Bib 125/95

CASE NO 543/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:	TPD Case No 23640/92
MOROLE NTHEDI BOGOSHI	Appellant
and	
L C J VAN VUUREN NO	First Respondent
J D VISSER	Second Respondent
THE DIRECTOR: OFFICE FOR SERIOUS ECONOMIC OFFENCES	Third Respondent

In the matter between:	TPD Case No 23866/92
MOROLE NTHEDI BOGOSHI	First Appellant
ANDREW MOLAMU LEPULE	Second Appellant
and	
THE DIRECTOR: OFFICE FOR SERIOUS ECONOMIC OFFENCES	First Respondent
L C J VAN VUUREN	Second Respondent
JOHANNES ABRAHAM VAN DER WESTHUIZEN	Third Respondent
EUGENE DU PLESSIS	Fourth Respondent

Coram: CORBETT CJ, NESTADT, VIVIER, HARMS et OLIVIER, JJA

Date heard: 1 September 1995

Date delivered: 13 November 1995

JUDGMENT

NESTADT, JA:

In issue in these two appeals is the validity of the seizure by the respondents, in terms of the Investigation of Serious Economic Offences Act, 117 of 1991 ("the Act"), of certain documents of the appellants. The main question that arises is whether they were protected from seizure by reason of legal professional privilege.

The appellants, Messrs Bogoshi and Lepule, are attorneys practising in partnership with each other. The respondents are the Director of the Office for Serious Economic Offences ("the director") and certain members of his staff. As appears from the preamble to the Act, such office was established in order to swiftly and properly investigate "serious economic offences". Clearly, this is a reference

to commercial or so-called "white-collar" crime. It is well known that the incidence of such crime has in recent years increased. The Act was obviously designed to provide special measures to combat this trend. In terms of sec 5(1)(a) the director may, if he has reason to suspect that a serious economic offence has been committed, hold an inquiry into the matter in question. To this end he may designate an assistant to conduct it. Sec 5(6) empowers the director to summon any person who is believed to be able to furnish any information on the subject of the inquiry to appear before the director for questioning. Sec 6(1) provides that for the purposes of an inquiry, premises may be entered and searched and documents seized. The relevant part of the section reads:

> "The Director or any person authorized thereto by him in writing may for the purposes of an inquiry at any reasonable

time and without prior notice or with such notice as he may deem appropriate, enter any premises on or in which anything connected with that inquiry is or is suspected to be, and may -

(a) -----

(b) -----

(c) -----

(d) seize, against the issue of a receipt, anything on or in the premises which in his opinion has a bearing on the inquiry in question, or if he wishes to retain it for further examination or for safe custody."

In 1991 a judicial commission began an inquiry into the affairs of the Multilateral Motor Vehicle Accident Fund ("the fund"). This was a body established under Act 93 of 1989 to provide compensation for third party victims of motor collisions. It assumed the liabilities of the Motor Vehicle Accident Fund established by sec 3 of Act 84 of 1986. Early in 1992 the commission reported to the director that there was evidence that the appellants' firm had committed certain irregularities in their handling of 21 claims ("MVA

claims") against the fund or its appointed agents on behalf of clients. The suspicion, so it would seem, was that Bogoshi, having recovered compensation on behalf of his clients from the fund, had fraudulently failed to pay over the correct amount to them; instead, monies had been improperly retained for his or the firm's own benefit. The director decided to investigate the allegations. What then happened was, in summary, the following. On 24 July 1992 members of the director's staff, acting under a written authority granted to them in terms of sec 6(1) of the Act by the director on 6 July 1992, entered the appellants' offices and in their absence seized and removed certain of their files (together with the contents thereof). These files related to six of the MVA claims referred to by the commission. One of the files was immediately returned because it allegedly

concerned a current matter. On 5 August 1992 the director, acting in terms of sec 5(6), summoned Bogoshi to appear before him on 18 August 1992 in connection with "alleged irregularities concerning claims submitted to the Multilateral Motor Vehicle Accident Fund and the Motor Vehicle Accident Fund." He was also required to produce a number of documents including 15 further files (relating to the balance of the 21 claims referred to). On 18 August 1992 Bogoshi appeared in person at the inquiry. He did not, however, produce any of the files. The inquiry was postponed to 25 August 1992. On that day counsel appeared on behalf of Bogoshi. Counsel argued that the entire contents of the files were privileged, that the clients had not waived such privilege and that the files therefore need not be produced. On behalf of the director this was contested. On

2 September 1992 the person designated by the director to hold the inquiry ruled that no attorney and client privilege attached to the files or their contents. The inquiry was then postponed. This was to enable Bogoshi to bring review proceedings in terms of Rule 53. On 20 November 1992 Bogoshi launched his application ("the first application"; case no 23640/92) against the respondents. In the main the case which he sought to make out was that the ruling that the files were not privileged was bad in law. An order was sought that the ruling be set aside and that a declarator should issue that the files in question need not be produced and that those already seized be returned. Four days later, ie on 24 November 1992, the appellants, as a matter of urgency, brought a further application ("the second application"; case no 23866/92) against the respondents. What led

to it was that on that same day members of the director's staff, acting under an authority signed on behalf of the director on 20 November 1995 in terms of sec 6(1) of the Act, had again entered the appellants' premises and seized and removed a further 1143 files (relating to MVA claims). The relief claimed in the second application (based, as before, on inter alia the contention that the documents were privileged) was an order setting aside the authority referred to and that the files seized be returned to the appellants.

The respondents opposed both applications. Answering and replying affidavits having been filed, the matters came before Du Plessis J, sitting in the Transvaal Provincial Division. Both applications were heard together. Judgment was delivered on 2 April 1993. It has been reported (see Bogoshi vs Van Vuuren NO and

Others; Bogoshi and Another vs Director, Office for Serious Economic Offences and Others 1993(3) SA 953(T)). It will be seen that it deals with a number of issues besides privilege. I return to these later in this judgment; for the moment I confine myself to the issue of privilege. In this regard, Du Plessis J's approach was that whilst professional privilege was a fundamental right which prevents seizure of a privileged document and although the Act did not override professional privilege, an attorney's file does not as a whole become privileged; true, in this case, the files must be taken to have contained some privileged communications; and these were accordingly immune from seizure; at the same time, however, the files would also have contained non-privileged documents; these could be seized (see the reported judgment at 958I-959D; 960D-G).

Applying this reasoning to the first application, it was held that the

ruling made on 2 September 1992 that no privilege attached to the files was wrong and should be set aside. It was obviously regarded as being too wide. However, the rest of the prayers were refused. Seeing that the files per se were not privileged, Bogoshi was not entitled to a declarator that the files need not be produced. Moreover, Bogoshi had not claimed privilege before the five files were seized. Whatever privilege existed had been "breached". The return of these files should therefore not be ordered (963 C-F). As to costs, it was held that the respondents were largely successful and should recover 60% of their costs. Regarding the second application, there had been a claim to privilege by the appellants. Du Plessis J was thus faced with the problem of what the fate of the 1143 files should be pending a determination of which documents in

each file were privileged and which were not privileged. The learned judge attempted to reconcile the right of the appellants to have privileged documents remain confidential with the respondents' concern that they be preserved. This he did by adopting "a practical solution" (961 C-D). It was held that the entire contents of the files be kept safe "until the question of privilege has been decided". The files (having by agreement on 25 November 1992 pendente lite been placed in the custody of the registrar of the court) would remain where they were pending a resolution of which documents were privileged; in the meantime those which the appellants claimed were privileged could in the presence of a representative of the respondents be removed from the files; they had, however, still to be kept by the registrar (in a separate, sealed container); the registrar would hand

the remaining files and their contents to the respondents (961 E-G; 965 E - 966 B). In the result, so it was further held, the appellants had achieved only a "very limited measure of success" (965 B), namely, that they could extract what they claimed were privileged documents from the files (to be dealt with in the manner described). But the respondents had been justified in seizing the files. And the appellants were not entitled to their return. Accordingly, the second application was dismissed with costs (excluding those of the actual hearing, in regard to which, as I have said, the respondents were limited to 60%).

Against the order in the first application Bogoshi, and against the order in the second application the appellants, now appeal. They do so with the leave of the court below. At the

commencement of the hearing of the appeal an order condoning the appellants' late lodging and delivery of a proper record and their (alleged) late furnishing of security was granted. By consent costs of the application for condonation were made costs in the appeal.

Before us, Mr Moseneke, on behalf of the appellants argued what I may call a preliminary point. It was founded on the decision in Park-Ross and Another vs Director: Office for Serious Economic Offences 1995(2) SA 148(C). This case held (at 172G and 176C) that sec 6 of the Act was in conflict with the right to privacy contained in sec 13 (being part of chapter 3) of the Constitution (Act 200 of 1993) and was accordingly invalid. Counsel submitted that this being so, the respondents could no longer rely on sec 6 to justify the seizures and the documents in question

had to be returned. The argument must be rejected. The judgment a quo having been delivered before the Constitution came into operation, the appeal falls to be decided without applying Chapter 3 of the Constitution. This is the effect of what was decided by the Constitutional Court in S vs Mhlungu and Others 1995(3) SA 867(CC) at 888B-G. The principle is stated in relation to trial proceedings but obviously it applies also to motion matters. It follows that for our purposes effect must be given to sec 6.

What I think needs to be emphasised about the judgment a quo is that it is based on two propositions, namely (i) that there must have been some documents in each of the files which were not privileged (and which could therefore be seized) and (ii) that (as appears from 961B-C) "(i)t is not claimed privilege which renders a

document immune to production, but established privilege" (my emphasis). The argument for the appellants attacked both these findings. It was submitted in the first place that the assumption in (i) was erroneous; the probabilities were that the entire contents of the files were privileged; at least this should be presumed. As to (ii), the principle strongly contended for was that until it had been determined which documents in each file were privileged and which were not, or unless only identifiable, non-privileged documents were sought, there could be no seizure by the respondents of any of the files; simply put, because the files contained at least some privileged documents, nothing could be seized; were this not so, the privilege attaching to confidential documents would be undermined if not rendered nugatory; even the seizure of privileged documents for safe

keeping only, is inimical to the preservation of confidentiality. Relying especially on a passage in Sasol III (Edms) Bpk vs Minister van Wet en Orde en 'n Ander 1991(3) SA 766(T) at 785 G-J, as also the recommendations made in Park-Ross (at 172G - 173B) as to how, in terms of sec 98(5) of the Constitution, sec 6 should be corrected by Parliament, it was said that the respondents should, before acting in terms of sec 6, have adopted what was termed the salutary practice of first obtaining (possibly ex parte) an order of court authorising the seizure of the files. Such an order would (as I understood this "prior authorisation" argument) specify a procedure for resolving any dispute as to the status of the documents but, in the meantime, would prevent the respondents from seizing and thus perusing documents alleged to be privileged. The order of Du Plessis J, so the argument

concluded, though providing a mechanism of the kind envisaged, came too late; the unqualified prior seizure should therefore have been held to have been invalid and the return of all the files ordered.

The argument that the files must be assumed to have contained only privileged documents ((i) above) is not tenable. Indeed, I did not understand counsel to persist in it. The appellants' affidavits do not allege that the files contained only privileged documents. This is not surprising. The broad principle is that only confidential communications (and material integral thereto) between attorney and client made for the purpose of obtaining legal advice are privileged. Obviously, amongst the multitude of documents usually contained in an attorney's MVA file, there would be documents and information which in the ordinary course may be

presumed not to be privileged. I have in mind, by way of example, the name and address of the client; the so-called MV 3 claim form (which must contain precise details of the client's heads of damages and the amounts claimed); written evidence of the identity of the appointed agent; the pleadings; where there was a settlement of the claim, an exchange of correspondence between the parties evidencing the settlement; and statements of account reflecting the amount received by the attorney from the defendant, particulars of the attorney's fees and disbursements and what the nett amount was that was paid over to the client (including, possibly, the paid cheque).

The prior authorisation argument ((ii) above) has more merit. There can be no doubt that the Act does not exclude the

operation of attorney-client privilege (being the species of legal professional privilege with which we are concerned). Furthermore, it can, I think, safely be assumed that because of the fundamental nature of the rule, those documents in the files which were privileged would normally be protected from seizure; in other words that where privilege applies, a seizure of documents under sec 6 is, despite the section's wide wording, ab initio to be confined to non-privileged documents. (See the discussion on the effect of professional privilege on the seizure of privileged documents, by Hoffmann and Zeffertt: The South African Law of Evidence 4th ed, 256-7.) The problem raised by the argument is the essentially practical one of how, when and by whom non-privileged documents are, at the initial stage, to be identified and thus separated from those which are

privileged. The issue involved is not altogether a novel one. As appears from some of the cases cited in the judgment a quo, it has arisen before. It is, however, unnecessary to deal with the point. This is because, as will be seen, the appellants face a more basic obstacle to the grant of the relief claimed in their applications.

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

But most important for our purposes is the principle that privilege does not arise automatically. It must be claimed. This may be done not only by the client but by the attorney. Indeed, he is under a duty to claim the privilege. However, because the privilege is the right of the client, the attorney, in claiming it, must act not in his own interests or on his own behalf but for the benefit of the client. Unless he does so, his claim to privilege may be regarded as not genuine. And, in this event, a court would be entitled to disregard the claim to privilege and admit the document in evidence or permit its seizure, as the case may be. This has occurred where the attorney has claimed the privilege ostensibly on behalf of his client but in truth in order to frustrate an investigation into his own alleged criminal conduct. In re Impounded Case (Law Firm) 879 F.2d 1211

(3rd Cir 1989) was such a case. It involved the seizure of documents. At 1213-4 the court said:

> "It is not apparent to us what interest is truly served by permitting an attorney to prevent this type of investigation of his own alleged criminal conduct by asserting an innocent client's privilege with respect to documents tending to show criminal activity by the lawyer. On the contrary, the values implicated, particularly the search for the truth, weigh heavily in favor of denying the privilege in these circumstances."

(See, too, Baird vs Koerner 279 F.2d 623 at 632). The Canadian courts would seem to adopt a similar approach (Re Director of Investigation and Research and Shell Canada Ltd (1975) 22 CCC (2d) 70 (FCA) at 80). A further illustration of an ineffectual claim to privilege (this time by the client himself) is the English case of R vs Ataou [1988] 2 All ER 321. The client was a witness for the prosecution. Counsel for the accused, in order to impugn the

witness's credit, sought to cross-examine him on a record of a statement he had made to his solicitor (to the effect that the accused was innocent of the charge). The Court of Appeal overturned the trial judge's ruling that without the consent of the witness, cross-examination on the statement was impermissible because the statement was privileged. It was held that there was "no ground on which the client could any longer reasonably be regarded as having a recognisable interest in asserting the privilege" (see at 326h). Reference was made to Cross on Evidence, who in dealing with the general rule "once privileged, always privileged" states (in the 7th ed at 435-6) that "a time may come when the party denying the continued existence of the privilege can prove that the party relying on it no longer has any interest to protect...".

What is the result of applying these principles to the facts of the present matter? Had the clients' conduct been the object of the respondents' investigations, it would have been the duty of the appellants to assert privilege on their behalf. But the files were, of course, required for the purposes of an inquiry into the conduct of Bogoshi (or that of his firm). The allegation which the respondents were investigating was that the clients had been defrauded. It is, accordingly, difficult to conceive of any of them wishing to maintain confidentiality in the files. More particularly is this so seeing that their claims had been dealt with. Such claims had been paid or otherwise disposed of. The files were "closed" and the appellants' mandate had in each case terminated. If the clients nevertheless had some recognisable interest in resisting the respondents' seizure of

their files, the appellants' affidavits make no attempt to explain what it could have been. There is no evidence that any of the clients had claimed privilege or wished to do so. It was in their interests that the allegations against Bogoshi be properly investigated. An examination by the respondents of the files could only have facilitated this. It would seem, therefore, that the appellants, in claiming privilege, were not seeking to protect the interests of their former clients. It is to be inferred that they were rather acting in their own interests, namely to thwart a proper investigation into their own conduct. This is the tenor of what the director alleges in his answering affidavit in the first application. He states:

> "I submit that there is therefore no reason why any of the clients, prima facie, would wish to claim a privilege, and in doing so, to make it more difficult for my office to discover whether the attorney involved in the matter still owes

> additional money to them. It seems to me with respect that the attorney is in this instance relying on the alleged privilege for his own purposes and not for the benefit of the clients."

In his replying affidavit, Bogoshi does not contest this. Indeed, even in his founding affidavits (in both applications) Bogoshi does not, at least with any clarity, make out the case that his claim to privilege was or is made on behalf of the clients. On analysis, all that is really said is that the files were kept on behalf of clients and that they are therefore privileged. Had Bogoshi's claim to privilege been as agent of his clients, one would have expected him to have tendered production of those documents in the files which were not privileged. He never did so.

It is, of course, the task of the Court vigilantly to safeguard legal professional privilege. The right of governmental

authorities to enter upon an attorney's office and there to seize client's documents must be critically examined. At the same time, however, "(i)t is important...that the protection which privilege affords should be applied strictly in accordance with the conditions necessary for the establishment of privilege" (per Friedman J in Euroshipping Corporation of Monrovia vs Minister of Agricultural Economics and Marketing and Others 1979(1) SA 637(C) at 643H). But this is not always easy. It has been said that cases arise where a mechanical application of the rules of privilege is not possible (see Professor Paizes: Towards a Broader Balancing of Interests: Exploring the Theoretical Foundations of the Legal Professional Privilege, (1989) 106 SALJ 109 at 135). In certain respects, ours would seem to be such a matter. It is problematic whether the clients can for all

purposes be taken to have lost their right to privilege. The affidavits do not canvass this issue. Nevertheless, I do not think that on the somewhat unusual facts of the present matter, privilege was a bar to the respondents' seizure of the files. In my opinion, the appellants' reliance on the rule was misplaced and, I feel bound to add, unfortunate. For the reasons stated, their claim to privilege was not a bona fide one and should be disregarded. Nor, as already indicated, is there any reason to think that the clients themselves might have wished to claim privilege. It can safely be assumed that they would not have.

This disposes of the issue of legal professional privilege. The appellants, however, also attacked the validity of the seizure of the documents on various other grounds. One was founded on the

submission that the inquiry itself had been irregularly instituted and was therefore fatally defective. The argument was originally a two-fold one, namely (i) that the director, in deciding to hold the inquiry, had failed to properly exercise his discretion in terms of sec 5(1)(a) of the Act and (ii) that the summons issued against Bogoshi in terms of sec 5(6) to attend the inquiry was so lacking in particularity as to be invalid. It will be recalled that the powers of seizure granted in terms of sec 6(1) are stated to be "for the purposes of an inquiry". I therefore assume that unless the director was entitled to hold an inquiry, he could not competently authorise a seizure of documents under sub-sec (d). Even so, neither point is sound. Indeed, Mr Moseneke in oral argument before us wisely abandoned the first. Du Plessis J rightly (at 962I-963A) held that Bogoshi was not entitled to

raise the issue. In the circumstances, it is unnecessary to deal with it. I would, however, just say this about it. Far from there being inadequate reason for the director to suspect that Bogoshi had defrauded his clients and thus committed a serious economic offence (this is what the appellants contended), the record reveals ample grounds for the director being entitled to entertain such a suspicion. As regards the second point, reliance was placed on sec 5(7)(b) of the Act. It requires the summons to "contain particulars of the matter in connection with which the person concerned is required to appear before the Director". The complaint was that the statement in the summons that Bogoshi's appearance was required in connection with "(a)lleged irregularities concerning claims submitted to the Multilateral Motor Vehicle Accident Fund and the Motor Vehicle

Accident Fund" was too vague; it did not inform him of the case he had to meet or indeed that it was his conduct that was being investigated. I think the statement is vague; but not fatally so. It must be borne in mind that in terms of sec 5(6)(a), Bogoshi did not face any charges; the proceedings were merely an inquiry (albeit directed at him) with a view to obtaining information. It was open to Bogoshi to seek further particulars - as he in fact did. And, as appears from the reported judgment at 961H-J, there has been an undertaking, accepted by Bogoshi, to furnish better particulars - which is where the matter rests.

A further argument was that both warrants (in view of the wording of sec 6(1), they are really authorities) were invalid. I agree that they constitute a serious encroachment on the rights of the

individual. I shall also, for the purposes of the argument, accept that, like search warrants issued under sec 21 of the Criminal Procedure Act, 51 of 1977, they must be carefully scrutinised and strictly construed; and that if the powers granted have been exceeded or are too general, the removal of the documents will be illegal (Minister of Justice and Others vs Desai, NO 1948(3) SA 395(A) at 403-4; Divisional Commissioner of SA Police, Witwatersrand Area, and Others vs SA Associated Newspapers Ltd and Another 1966(2) SA 503(A) at 512D; Cheadle, Thompson and Haysom and Others vs Minister of Law and Order and Others 1986(2) SA 279(W) at 282D-J). Both authorities in identical terms empower those named in them, "for the purposes of an inquiry instituted by the Director in terms of section 5(1) of the Act relating to the matter of alleged

irregularities concerning claims submitted to" the fund, to enter the appellants' premises "in which there is suspected to be books and/or documents...relating to claims submitted to the" fund, and there inter alia to "seize...anything on or in the premises which in their opinion has a bearing on the inquiry in question, or if they wish to retain it for further examination or for safe custody". The broad submission was that (i) the director, in granting the first authority, and his deputy in granting the second authority, had failed to properly exercise the discretion conferred on them by sec 6; (ii) the authorities failed to adequately define what could be seized and (iii) the authorities permitted seizure of documents which go beyond the scope of the inquiry which is in any event insufficiently identified. I doubt whether these matters were properly raised by the appellants in their

founding affidavits or that any appropriate relief was claimed (at least in the first application). Nevertheless, Du Plessis J dealt with a similar argument but rejected it (see at 962G-I). In my opinion, the learned judge was correct in so doing. In so far as any exercise of a discretion by and on behalf of the director arises, ((i) above), there is no basis for challenging its propriety. It matters not that the respondents might (with difficulty, I apprehend) have obtained the information they were seeking from the clients themselves or from the fund or their appointed agents. They were entitled to see what the appellants' files revealed. The files were obviously an important source of information as to how the appellants had dealt with the moneys that had been received from the fund as compensation for the MVA claims. It is true, in relation to (ii) above, that the documents

to be seized are not specifically particularised. But sec 6(1)(d) does not require that this be done. The discretion which is afforded those authorised is, as the court a quo found, in accordance with the terms of the section itself. The authorities were thus not too vague. As regards (iii) above, only documents which, in the opinion of those authorised, have "a bearing on the inquiry" may be seized. So there can be no question of documents unrelated to the inquiry being able to be removed. But is the inquiry sufficiently identified? I think it is. Even though there is no mention of what the alleged irregularities are or who committed them, the inquiry is one which relates to alleged irregularities in the submission of claims to the fund. These is no reason to think that the persons authorised would not have known what this inquiry was.

The appellants' final argument concerned the seizure of the 1143 files. It was that the execution of the authority in question was contrary to the sub judice doctrine (as it was termed). This, so it was submitted, was because the first application in which the respondents' right to seize the appellants' files was being challenged, had already been launched and was pending; the respondents were thus disregarding, or at least undermining, the court process; the seizure of the files on 24 November 1992 should therefore on this ground alone have been set aside. I suppose that what was really being contended was that in acting as they did, the respondents were in contempt of court and that this amounted to an abuse of the judicial process which the court a quo, in the exercise of its inherent jurisdiction, was entitled to prevent. That the Supreme Court has

such a power is undoubted. Whether, however, on this basis, an otherwise valid authority to seize documents could be set aside is doubtful. We were not referred to any authority in support of such a proposition. But it is unnecessary to pursue the point. In my opinion, there is no question of the respondents having acted improperly. They had good grounds for wishing to seize the files. The respondents' aim was to preserve them and their contents. There was an urgent need to do so. The respondents had reason to believe that relevant information was being destroyed by Bogoshi. They had reason to fear that the contents of files were being tampered with. Bogoshi had failed to fulfil promises to hand over files and other documents to the respondents. In particular, he had on 20 November 1992 agreed to allow the respondents to take

possession of all the appellants' closed MVA files for safe-keeping at a neutral place. This undertaking too was breached. When on the appointed day, namely 23 November 1992, the respondents arrived at the appellants' offices for certain of the files, they were prevented from taking them. On the following day, ie 24 November 1992, Bogoshi specifically refused to hand over any files to the respondents. The appellants deny certain of these allegations but the court a quo rightly found (at 956I) that the second application had to be decided on the respondents' version. This being so, the respondents were within their rights to seize the 1143 files on 24 November 1992. Appellants' argument that because the first application was then pending they were not so entitled, must

therefore also fail.

The appellants also attacked the court a quo's costs order. I did not, however, understand it to be argued that if the appeal failed on the merits, there was any basis for interfering with Du Plessis J's discretion. I do not think there is.

One last word. It follows from my finding that the appellants were not entitled to rely on privilege, that the ruling to which I earlier referred was, in its effect, correct (though given for the wrong reasons). This means that the order a quo as to how the files are to be dealt with was unduly favourable to the appellants. However, there being no cross-appeal by the respondents, it (and the costs orders) must stand.

The appeals are dismissed with costs including the costs of two counsel.

H H Nestadt
Judge of Appeal

Corbett, CJ)
Vivier, JA) Concur
Harms, JA)
Olivier, JA)