commission of enquiry) the judge may be cited and where a personal attack is made on a judge, such as bias, the judge should be given notice of the allegation and so be allowed the choice to intervene.

[42] What I have said about the non-reviewablility of a judge does not, of course, apply to a magistrate. A magistrate is subject to review, so that the peculiar problem that has had to be addressed in this case does not arise in the case of a magistrate.

[43] In para 36 I undertook to explain the procedures by which an *ex parte* order of a judge may be attacked. The explanation follows.

<u>The True Nature Of The Proceedings</u>

[44] *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) was concerned with an attempt to oppose an order which had been granted *ex parte*. Le Roux J stated, correctly (at 347 if – 348A):

> 'On principle, however, it seems to me that any person who shows a direct and substantial interest in the proceedings, and whose affidavit indicates that his opposition might contribute something to a just decision of the case, should not be deprived of an opportunity of being heard.'

[45] The principle is expanded upon by Nugent J in *Ghomeshi–Bozorg v Yousefi* 1998 (1) SA 692 (W) at 696D-E as follows:

> 'It must be borne in mind too that an order granted *ex parte* is by its nature provisional, irrespective of the form which it takes. Once it is contested and the matter is reconsidered by a court, the plaintiff is in no better position in other respects than he was when the order was first sought. (*Banco de Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 (3) SA 330 (T) at 332B-D) and there is no reason why he should be in a better position in this respect merely because the defendant was unaware that he was called upon to submit to the court's jurisdiction for the purpose of an impending action.'

[46] See also *M V Rizcun Trader (4); M V Rizcun Trader v Manley Appledore Shipping Ltd* 2000 (3) SA 776 (C) at 784G – 785C and *Drive Control Services (Pty) Ltd v Troycom Systems (Pty) Ltd (N-Trigue Trading CC Intervening)* 2000 (2) SA 722 (W) at 723H – 724B.

[47] One is concerned here with one of the most fundamental principles of our law – *audi alteram partem*. A party's right to a hearing cannot be lost merely because a judge hearing an urgent application omitted to provide for a return day or to expressly draw to his attention the respondent's right to resist relief obtained against him without his knowledge.

[48] When the matter is approached with the correct principles in mind all four proceedings emerge as one single case, all four orders were properly

termed ‘court orders’, even though they were made at different stages by four different judges. It is no wonder that all the orders bear the same case number. And that case was started by the Commission, not by the appellants. Although they were ordered at the second stage by Bertelsmann J to file a notice of motion and founding affidavit, that affidavit when filed was largely in the nature of an answering affidavit, to which was added information as to the manner in which the search had been conducted. With the possible exception of the post-warrant events, if the matter is approached in the manner I have suggested it may be that the onus and the operation of the *Plascon Evans* rule is reversed. The fact that the appellant’s first affidavit was called a founding and not an answering affidavit is a matter of form, not substance, and the law is concerned with substance.

[49] For all these reasons the Commission’s point *in limine* may be put aside and we may proceed to the merits of the appellant’s ‘application’. But first some brief background facts.

Background

[50] Early in the year 2000 the Commission informed the appellants that it had received a complaint of their abuse of their dominant position from a firm called Ashcor. Information was requested from them and at least some information was given. As the months went by the attitude of PPC became established that it had done what it was asked to do, in so far as it could discern what the Commission was really seeking, that it was not clear what

prohibited practices it was supposed to be involved in, that it was ready to deal with the Commission in a non-adversarial way, and in particular that it would like to discuss the future shape of the cement industry with a view to banishing the imputation of monopolistic practices. Also as the months went by, the Commission's view hardened into a belief that PPC was concealing the facts, playing for time and merely pretending to co-operate. By now the Commission's suspicions had broadened to include possible breaches of s4 of the Act (restrictive horizontal practices), s8 (abuse of dominance) and s9 (price discrimination by dominant firm). An important reason why these suspicions were aroused was that one Patterson, no less important a person than the managing director of Slagment, came into contact with one Maritz, who was the chief inspector appointed to conduct the investigation. He informed Maritz of certain alleged monopolistic practices of the three main cement producers (Apha, Lafarge and PPC) which involved the manipulation of Slagment, which they owned. Documents evidencing these allegations were to be found at Slagment, and, Maritz concluded, they were to be found also at the premises of PPC, which managed Slagment. At a stage Patterson recommended that the Commission act 'swiftly' in order to ensure that the delivery of information 'is not co-ordinated by one of the cement producers' as Maritz put it, quoting him. The Commission then served summonses on the appellants calling upon them to produce a vast range of documents. The summons directed at PPC was 17 pages long. This is to be contrasted with

the document, some one and a half pages long, listing the documents that the Commission was really looking for, with which the inspectors armed themselves before setting out on the search. The summonses were withdrawn late in July 2000, shortly before the warrants were sought because, say the appellants, they threatened having the summonses set aside by a court, because, says the Commission, it did not wish to waste further time and money on the summons route. Shortly after the withdrawals Maritz learned from Patterson that one Gommersall, group managing director of PPC, had spoken to him and been told of Patterson's contact with Maritz. According to Patterson, Gommersall had told him to break off contact with Maritz unless he was summoned. Patterson also remarked that he was back in the 'cement camp'. The application for the warrant followed on 2 August 2000.

[51] To revert to the summonses, I shall not say much about them, as they were withdrawn, and no longer feature directly in the case. But I would say that the decision to withdraw them was probably a wise one, as they seem to fit the description of a subpoena given by Page Wood VC in *Lee v Angas* (1866) 2 Eq 59 at 63 as calling upon a witness 'to ransack his papers'. See also the remarks of Mahomed CJ in *Beinash v Wixley* 1997 (3) SA 721 (A) at 735C concerning an offending subpoena:

> 'The language used is of the widest possible amplitude, including within its sweep every conceivable document of whatever kind, however remote or tenuous be its connection to any of the issues which require determination ….. Not the slightest basis is suggested to support the belief that any of

> these documents exist at all or that, if they do, they can be of any assistance in the determination of any relevant issue …'

[52] This said, it is now possible to turn to the reasons why the appellants say that the warrants should be set aside and the products of the search be returned.

Appellants' Grounds Of Complaint

[53] The complaints are:

1. The warrants were 'wrongly issued', as Daniels J applied the wrong criteria and also because there were in any event no reasonable grounds for believing that prohibited practices had taken, or were taking or would take place.

2. The search warrants were unlawful because they were overbroad, or because they conferred a subjective discretion on the inspectors or because their issuance was based on reasons and grounds for which the Act makes no provision.

3. The search warrants were executed unlawfully because:

(a) the inspectors were complicit in the entry of a SABC television crew onto PPC's premises, where the proceedings were filmed, such entry being unauthorised and contrary to Spoelstra J's order and the terms of s49 (1) of the Act. There was similar complicity in the entry of e-TV at Slagment.

(b) the inspectors failed to hand over a copy of the application for the warrant, despite request.

(c) the inspectors removed copies of PPC's computer hard drives from their premises.

4. the application should not have been brought *ex parte*.

5. the Commission withheld relevant information from Spoelstra J or furnished him with misleading information, in that it failed to disclose the full co-operation that the appellants had given to it and was factually incorrect in conveying that Patterson had told them that documents would be altered, suppressed or destroyed.

I think it convenient to start with complaint no 3 as it seems to me to be decisive of the appeal.

The Manner Of The Search

[54] Before dealing with the events of the 3rd and 4th August 2000 it is necessary to make some prefatory remarks. A perusal of the sections which I have quoted shows two things. The first is that the legislature has placed power in the hands of the Commission. That is as it should be, as monopoly is a canker that eats into a free enterprise economy. The second is that the legislature showed an awareness that power may be abused and so went to lengths to see that constitutional values were respected. In this connection see, among many other things, especially the references to decency, order, dignity, freedom, security and privacy in s49 (1).

[55] That the appellants have established on the papers two real complaints about the manner in which the search was conducted is to my mind clear.

The first may broadly be described as hampering the appellants in their efforts to approach a court in order to have the warrant set aside. The second consists in the impropriety of the invitation to the SABC and e-TV surreptitiously to invade the premises of PPC and Slagment respectively.

[56] The first complaint largely hinges on the failure of the inspectors to provide the appellants with a copy of the affidavit which the Commission had used to obtain the warrant, despite repeated requests for it. Gommersall, aforementioned, arrived at PPC's premises not long after the search party had entered. One Burger led the team. (Maritz led the team at Slagment). Gommersall's attorney requested that the search be halted whilst the Court was approached in order to test the validity of the warrant. Burger declined and after a time the search proceeded. Requests for a copy of the affidavit were met with the answer that only the Commissioner, Simelane, the second respondent, had a copy and that repeated attempts to reach him on his cell phone had met with no success. This went on throughout the day. As later emerged, roundabout midday Simelane was parked in PPC's car park, uninvited, giving an interview to the SABC. When this was revealed in the affidavits, Burger for the first time conceded that she had seen him there but claimed that she had not spoken to him. Her words were: 'I happened to be walking to my car about ± 12:45 when I saw the Commissioner being interviewed. I did not stop to speak to him as I was required in the offices'. I find this stilted explanation impossible to accept. PPC's legal

representatives had been pressing her for a copy of the affidavit and according to her she had been making real attempts to reach Simelane on his cell phone, without success. Why could she not have directed a brief request to him, even if she would have had to wait a minute or two? As for the compulsion to return to the office, surely she had enough helpers to allow her to be absent for a short while. It comes as no surprise that on the next day (the 4th) the Commission dropped the tactic of evasion and instead bluntly refused to provide a copy of the affidavit. I also find it difficult to believe the statement implicitly if not expressly made, that the inspectors did not have a copy of the affidavit with them. After all, it was Maritz who had just previously made the affidavit on the strength of which the warrants had been obtained.

[57] In the Commission's answer to the appellants' application Burger made the main affidavit concerning events at PPC and Maritz the main one concerning those at Slagment. The example I have just given of unsatisfactory evidence is by no means the only one. Both their affidavits are replete with evasion, simple denials instead of a version and failures to meet statements that needed to be met. I realize that they have not had the opportunity of proving themselves in the course of oral evidence, but at times this all becomes so unsatisfactory that one is driven to accept some of the details set out in the appellants' affidavits which intensify the egregious facts which are common cause.

[58] An example is afforded by Maritz's handling of Gommersall's complaint. Gommersall squarely accuses the Commission of a deliberate strategy to refuse PPC access to the affidavit in order to deprive it of a basis for attacking the warrant. Maritz's response is that all that s46 (6) requires is that the person handing over the warrant must identify himself and explain the authority by which the warrant is being executed. The Commission, he says, 'acted in the letter and spirit of this section'. Gommersall then complains that PPC's request that the search be deferred pending an application to court was refused, this, he says, in breach of subsections 49 (1) and 49 (3) (b) of the Act, and in violation of the appellants' constitutional rights to privacy, dignity and just administrative action and their rights of access to a court in terms of sections 10, 14, 33 and 34 of the Constitution. To this Maritz's response is that the appellants' legal representatives were present and there was nothing stopping them from going to court. Perhaps so. He proceeds 'I therefore do not understand the allegation that applicants were not permitted to approach a court of law'. To do what, one may ask, without knowing what they had to meet? Subsections 49 (3) (a) and (b) enjoin the person executing the warrant to allow the person in control to exercise the right of being assisted by an advocate or attorney. Is that advocate or attorney then to be deliberately denied the means of providing that assistance? As I had occasion to remark in *Naude and Another v Fraser* 1998 (4) SA 539 (SCA) at 563F 'There is little point in granting a person a hearing if he does not know how he is concerned,

what case he has to meet.' Otherwise, in this case, an *ex parte* application would become an application *ex parte* squared. I find Maritz's alleged failure to understand contrived.

[59] My conclusion on this aspect of the case is that Gommersall's complaint was justified. Having obtained an *ex parte* order the Commission did all it could to complete its search before the appellants could reach a court.

[60] The second main complaint, as I have said, is the invasions by two TV teams. The facts are these. On the evening of 2 August 2000 the SABC and e-TV were alerted by an official of the Commission, one Coode, that it would be performing a search and seizure operation the next day. They were not told whose premises were to be searched but it was arranged that they would meet with the Commission's team at Halfway House the following morning. This was done and the entourages proceeded in convoy to the premises of PPC and Slagment. The arrival at the premises was enough to tell the camera men who was going to be searched. This was already a breach of Spoelstra J's order prohibiting publication before execution. What if the Commission representatives had told the TV team that they had to effect their own entry, they had told the truth to the gate attendant that they intended to photograph a search inside PPC's premises, they had been refused entry and had then photographed the exterior of the premises for the delectation of the general public? To take what happened at PPC, the party entered the car park through a control gate and its members presented themselves at the premises. The

camera crew had not been invited to enter PPC's grounds, nor did any court order permit them to do so. These facts, which are common cause, together with the further undisputed fact that there was no express identification of the camera crew when they entered the building, already constitute a grave invasion of PPC's right to privacy.

[61] At this point comes another quibble. The Commission contends that Spoelstra J's order was not breached by the entry into the premises because the prohibition contained in it fell away at 9 am when the premises were entered in order to commence the search. This cannot be so. The warrant was not executed until the search and seizure was completed. Such an interpretation of the order would have allowed PPC an opportunity of approaching a court with the possibility that the warrant would be set aside. That is the sensible interpretation and surely what the court had intended. This view is re-inforced by the wording of s46 which draws a distinction between 'commencing the execution' (s46 (6)) and 'executed' (s46 (3) (a)).

[62] I can only conclude that the Commission was intent on advertising itself, with no regard to the harm it might do to its suspects. Not all firms suspected of monopolistic practices are guilty of them and it must be remembered that the innocent among the suspects might be harmed, or even put out of business by bad publicity, with consequences not only for the shareholders but also the workers, and indeed the public at large.

[63] The impression of publicity-seeking is re-inforced by Simelane's

uninvited media interview held in PPC's own car park. There is another aspect of his conduct that deserves comment. In his replying affidavit Gommersall stated that the book kept at the entrance gate reflected that at 12:40 Simelane had signed and stated in the Whom Visited column, 'MD'. Gommersall added that it was simply untrue for Simelane to have said that he intended visiting the managing director. And we know from one of the Commission's witnesses that the meeting in the car park was pre-arranged. Now it is true that Simelane had no right or duty to answer this allegation, made in reply, but I would have expected him to offer to do so if Gommersall's imputation of dishonesty were false.

[64] To proceed with the search at PPC. The SABC crew entered the premises as if they were members of the Commission's team and started filming events. No express attempt was made by the Commission's team to identify them, as I have said, and for a time the PPC employees, quite understandably, assumed that they were there in that capacity. Then Gommersall's secretary, Margaret Sherry, asked who these people were (referring to the TV crew) and she was told that they were from the SABC. At first she thought that the answer was a joke. None of PPC's witnesses said that the crew members were actually introduced as part of the Commission's team, but it was clear that it was PPC's case that they had been stealthily smuggled in. Yet, this is the way in which Bester handles the matter:

'As we entered through the access door, Margie asked: 'Is it everyone?' I

> said yes, not in any way applying my mind to the presence of the SABC team. I at no point claimed that the SABC crew was part of our staff. In fact what I had anticipated was that when we arrived at the first applicant someone would demand ID's of everyone …'

[65] Maritz's explanation is equally lame:

> 'I further deny that Burger and/or Ludin, or any member of the Commission, represented that the SABC was part of the delegation from the Commission.'

This is a good example of blunt denial coupled with evasion, of the sort of which I have spoken.

[66] The whole of the conduct of the Commission representatives smacks of rampant triumphalism. When Margaret Smith remarked that she thought that her informant as to the identity of the TV crew was joking, a Commission representative laughed and said 'this [is] big news'. When Ms Sherry confronted Ms Ludin, the fourth respondent, with the fact that the TV crew had been sneaked in, the response was 'this [is] the way that search seizure procedures [are] conducted' (this despite the fact that later Ms Ludin told her that this was the first search and seizure carried out by the Commission and the first such operation in which she had been involved).

[67] It is clear that the conduct of the Commission representatives caused great indignation, unsurprisingly so. Looking back in retrospect Gommersall said in his reply:

> 'What the Commission really wished to do was to give themselves maximum publicity at how powerful and important a body they were and how they would teach business a lesson by humiliating them and knocking

> them into submission. The whole operation was an exercise in power and abusive in its nature and it is for this very reason that PPC and Slagment have resolved to bring these proceedings. It is unconscionable that reputable companies should be subjected to such abusive behaviour.'

[68] These are strong words, but I think there is substance in them. It remains to be added that in some respects the Commission representatives obeyed the injunctions of the Act scrupulously, but that cannot negate the improprieties that I have described.

[69] I do not intend devoting time to the remaining complaint about the execution, namely that the expert Britz retrieved information from PPC's hard drives and failed to hand over to the Registrar the copies he had made. The process followed by Britz was to extract erased material from the hard drives and this took a long time. Whether or not Britz exceeded the terms of the warrant, I do not think that his behaviour nearly equates that of the Commission's team, even though I do not underestimate the potential importance of the information that he may have obtained.

[70] Daniels J said that he could not condone the actions of Burger and Maritz in relation to the media, but that he could not find that they had intended to commit contempt of court (the appellants had also asked for contempt relief). He did not do anything further about their conduct. The question is, what should we do about it?

Consequences Of The Commission's Behaviour in Executing The Warrant

[71] I take a serious view of the Commission's conduct and am of the view

that we must make it clear that we will not allow persons or businesses to be subjected to an abuse of power and must also make it clear to the Commission that it also is subject to the Constitution and the law and must accordingly mend its ways in certain respects. The effective way of achieving these ends is, in my view, to set aside the whole of the proceedings commenced by the Commission when applying for a warrant. What it decides to do thereafter is for it to decide. I must emphasize that the facts which I have set out, even the undisputed facts, involve a gross violation to the appellants' rights to privacy under the Constitution and s49 (1) of the Act, and also of the appellants' rights of resort to a court. These are fundamental matters.

[72] The basis for the entire setting aside of the search procedures to date may depend upon the nature of Spoelstra J's function. If he acted judicially then the law provides remedies if its process is abused, as when a search of the kind just described takes place. A good example of this is to be found in some of the *Anton Piller* cases in which the courts have rightly insisted on strict compliance with their orders. See for instance, *Easyfind International (SA) (Pty) Ltd v Instaplan Holdings and Another* 1983 (3) SA 917 (W) at 931E–933H and *Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner and Others* 1984 (3) SA 850 (W) at 855A-I. An *Anton Piller* order is obviously different from the type of order granted by Spoelstra J, but it has certain essential elements in common, namely its *ex parte* nature, the drastic invasion of rights it brings about, and the serious consequences it can have for

the respondent. It is because of these features that the courts have insisted on maintaining a firm grip upon the execution of *Anton Piller* orders.

[73] If, on the other hand, the warrant is not a court process and the ensuing search does not constitute the execution of a court process, then the inherent jurisdiction of the High Court to prevent abuse of its process would be absent. But I see no reason why that fact should exclude the setting aside of the whole process. The basis would then be wrongful failure to obey the injunctions of the Constitution and s49 (1), especially with regard to privacy. The Commission has important work to do, but it is not to frighten the horses. Once one is satisfied that there has been a serious breach of those duties, there is no call for a delicate severance of the various constituents of the Commission's acts. It should be made to start with a clean slate. The execution was bad because it involved *inter alia* a gross, and as yet inadequately explained, invasion of privacy by taking along the TV media. Notionally, an unlawful execution will not by itself inevitably taint a warrant that is itself regular. In this case, however, the Commission's affidavits show that media accompaniment was a component of the plan very early on. Coode denies that she contacted the media before the order was obtained but nobody denies that the media contact was thought of before the order was obtained. The most plausible inference is that it was. The circumstances are therefore that this major affront to privacy taints the entire process.

<u>The Other Relief</u>

[74] This being my conclusion it is unnecessary to consider the further grounds advanced by the appellants, they being set out in paras 1, 2, 4 and 5 contained in para 53 above. I would, however, point out, with a view to the future, that serious questions are raised by the argument that the warrants are overbroad, imprecise and not in accordance with the Act. I refrain from making any further comment, other than to say that a warrant should be tailored for the occasion, not simply taken from stock.

Conclusion

[75] For these reasons the appeal must succeed. The following order is made:

1. The appeal is allowed with costs including the costs of two counsel.

2. The order of the court *a quo* dismissing the appellants' application with costs is set aside and replaced with the following:

a. The warrants against the first and second applicants issued by Spoelstra J on 2 or 3 August 2000 are set aside.

b. The first to fifth respondents are to return forthwith all documents, records, data and other property ('the documents') of the applicants seized under the warrants.

c. The applicants are authorized to take possession of the documents under the control of the Registrar placed with him pursuant to an order dated 4 August 2000.

d. The first to fifth respondents and their employees and agents are interdicted from disclosing any information that has come to their knowledge in the course of the execution of the warrants and the documents yielded from the execution of the warrants.

e. The first to fifth respondents are ordered to pay the costs of this application (including the costs of the application before Bertelsmann J), such costs to include the costs of two counsel, jointly and severally.

W P SCHUTZ

JUDGE OF APPEAL

CONCUR
NIENABER JA
HOWIE JA

ZULMAN JA

NUGENT JA