



REPUBLIC OF SOUTH AFRICA

**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

Case number: 671/06
Reportable

In the matter between:

THINT (PTY) LTD

APPELLANT

and

**NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

FIRST RESPONDENT

**THE INVESTIGATING DIRECTOR:
DIRECTORATE OF
SPECIAL OPERATIONS**

SECOND RESPONDENT

JOHAN DU PLOOY

THIRD RESPONDENT

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

HEARD: 29 AUGUST 2007

DELIVERED: 8 NOVEMBER 2007

SUMMARY: Search and seizure – search warrant – validity of – warrants issued in terms of s 29 of National Prosecuting Authority Act 32 of 1989 – whether references to suspected offences inappropriately vague.

ORDER OF COURT SET OUT IN PARA 14 IN JUDGMENT OF NUGENT JA.

Neutral citation: **This judgment may be referred to as *Thint (Pty) Ltd v National Director of Public Prosecutions* [2007] SCA 136 (RSA).**

JUDGMENT

FARLAM JA

[1] This is an appeal from a judgment of Du Plessis J, sitting in the Pretoria High Court, in which he dismissed with costs the appellant's application for orders (a) setting aside a search warrant issued by Ngoepe JP in chambers in the Pretoria High Court, in terms of s 29(4) of the National Prosecuting Authority Act 32 of 1998; (b) declaring the searches and the seizures conducted pursuant to the warrant at the appellant's office in Pretoria to be unlawful; (c) directing the respondents, the National Director of Public Prosecutions, the Investigating Director of the Directorate of Special Operations and Mr Johan du Plooy, a senior special investigator in the Directorate of Special Operations, to return to the appellant all items seized during the said searches and to deliver all minor images made of computer items seized; and (d) ordering the respondents to pay costs on the attorney and client scale, including the cost of three counsel.

[2] The warrant which forms the subject matter of this appeal was issued by Ngoepe JP on 12 August 2005 together with a further 21 warrants authorising searches and seizures at other premises in Pretoria and elsewhere in the country. The operative part of the warrant was in identical terms to the corresponding parts of the other warrants. Attached to it were two annexures. The first annexure contained twenty two paragraphs, the wording of which closely followed, with the necessary adjustments, twenty two of the paragraphs in the corresponding annexure to twenty of the other warrants authorised on the same day.

[3] On the morning of 18 August 2005 the warrants issued by Ngoepe JP in respect of the office of the appellant was executed by members of the Directorate of Special Operations of the National Prosecuting Authority. At the same time most of the other warrants authorised by Ngoepe JP were also executed. They included a warrant in respect of the Pretoria residence of Mr PJMR Moynot, who is a director of the appellant. The remaining warrants were issued in respect of homes and offices or former offices of Mr Jacob Zuma as well as the home and office of his former attorney, Ms J Mahomed, and the office of his present attorney, Mr M Hulley

[4] Mr and Mrs Moynot were originally co-applicants in this application, seeking orders in respect of the items seized at their residence. The respondents conceded that the warrant issued in respect of their home was invalid, returned the items

seized and tendered to pay costs up to the date of tender. In the circumstances, save for a preservation order in respect of a plan of Mr and Mrs Moynot's home, which was made by agreement, no order was made in respect of that part of the application which related to the items seized at the Moynots' home and it does not figure in this appeal.

[5] On 26 August 2005 Ms Mahomed brought an application in the Johannesburg High Court for, *inter alia*, relief similar to that sought by the appellant in the present matter, which relief was granted to her on 9 September 2005 by Hussain J. Subsequently Mr Zuma and Mr Hulley successfully brought a similar application in the Durban High Court, where Hurt J granted them the relief they sought. The respondents in the applications heard by Hussain J and Hurt J appealed to this court against the orders given against them and their appeals were argued on the two days preceding the day on which the present appeal was argued. The judgments in those appeals are being handed down simultaneously with the judgment in this matter.

[6] In the *Mahomed* appeal the appellants, who are the first two respondents in this appeal, conceded that the warrant issued in respect of Ms Mahomed's home and offices and the resulting seizures effected pursuant thereto were invalid with the result, so they stated, that their appeal had to be dismissed subject to a variation to the orders granted by the court *a quo* providing for the preservation of the original items seized under the warrants or copies thereof. Ms Mahomed opposed the variation sought and the appeal was then argued solely on the issue as to whether the order granted by Hussain J should be varied by the insertion of a preservation order.

[7] In the appeal against the order granted by Hurt J in the application brought by Mr Zuma and Mr Hulley the appellants did not concede that the warrants and the execution thereof were invalid but they argued in the alternative that if they failed on the validity issue a preservation order should nevertheless be made.

[8] For the reasons given in the judgment in the appeal relating to the application brought by Mr Zuma and Mr Hulley, which in my view, are applicable here, I am

satisfied that the appeal against the dismissal of the appellant's application should succeed. I am also satisfied for the reasons set out in that judgment that a preservation order should be made.

[9] By agreement between the parties certain documents which the appellants' representatives said were privileged were placed in bags which were sealed and subsequently handed over to the registrar of the Pretoria High Court for safekeeping. The other items which were seized were taken away by the respondents' representatives. During the execution of the warrant mirror images were made of the hard drives from Mr Moynot's laptop and the computer of Ms N Govender, Mr Moynot's personal assistant. Apart from the documents in sealed bags in the custody of the registrar, the other items seized under the warrant are in the possession of the respondents. If a preservation order is to be made in this matter it will have to provide for the handing over to the appellant's representatives of items presently in the possession of the respondents and all copies made thereof and of the documents presently in the custody of the registrar and the preservation by the registrar of copies of the items to be handed over by the respondents and by him.

[10] As far as the costs order sought in the court *a quo* is concerned I do not think that a case was made out for costs on the attorney and client scale or for the costs of three, as opposed to two, counsel.

[11] In my opinion an order in the following terms should be made:

1. The appeal is dismissed with costs including those occasioned by the employment of two counsel.

2. The order of the High Court is set aside and replaced by an order in the following terms:

'1. The search warrant attached to the Notice of Motion as Annexure "J" is set aside and it is declared that the searches and seizures conducted on 18 August 2005 at or in the premises referred to in Annexure "J" were unlawful.

2 (a) The respondents are ordered to hand over to the registrar forthwith all items seized and removed from the respective premises in terms of the aforesaid warrant (apart from items already in the custody of the registrar), together with all copies of

such items which the respondents or their agents may have made while the items have been in their possession, irrespective of the means by which such copies have been made or taken.

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

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

- (i) notified by the respondents that the retained items or any of them may be returned to the first applicant; or
- (ii) if proceedings are instituted pursuant to the investigation referred to in the founding affidavit placed before Ngoepe JP when the said warrants were authorised, the conclusion of such proceedings; or
- (iii) the date upon which the first respondent decides not to institute or to abandon such proceedings;

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

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

- (i) any order of any competent court (whether obtained at the instance of the first applicant or the respondents);
- (ii) the lawful execution of any search warrant obtained in the future; or

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

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

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

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

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

3. The respondents are ordered to pay the first applicant's costs in this application, including those occasioned by the employment of two counsel.'

IG FARLAM
JUDGE OF APPEAL

CLOETE JA) CONCUR

NUGENT JA:

[12] The material facts and issues in this case are fully set out in the judgment of my colleague Farlam and need not be repeated. I am unable to agree with the order that he proposes.

[13] As pointed out by my colleague the warrants that are now in issue are not materially different to the warrants that were considered in *National Director of Public*

Prosecutions and Others v Zuma and Another, the judgment in which is to be delivered simultaneously with this judgment. For the reasons given in my judgment in that matter I am of the view that the warrants in this case were similarly valid and that the order made by Du Plessis J was correct. I agree with my colleague that costs on a punitive scale and the costs of three counsel are not warranted.

[14] The appeal is dismissed with costs that include the costs occasioned by the employment of two counsel.

R.W. NUGENT
JUDGE OF APPEAL

PONNAN JA)
MLAMBO JA) CONCUR