CASE NO.: A 334/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

DAVID SWARTZ **APPLICANT**

and

MARTIN INDONGO **1ST RESPONDENT**
THE INSPECTOR GENERAL OF THE NAMIBIAN POLICE **2ND RESPONDENT**
THE MINISTER OF SAFETY & SECURITY **3RD RESPONDENT**

CORAM: **SMUTS, J**

Heard on: 23 December 2011
Delivered on: 16 January 2012

JUDGMENT

SMUTS, J.: [1] On 23 December 2011, the applicant approached this court on an urgent basis for a order condoning the use of urgent procedures and for the following further relief:

> *"2. Declaring the search and seizure conducted by the first respondent and his team to be illegal, null and void;*

3. *Directing that the first respondent and his team to immediately return the following items that were seized by them to the applicant, alternatively, directing the respondents to immediately return the following items that were seized by the first respondent and his team to the applicant namely:*

- *a Toyota Hilux E- Cub 2.0,*
- *a pick up motor vehicle VVT-I model 2010,*
- *a Volkswagen Golf 6 GTI model 2011,*
- *a 142 inch plasma television screen,*
- *a 152 inch plasma television screen,*
- *a coffee table*
- *a blackberry cell phone,*
- *a bed,*
- *a headboard and dressing mirror,*
- *a lounge suite,*
- *a quad bike,*
- *2 ATM Bank Windhoek cards (my personal one and one for the Close Corporation),*
- *a Namibian identity card,*
- *cash to the amount of approximately N$49 500.00*
- *a blackberry cell phone*
- *a FNB ATM card*

4. *Ordering that the respondents in whatever respect the court may find, comply with the terms of prayer 3 hereof by 16:00 on Wednesday the 21st of December 2011.*

5. *Ordering the respondents to pay the costs of this application including the costs of pursuant to the employment of one instructing and one instructed counsel."*

[2] The applicant had originally set the matter down for 21 December 2011. This had provided far too little time to the respondents to provide answering affidavits and the date of hearing was extended by agreement between the parties by two days in order to afford the respondents an opportunity to answer to the application.

[3] The first respondent is the head of the Drug Law Enforcement Unit of the Erongo Region of the Namibian Police. He was the senior officer involved in a search of the applicant's home. In the course of that search a number of items were seized and taken from his home, forming the subject matter of this application. The second and third respondents are the Inspector General of the Namibian Police and the Minister of Safety and Security respectively.

[4] The search of the applicant's home occurred on the morning of 5 December 2011. In the course of the search, a number of items were seized. They are set out in

the notice of motion and already referred to, except for the first item mistakenly inserted which falls away.

[5] This application concerns the legality of the search and seizure by member of the Namibian Police's Drug Law Enforcement Unit. It is common cause that the search was without a warrant. The respondents said that they were entitled to proceed with the search under s22 of the Criminal Procedure Act, 51 of 1977 "(the Act)". They further said that the seizure of the items in question was authorised under s20 of the Act. Before referring to the relevant statutory provisions, the factual background is first set out as to what gave rise to the search and what occurred in the course of the search.

[6] The applicant challenges the search and seizure on the grounds of an infringement of his constitutional right to privacy. He brings this application under art 25 of the Constitution on the grounds of the alleged infringement of his constitutional rights.

[7] In the founding affidavit, the applicant states that members of the Unit under the command of the first respondent "disorderly stormed" his residence at Erf 5273, Hofsanger Street, Khomasdal, Windhoek. He further states that the members of the Unit broke a padlock on his small gate and forced themselves onto his premises without seeking his permission. After this occurred, he states that he opened his electronically controlled gate and that the Unit members proceeded with the search. In the course of this search, the Unit members seized the items set out in the notice of motion. The applicant acknowledges in his founding papers that some of the money was contained in a plastic bag which also contained what he termed a small "rock" which was

explained in the answering affidavit to mean cocaine in street parlance. He acknowledged that he was arrested and subsequently released on bail of N$2 000 on a charge of dealing in drugs valued at N$100 and of committing the offence of money laundering. His explanation for the large sum of cash found in his possession in various places at his residence was that he was engaged in a business of selling fish as well as cars and also providing cash loans. He attached to the founding affidavit copies of an amended founding statement in respect of a close corporation known as D&C Trading CC. These papers and his affidavit indicate that he is sole member of that close corporation. He did not provide any further accounts or documentation relating to transactions of this entity.

[8] The applicant challenges the lawfulness of the search and seizure of the items and asserts that the seizure of the items did not fall within the scope of s20 of the Act. He submits that the seizure was for the purpose of preserving the items and that the respondents should rather have invoked and followed the mechanism provided for in s51 of the Prevention of Organised Crime Act, Act 29 of 2004 (“POCA”). The applicant also challenges the legality of the search without a warrant and contends that the police did not meet the requisites of s22 of the Act.

[9] Despite the short period of time available, a lengthy and detailed affidavit was provided by the first respondent. He is based in Walvis Bay. He had travelled to Windhoek to do so. Although criticizing the extremely short period of time afforded to the respondents to deal with the application, the respondents did not however oppose the

hearing on an urgent basis but instead focused their opposition on the merits of the search and seizure.

[10] The first respondent, who has served in the Unit for 5 years, explained that Namibia has transformed from being a drugs transit country in the 1990s to developing into a drug consuming country. He states that the prevalence of cocaine usage and dealing within Namibia has increased markedly and that cocaine has overtaken mandrax and dagga in prevalence. He also points out that cocaine is a dangerous and highly addictive drug and that the major centres of Namibia, namely Windhoek, Oshakati, Walvis Bay, Swakopmund and Keetmanshoop, are battling with cocaine related crime. He points out that the use of cocaine has led to an increase in violent crimes such as rape, murder, robbery, housebreaking, theft and prostitution in these areas which are linked to the use of dangerous drugs such as cocaine.

[11] It is within this context that the first respondent explained that whilst investigating a person whom he terms as a “known and convicted Swakopmund cocaine drug dealer”, a certain Jaco Martin Olivier, he came across financial records which showed substantial cash deposits made by Olivier on a regular basis into the applicant’s banking accounts, including that of D&C Trading cc. He stated that these transactions gave rise to a suspicion of illegal drug deals between the applicant and Olivier. He accordingly instigated the investigation of the applicant by his counterpart in the Unit in Windhoek, Inspector Basson. According to Inspector Basson, the applicant was a known drug dealer in Windhoek. The first respondent attached the banking account records of the

applicant and of his close corporation. These reveal several cash deposits exceeding an aggregate of N$2,5 million in the two accounts, mostly over the past two years. He referred to cash deposits made by persons whom he referred to as “known and convicted drug dealers” including Olivier, a certain Anton Erasmus, Clinton Malander and the brothers Fabian and Shaun Langenhoven.

[12] The first respondent specifically stated that the substantial and frequent cash deposits into these accounts raise a suspicion of drug dealing. It was for this reason that the applicant was under surveillance and that undercover police operations were undertaken in which cocaine was purchased from what the first respondent called “the applicant’s syndicate”. The respondents referred to the applicant as head of a syndicate although he was not at the forefront of selling drugs and that he operated from a house in Diamante Street, Khomasdal. The first respondent indicated that the Unit members were not however certain that this was the applicant’s residence. For this reason it would have been difficult to obtain a search warrant, given this uncertainty. The first respondent further indicated that there have been series of “test-buys” of cocaine during the preceding weekend of 3 to 4 December 2011 in the area of Diamante Street, Khomasdal.

[13] The Unit members then on 5 December 2011, proceeded to the address in Diamante Street, a heavily secured house, with a view to conducting a search, and suspecting that the applicant resided there. But when they were eventually able to enter those premises, they established that the applicant did not live there and that he lived at

the house in Hofsanger Street in Khomasdal where the search was later conducted. The Unit members needed directions from an occupant of that house in order to find the applicant's residence. The first respondent then approached the house and endeavoured to obtain entry to the secured premises with electronic controlled gates by enquiring from the applicant about purchasing fish. The applicant, when approaching the first respondent, appeared to have seen the presence of one of two other vehicles further down the street and responded by stating that he did not have any fish and that first respondent should leave. The first respondent then went back to his colleagues and thereafter returned to the house and demanded that the applicant afford them access, identifying themselves as police officers and requested the applicant to open the electronically controlled gates.

[14] The applicant declined to do so and went into his house. The unit members then decided to use force to enter the premises by endeavouring to break the lock on the small gate by means of crow-bar. The applicant then emerged and proceeded to open the electronically controlled main gate. The first respondent explained in detail how the search proceeded and described the items which were seized. In the course of the search he stated that various sums of money totalling in excess of N$47 000, were found at different locations in the house. These included a sum in a transparent plastic bag which applicant had, upon enquiry, produced. It containing in excess of N$ 24 000. The first respondent testified that a small piece of cocaine fell from this plastic bag together with the money. He identified it as cocaine by reason of his experience in the Unit. He stated that the applicant proceeded to pick up that small piece of cocaine,

threw it in his mouth and swallowed it. At the outset of the search, the applicant had earlier stated that he did not possess any drugs and had no knowledge of any dealing in drugs. A second piece of cocaine was later found amongst other money, also in a transparent plastic container. According to the first respondent, the applicant admitted that it was his cocaine. He was then charged with this. His admission in this regard is not put in issue in reply.

[15] Other money was found elsewhere in the applicant's possession including in the boot of his Volkswagen Golf motor vehicle and behind a refrigerator in the garage. The first respondent testified that there were two refrigerators in the garage, one of which contained fish. Apart from the applicant stating that he was in the business of selling fish and motor vehicles, he did not provide any further explanation for the money in his possession or any proof in support of transactions relating to those activities. Nor did he provide any explanation for the large sums paid into his account by those termed as drug dealers except to say that these sums related to his fish business. He states in reply that Olivier is known to him but denies any knowledge of the latter being a convicted drug dealer and states that the deposits related to the supply of fish stocks. No documentation was provided in support of this assertion in reply. Nor were any details whatsoever provided in reply concerning the scale and ambit of the fish business. This despite the fact that Unit members had expressly asked for proof of the money being received in the course of the fish business. He was arrested following his admission concerning the cocaine found in his bedroom and was taken to the Wanaheda Police Station upon the completion of the search and seizure.

[16] When the search started, a member of the Unit, Sergeant Nunuheb had been positioned outside the house. During the relatively short time of the search and seizure, two prospective purchasers of cocaine approached him to purchase cocaine. Sergeant Nunuheb went along with the purchasers' requests. Each of them made payments for the drug and was told to go inside the residence. Once inside, sworn statements were obtained from each of them. A total of N$1 300 was received in this way from these prospective purchasers, Donovan Briedenhann and Orban Meyer. Their affidavits were attached to the answering affidavits.

[17] The first respondent also referred to recovering small plastic containers commonly used in the illicit trade in cocaine in the head board of the bedroom bed.

[18] The first respondent concluded that the applicant's house provided evidence of the applicant's drug dealing by reason of the two prospective purchasers of cocaine who arrived at the house, the quantities cash found in various parts of the applicant's house, the fact that the applicant was in possession of cocaine, his action of swallowing evidence, his initial conduct of seeking to prevent the search, his financial records revealing suspicious transactions with convicted drug dealers and finding the small plastic container used in illicit cocaine dealing in the head board of the bed. Upon enquiry, the applicant also informed the first respondent that he paid for one of his vehicles (VVTi pick-up) in cash in the sum of N$162 718, 61 and that a N$ 200 000 cash deposit was made in respect of the 2011 VW Golf 6 GTI. The former fact was

confirmed under oath by the dealer in question. As a consequence the applicant was not only charged with possession of cocaine but also with the offence of money laundering under POCA.

[19] In respect of the seizure of the items, the first respondent stated that the items constituted evidence and that there was a need to preserve those items while the investigation proceeded concerning the acquisition of those assets. The first respondent stated that he had a strong suspicion that the applicant's assets so seized were purchased from the proceeds of crime and stated that the substantial cash deposits in respect of both vehicles and the cash deposits in respect of the banking accounts could not be backed by income lawfully earned by the applicant. Despite this emphatic statement in the answering affidavits the applicant provided no further detail whatsoever in reply in respect of his income and for the cash received by him and his close corporation. No financial statements were provided in respect of the close corporation. No details of any transactions were in fact given. No further explanation was provided concerning the nature, scale and ambit of the business, save to point out that it was conducted in cash.

[20] The question accordingly rises as to the legality of the search and seizure, both of which are placed in issue by the applicant. The first issue is whether the Unit members met the requisites of s22 of the Act in respect of their search without a warrant. This section is entitled "Circumstances in which article may be seized without search warrant". It provides:

"A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20 –

(a) *if the person concerned consents to such search for and he seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or*

(b) *If he on reasonable grounds believes –*

(i) *that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and*

(ii) *that the delay in obtaining such warrant would defeat the object of the search."*

[21] Although the first respondent stated that the applicant consented to the search after eventually providing entry to members of the Unit, it would not appear to me that there was consent as envisaged by this section, approaching the facts in accordance with the well established principles as set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[1], repeatedly followed by this court. The first respondent attracts the onus of establishing consent [and the reasonable grounds for the belief under subsection (b)]. The facts raised by him in support of his contention of consent do not in my view establish that. But the first respondent further states that he had reasonable grounds for a belief that a warrant would be issued to him under s21(1) of the Act upon application and that the delay in obtaining such a warrant would defeat the

[1]1984(3) 623(A) at 635 C

object of the search. In my view, the first respondent established reasonable grounds for his belief in respect of both legs of that statutory requirement.

[22] A warrant would in my view have been issued to him had he applied for one. He fully explains why no such application had been made beforehand, by reason of the uncertainty as to the place of residence of the applicant. This reason is subsequently demonstrated to be well founded as the applicant was not in fact residing at the residence in Diamante Street, Khomasdal. The cash deposits by Olivier and others identified as drug dealers known to the Unit and the undercover operation on the preceding days would have justified the issue of a search warrant.

[23] There would also be reasonable grounds for a belief that the obtaining of the warrant, after establishing the applicant's actual whereabouts as the events unfolded, may also have defeated the object of such a search. The first respondent stated that the person who pointed out the applicant's residence to him when pressed to do so was visibly nervous in doing so. There would certainly be reasonable grounds for apprehending that the applicant may get wind of a possible search had the first respondent then delayed by applying for a warrant.

[24] I am accordingly satisfied that the search was in accordance with s22 of the Act and was thus lawful. The relief sought in this regard accordingly fails.

[25] The further question arises as to the seizure of the articles. The first respondent relies upon s20 of the Act. This section provides:

> *"The state may, in accordance with the provisions of this chapter, seize anything (in this chapter referred to as an article) –*
>
> (a) *which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;*
>
> (b) *which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or*
>
> (c) *which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."*

[26] The respondents would need to satisfy any one of the three contemplated circumstances to provide for a lawful basis for unit members to have seized the articles in question. The first respondent primarily relies upon s20(b) by contending that the items in question afford evidence of the commission of the offence or the suspected commission of an offence. He also however relies upon s20(c) by asserting that certain of the items were intended to be used or upon reasonable grounds believed that they were intended to be used in the commission of an offence. This latter ground would form a basis for the seizure of the head-board, bank cards, identity document, cell phones and cash and possibly one of the vehicles. The seizure of the other furniture and both vehicles may be justified by s20(b) of the Act. The applicant has been charged not only with dealing in and possession of cocaine in contravention of the Abuse of

Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 but also the offence of money laundering. Offenses relating to money laundering were introduced by POCA. They include s6 of POCA which provides that it is an offense for person to acquire, use or have possession of property and who knows or reasonably would have known that it is or forms part of the proceeds of unlawful activities. This is a serious offence, as is evidenced by the severe penal provisions provided for in s11 of POCA. As I have indicated, the first respondent referred to several cash deposits in the banking account of the applicant as well the close corporation in which he is the sole member for which no proper explanation was provided by the applicant. Furthermore a considerable sum of cash was found in different locations in his house. The applicant further stated that one of his vehicles was bought by way of cash and that a cash deposit of N$200 000 was made in respect of the other. It would seem that the possession of the vehicles and seized furniture may afford evidence of the suspected commission of the offence of money laundering as set out in POCA.

[27] The first respondent describes the seized furniture as being expensive household assets, not put in issue in reply, and that the applicant was not able to show, upon enquiry, how he earned the income to enable him to acquire them. The first respondent gave evidence that the lounge suite which has been seized has a high value attached to it as well as the plasma television sets seized and the quad bike. This was stated with reference to large cash sums which the applicant asserted were paid for these items. These items may thus afford evidence of the commission of suspected commission of the offence of money laundering. Although no value was attached to the bed referred to,

it is included in what the first respondent refers to as “luxury and expensive goods concerned with drug dealing proceeds”. Even if it is separate from the head board in respect of which the first respondent has established reasonable grounds to believe that it was used in the commission of an offence, its inclusion as a luxurious item and the fact that the first respondent states that there were other beds and another working television set may indicate that it may afford evidence of the commission of the offence of money laundering.

[28] It would thus seem to me that the items which were seized by the members of the unit would fall within s20 of the Act. As stated by Du Toit de Jager Paizes, Skeen and Van der Merwe in their work Commentary on the Criminal Procedure Act[2] concerning s20:

> *“This section contains the general power of the state to seize certain articles in order to obtain evidence for the institution of a prosecution or the consideration of instituting such prosecution. It should be noted that virtually everything maybe seized in terms of the section, provided that it qualifies to be included in one of the three groups contained in s20... It is clear that s20 is very wide and intended to assist the police in their investigations of a criminal case:.”*

[29] In my view, the first respondent established that his belief in respect of use or intended use of the cash, cell phones, identity card and bank cards was reasonable. This is an objective question, as is the question as to whether the other items may

[2]Annotated edition 2006 at 2-2C to 2-2D

afford evidence as to the commission or suspected commission of an offence. This question was also in my view established objectively on the basis of all the facts before the court, including the applicant's acknowledgment of knowing the persons from whom he received the cash deposits – although denying that they were drug dealers - and his failure to dispute his admission in reply concerning the possession cocaine and to properly explain or provide details of the acquisition of such large cash deposits and for the cash which had been applied to the acquisition of the cars and the other luxury items referred to by the first respondent and contained in paragraph 2 of the notice of motion.

[30] The first respondent indicates that the cell phones – potentially invaluable in providing evidence - may be released once such evidence is obtained. The bank cards and identity document may also be released subject to conditions relating to access to the money in the banking accounts. The first respondent further indicates that the matter has been referred to the office of the Prosecutor-General with a view to a consideration of invoking further procedures and steps contained in POCA. The fact that POCA provides a mechanism for the preservation of assets and their forfeiture, does not mean that the search and seizure provisions under the Act do not apply to offences suspected to have been committed which have been established under POCA. It is of course open to the state to have recourse to those provisions under the Act when investigating offences under POCA. POCA contains no provisions of its own concerning search and seizure of items for the purposes listed in s22 and 20 of the Act. What required is for the State to meet the requisites in those sections which it has done so in

this matter. The fact that the investigating officer would also want the items to be preserved does not detract from the question as to whether those requisites (for search and seizure) were met.

[31] It would follow that the seizure of the items listed in the notice of motion was in my view lawful.

[32] Despite the respondents' onus to establish meeting the requisites of ss20 and 22, which they did in my view, the applicant bears the overall onus of establishing his entitlement to the relief contained in the notice of motion. That he has not done. It accordingly follows that the application is dismissed with costs.

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SMUTS, J

ON BEHALF OF THE APPLICANT: **MR. KHAMA**

Instructed by: **SIBEYA & PARTNERS LEGAL PRACTITIONERS**

ON BEHALF OF THE RESPONDENTS: **MR. KHUPE**
Instructed by: **OFFICE OF THE GOVERNMENT ATTORNEY**