CASE NO.: A75/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

GEORGE SIMATAA	**APPLICANT**
and	
MAGISTRATE OF WINDHOEK	**FIRST RESPONDENT**
ANTI-CORRUPTION COMMISSION	**SECOND RESPONDENT**
DIRECTOR OF ANTI-CORRUPTION	**THIRD RESPONDENT**
PROSECUTOR-GENERAL OF NAMIBIA	**FOURTH RESPONDENT**

TOMMASI, J

Reasons Delivered on: 23 July 2012

REASONS [1] On 1 April 2010 the Court granted applicant an order in the following terms:

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1. the matter to be heard as one of urgency and that the forms and serve provided for in the rules may be dispensed with;
2. that the two search warrants marked as 'GSI' and "GS2' issued by the first respondent on 1 and 10 March 2010, respectively, and the search and seizure in terms thereof be declared invalid and unlawful and

setting them aside and any step that may have taken on the basis of the said search warrants;

3. that the second and third respondents restore to the applicant all the items, goods and documents (including computers and data thereon) to the applicant;
4. that the second and third respondents pay the cost of suit.

[2] The applicants brought an application on an urgent basis requesting that a *rule nisi* be issued for the respondents to give reasons why an order in the above terms should not be granted. The matter was enrolled for 1 April 2010 and served on the respondents on 24 March 2010. The respondents opposed the matter and filed comprehensive opposing affidavits by the 3rd respondent (referred to as the Director) and Mr Oelofse, an authorised officer of the 2nd respondent in support thereof on 30 March 2010. The applicant replied hereto on 31 March 2010. The parties submitted argument on 1 April 2010. There were no factual disputes between the parties and the Court therefore granted a final order. What follows are the reasons for the afore-mentioned order.

[3] The Anti-Corruption Act, 2003 (Act 8 of 2003) (the Act) makes provisions for the 2nd respondent (referred to as the Commission) to investigate an alleged corrupt practice. It furthermore makes provisions for entry, search and seizure by authorised officers. In this matter the Court was called upon to determine whether the investigation by the Commission into an alleged corrupt practice was warranted and whether the two search warrants which were issued by the 1st respondent (the magistrate) were valid.

[4] On 25 February 2010 an article appeared in a local newspaper "*The Informante*" which contained allegations to the effect that the applicant, in his capacity as Permanent Secretary of the Ministry of Works and Transport, awarded a contract to Professor Lovemore Mbigi who was the applicant's supervisor of his PhD studies in aviation at a Zibabwean university, without following tender procedures.

[5] On 8 March 2010 and at the offices of the Ministry of Works and Transport, Mr Oelofse assisted by other authorized officers of the Commission executed the first warrant and the following items were seized:

(a) HP laptop found in the office of the applicant;

(b) Proline Destop Computer found in the office of the applicant;

(c) Acer Desktop found with the private secretary of the applicant;

(d) Various documents, including what appeared to be three quotations with regard to the performance Management System training.

[6] On 10 March 2010, on the strength of the same warrant, a laptop belonging to the applicant which was found in possession of a certain Ms Kalumbu on the 6th floor of the Ministry of works and Transport was seized by Mr Oelofse.

[7] On the same day and after having obtained a second search warrant Mr Oelofse assisted by other authorized officers of the Commission presented the applicant with a copy of the second search warrant at his residence. On this occasion a personal computer and an external hard drive of the applicant were seized.

[8] The applicant stated that he was pursuing a PhD degree in Business Administration through the National University of Science and Technology in Zimbabwe under the supervision of Professor Lovemore Mbigi. At the time the various goods were seized he was busy with a critical part of his thesis. Due to the fact that the warrants were coached in such broad and overboard manner, the Commission took possession of his goods and useful information of which a substantial part he needed daily. The data on the computers and electronic devices seized contained personal information which included his research work needed for him to complete his thesis which he had to submit during August 2010. He stated that his rights to privacy enshrined in the constitution was violated and furthermore that he would suffer irreparable harm if he was not allowed to access the electronic data stored on the computers and hard drive in order to complete his thesis within the required time frame. Such failure to complete his thesis would, according to the applicant, be costly and highly prejudicial.

[9] The fact that two search warrants were issued and executed on these two days and that the items mentioned by the applicant were seized, were not disputed. The legality of the decision to investigate and the validity of the search warrants were the issues raised by the applicant. I broadly outline the issues raised by the applicant as follow:

- the decision of the Director of the Anti-Corruption Commission (Third Respondent) to order a full investigation into the allegations that the applicant had awarded a contract to his professor without following tender procedures. The applicant submitted that the decision was not made in compliance with the statutory provisions and that the subsequent investigation, including the search and seizure was therefore unlawful.
- the search warrants were authorised without 2nd and 3rd respondent having complied with the provisions of section 22(3), (4) and (5) of the Act in that:
    1. The two affidavits relied upon by 2nd and 3rd respondents to obtain the warrants were not deposed to under oath; do not fully set out the requirements as provided for in terms of section 22(3)(a), (b) and (c); and do not contain sufficient allegations that a crime i.e contravention of section 43 of the Act has been committed. Applicant argued that the 1st Respondent should not under these circumstances have issued the warrants.
    2. Both warrants were addressed to "*all authorized officer(s)*" whereas it should have been addressed to a specific officer.
    3. That the first search warrant was issued for the offices of the applicant and that any other office searched on the strength thereof was unlawful.
    4. That the search warrants were impermissibly overbroad, general, vague unintelligible, unclear or coached in terms beyond the scope of the act.
    5. The search warrants did not specify the offence.

[10] **The decision of the Director of the Anti-Corruption Commission.** The salient facts relating to the decision by the Director are as follow: The Commission commenced its "*probe*" after serious allegations of corruption were levelled in the "*The Informante*". A copy of the newspaper report was attached. I shall revert to the contents of the newspaper in more detail hereunder. The applicant was of the view that although the Commission may initiate an investigation based on allegations made in a newspaper report but argued that it should have taken care not to unduly infringe on his constitutional rights based on allegations made in the report which were unsubstantiated.

[11]. The Director of the second Respondent, on the same day the article appeared in the afore-mentioned newspaper, reacted to this article and the allegations contained therein by designating two authorised officers, Mr Oelofse and Mr Ippinge to conduct preliminary inquiry in terms of the provisions of section 18(4) of the Anticorruption Act 2003 (Act 8 of 2003).

[12] The applicant submitted that it was a prerequisite for the Commission to have made two decisions before commencing with the investigation as is required in terms of section 18 (18)(1)(b) and (3) respectively. Applicant's counsel submitted that these two decisions were not properly made and therefore that the subsequent investigations and search warrants were unlawful.

37. The relevant sections read as follow:

> ***"18.*** *(1) The Commission must –*
>
> *(b) examine each* ***alleged corrupt practice*** *and decide whether or not an investigation in relation to the allegation is warranted on reasonable grounds.*
>
> *(3) If the Commission decides that an investigation in relation to the* ***allegation*** *is warranted on reasonable grounds, it must decide whether the Investigation should be carried out by the Commission or whether the allegation should be referred to another appropriate authority for investigation or action."*

[13] The "*alleged corrupt practice*" and "*allegation*" refers to an allegation made in terms of section 18 (1) (a) " *by any person who alleges that another person has or is engaged, or is about to engage, in a corrupt practice"*

[14]. The Commission's response to this was that the one of its functions was to receive or initiate and investigate allegations of corrupt practices in terms of section 3(a), and they may on the strength of section 20 (1) of its own motion initiate investigation of a allegation of a corrupt practice. The applicant partially and in my view correctly so, conceded that the Commission was entitled to initiate an investigation on the strength of the newspaper article.

[15]. A summary of the material allegations made in the newspaper are as follow:

1. the applicant (*a public officer*) allegedly awarded Professor Lovemore Mbigi his supervisor of his PhD studies a ministerial consultancy tender valued at over N$2million.

2. According to "*impeccable sources"* within the Ministry, the applicant awarded the tender without advertising. *(i.e in contravention with the Tender Board Act 1996, (16 of Act 1996) and/or regulations*)

3. the sources had this to say about the issue of gratification: "*Now we don't know whether Simataa (applicant) gave Mbigi the contract so that he could pass his studies*." This can only be construed as being a mere suspicion that the applicant awarded the contract in order to benefit.

[16]. The question is whether this was an "*allegation*" either in terms of section 18 or 21 (1). According to the meaning found in "The Encarta Dictionary" an allegation is :

> *"an assertion, especially relating to wrongdoing or misconduct on somebody's part, that has yet to be proved or supported by evidence."*

It cannot be said that the Commission was required at this stage to form a value judgment whether the allegations are true or reliable. The information contained in the

newspaper article was a mere allegation or suspicion which prompted the Commission to gather information to give substance thereto.

[17] To ascertain whether the above "*allegations*" constitute a corrupt practice, regard must be had for the provisions of Chapter 4 that consists of definitions of key words, definitions of various corrupt practices and penalties. It is common ground that the applicant was a public officer. The further two definitions need to be considered are whether the applicant was alleged to have used his office corruptly for gratification (section 43). Corruptly and gratification is defined as follow in chapter 4 of the Act:

> ***"corruptly"*** *means in contravention of or against the spirit of any law, provision, rule,*
> *procedure, process, system, policy, practice, directive, order or any other term or condition*
> *pertaining to -*
> *(a) any employment relationship;*
> *(b) any agreement; or*
> *(c) the performance of any function in whatever capacity;*
>
> ***"gratification*** *" includes -*
> *(a) money or any gift, loan, fee, reward, commission, valuable security or property or interest in property of any description, whether movable or immovable;*
> *(b) any office, dignity, employment, contract of employment or services and any agreement to give employment or render services in any capacity;*
> *(c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;*
> *(d) any valuable consideration or benefit of any kind, any discount, commission, rebate, bonus, deduction or percentage;*
> *(e) any forbearance to demand any money or money's worth or valuable thing;*
> *(f) any service or favour, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty;*
> *(g) any right or privilege;*
> *(h) any aid, vote, consent or influence, or any pretended aid, vote, consent or influence;*
> *(i) any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs;"*

[18] The Director (2nd respondent) stated that the applicant was suspected of having a committed a corrupt practice referred to in section 43. Section 43(1) describes the following corrupt practice:

> ***"*** *A public officer commits an offence who, directly or indirectly, corruptly uses his or her office or position in a public body to obtain any gratification, whether for the benefit of himself or herself or any other person."*

[19] Having regard to the letter of the provisions of the Act, the allegations, if proven by evidence may very well constitute a corrupt practice in terms of section 43.

[20] The applicant was of the view that the Director did not properly consider whether an investigation was warranted. Section 18(2) reads as follow:

> *"When deciding whether an investigation into an alleged corrupt practice is warranted, the Commission* ***may consider*** *-*
> *(a) the seriousness of the conduct or involvement to which the allegation relates;*
> *(b) whether or not the allegation is frivolous or vexatious or is made in good faith;*
> *(c) whether or not the conduct or involvement to which the allegation relates is or has been the subject of investigation or other action by any other appropriate authority for the purposes of any other law;*
> *(d) whether or not, in all the circumstances, the carrying out of an investigation for the purposes of this Act in relation to the allegation is justified and in the public interest*.

[21] Section 18 gives the Commission discretion to consider those factors. It is however apparent from the steps taken by the Director that he considered the allegations to be serious allegations of corruption which were publicly leveled against a high ranking public officer by the newspaper article. The Director, correctly in my view, decided to conduct a preliminary investigation to verify the allegations made given the fact it came from a media report where the reporter relied on undisclosed sources. The sources furthermore merely speculated whether the applicant was to receive some benefit from the purported corrupt act.

[22] The preliminary investigation was attested to by Mr Oelofse. Mr Oelofse interviewed the Director of Administration for the Minister of Works, Mr Visagie on 25 February2010 and learned that:

- quotations for the consultancy tender were obtained by the applicant through e-mail
- applicant handed the quotations to Mr Visagie for his evaluation

- that applicant did not appoint the candidate proposed by Mr Visagie which proposal was the cheapest quotation
- that the applicant preferred the quotation of Professor Mbigi t/a Nehanda Management Consultants and made the final decision to appoint the latter in view of his experience and in-depth knowledge of training in this area
- The applicant and Mr Visagie were the only two persons involved in the appointment of the training consultant
- Mr Visagie did not know of the relationship between the applicant and Professor Mbigi.

[23] All of the above was communicated verbally and was not written down until 24 March 2010 i.e after both the search warrants were issued.

[24] In Mr Oelofse's replying affidavit he states that on 26 February 2010 he obtained "*some documents*" from Mr Visage. It is not clear which documents he received.

[25] Mr Oelofse also interviewed the secretary of the tender board, Ms Ensle who confirmed, after having consulted the tender register of the Ministry of Works and Transport, that there was no tender invitation for the Performance Management System Training.

[26] She provided Mr Oelofse with copies of the Annual Exemption from normal tender procedures for essential purchases and the supply of services for both the Department of Works and the Department of Transport. Mr Oelofse stated that the Annual Exemptions do not provide for the appointment of private consultants to conduct the Performance Management System Training. He was made to understand that the procedures prescribed that the Ministry of Works and Transport had to apply for an exemption in terms of section 17 of the Tender Board Act, 1996 (Act 16 of 1996).

[27] He then investigated whether the procedures for an exemption were followed and he obtained a statement in writing from Mr Hermanus Brand of the Department Public Service Management, Office of the Prime Minister, who confirmed that his office was responsible for receiving and registration of applications for farming out the "alleged" tender (meaning the tender referred to in the *Informante*) and to his knowledge no such application was received.

[28] The applicant had to obtain permission from the office of the Prime Minister in terms of section 5(2)(d) of the Public Service Act, 1995 (Act 13 of 1995) which stipulates as follow:

> *"(2) The Prime Minister shall direct the Public Service and his or her functions shall in particular include the following:*
>
> *(d) the farming out of work in the Public Service to private consultants, private persons and contractors in the private sector to perform such work for or on behalf of the Public Service;"*

[29] Mr Oelofse also obtained a statement from the under secretary, Mr Hamunyela who essentially confirmed that in his opinion the farming out of the tender needed the approval of the Prime Minister's Office and a "*no objection letter*" had to be obtained and; and the tender board has to give exemption from public tender in order to appoint a private consultant by way of inviting quotations.

[30] To summarise: the preliminary investigation brought to light that the applicant had awarded the contract to train the staff of the Ministry of Works and Transport in performance management to Professor Mbigi t/a Nehanda Management Consultants. It was furthermore established by the investigation that the applicant, in doing so, contravened the provisions of the Tender Board of Namibia Act and Public Service Act.

[31] The Director was satisfied that the preliminary investigation produced sufficient information and statements to substantiate the reasonable belief that corrupt practices had been committed by the applicant and that a full investigation was warranted. Mr Oelofse, held the same view but was more particular when he stated

the it supported the reasonable belief that the applicant had committed a corrupt practice described in section 43 of the Act.

[32] No preliminary investigation was however done in respect of the speculative allegation that the applicant awarded the contract in order to receive a benefit. Furthermore no reasons were given why this aspect was not investigated. No mention was made in the opposing papers whether it was confirmed that the applicant was indeed enrolled at a university in Zimbabwe for PhD studies in Aviation and whether Professor Mbigi as his supervisor was indeed in a position to ensure that the applicant would obtain his PhD from the said University. This aspect therefore remained pure speculation. Without reliable information in this regard the Commission could not have been of the view that a corrupt practice as envisaged by section 43 was committed. Without any evidence that the applicant received or would receive a benefit the actions of the applicant albeit irregular, could not be a corrupt practice as envisaged by section 43. The Act empowers the Commission to launch an investigation into offences created by Act and not mere irregularities.

[33] The failure from the authorised officers of the Commission to properly examine the allegations to ascertain whether a corrupt practice has been committed resulted in the omission to provide this information to the magistrate who issued the two warrants.

[34] Section 22(3) provides as follow:

> *"A warrant referred to in subsection (2) must be applied for by the Director, the Deputy Director or any other authorised officer and must be supported by an affidavit or a solemn declaration by the person making the application, or any other person having knowledge of the facts, stating-*
> *(a) the nature of the investigation being conducted;*
> *(b) the suspicion which gave rise to the investigation; and*
> *(c) the need for a search and seizure in terms of this section for purposes of the investigation."*

[35] In his affidavit Mr Oelofse set out the **nature of their investigation** by stating at he and Mr Iipinge were assigned to investigate a contravention of section 43 of the Anti-Corruption Act.

[36] He stated that an article appeared in the newspaper "*The Informante*, dated 24 February 2010 titled "*Works PS awards his PhD supervisor N$2m tender*". There is nothing to indicate that the newspaper article was attached to the affidavit. He further stated that had interviews with Mr Visagie, Director of Administration and Mr Hamunyela, Under Secretary of the Department Administration of the Ministry of Works and Transport and that he ascertained that the applicant had appointed Professor Mbigi to do the training of the employees of the Ministry of Works and Transport; that there was a circular informing managerial staff to attend the Performance Management System training; and according to Mr Hamunyela who had 18 years of experience in administration of the Ministry of Works and Transport, that the procedures in selecting and appointing a facilitator in this instance were not followed. This then **is what gave rise to the suspicion that a corrupt practice had been committed.**

[37] Lastly, in attempt to explain why there was **a need for search and seizure,** he stated that Mr Hamunyela retrieved an e-mail sent by the applicant to Mr Visagie titled "*Call for bids to deliver a mass Performance Training*". It was in this e-mail which prompted him to apply for a search warrant in order to seize all computers, laptops and relevant documentation in possession and under control of the Applicant as well as Mr Visagie. The afore-mentioned e-mail from the applicant to Mr Visagie reads as follow:

> "*The following text was send (sic) to four companies, three Namibian (Consulting Synergies Africa, Vision Activ and Knowledge Workx and one South African based. Also send free to grow)"*

[38] Not only does this affidavit not clearly set out the need for search and seizure but omitted to apprise the magistrate of the suspicion that the contract was awarded to obtain a benefit in the form of his PhD degree. Information in respect hereof was essential for the magistrate to have established that there were reasonable grounds for believing that a corrupt practice had taken place in terms of section 43.

[39] In terms of section 22 (4) the magistrate was empowered to issue a warrant authorising entry and search of the premises concerned if it appeared to him from the information furnished, that there are reasonable grounds for believing that *inter alia* a corrupt practice has taken place. It was thus required of the magistrate to evaluate the

suspicion which gave rise to the investigation as well as the need for a search warrant for purposes of an investigation. In *INVESTIGATING DIRECTORATE: SERIOUS ECONOMIC OFFENCES AND OTHERS v HYUNDAI MOTOR DISTRIBUTORS (PTY) LTD AND OTHERS 2000 (2) SACR 349 (CC*) when a similar worded provision (section 29) of National Prosecuting Authority Act 32 of 1998 was considered, Langa DP in paragraph [35], [36], [37] & [38] of his judgment stated the following:

> "*Subsections (4) and (5) of s 29 are concerned with authorisation by a judicial officer before a search and seizure of property takes place. The section is an important mechanism designed to protect those whose privacy might be in danger of being assailed through searches and seizure of property by officials of the State. The provisions mean that an Investigating Director may not search and seize property, in the context of a preparatory investigation, without prior judicial authorisation."*
>
> *Section 29(5) prescribes what information must be considered by the judicial officer before a warrant for search and seizure may be issued. It must appear to the judicial officer, from information on oath or affirmation, that there are reasonable grounds for believing that anything connected with the preparatory investigation is, or is suspected to be on such premises. That information must relate to (a) the nature of the preparatory investigation; (b) the suspicion that gave rise to the pre- paratory investigation; and (c) the need for a warrant in regard to the preparatory investigation. On the face of it, the judicial officer is required, among other things, to be satisfied that there are grounds for a preparatory investigation; in other words, that the Investigating Director is not acting arbitrarily. Further, the judicial officer must evaluate the suspicion that gave rise to the preparatory investigation as well as the need for a search for purposes of a preparatory investigation."*
>
> *It is implicit in the section that the judicial officer will apply his or her mind to the question whether the suspicion which led to the preparatory investigation, and the need for the search and seizure to be sanctioned, are sufficient to justify the invasion of privacy that is to take place. On the basis of that information, the judicial officer has to make an independent evaluation and determine whether or not there are reasonable grounds to suspect that an object that might have a bearing on a preparatory investigation is on the targeted premises.*
>
> *It is also implicit in the legislation that the judicial officer should have regard to the provisions of the Constitution in making the decision".[my emphasis]*

[40] Sight is not lost of the fact that there are competing interests involved. As rightly pointed out by the Director, there is a global outcry against corruption and that the Commission is tasked to fight such corruption. It is however implicit in the provisions of section 22(4) that before the Commission approach a judicial officer, the investigation must have reached the stage where there are reasonable grounds upon which the judicial officer may form the opinion that a corrupt practice has or is about to be committed. A mere suspicion or speculation is not sufficient. No other interpretation would be constitutionally permissible. The following analysis on

proportionality by Langa DP in *INVESTIGATING DIRECTORATE: SERIOUS ECONOMIC OFFENCES AND OTHERS v HYUNDAI MOTOR DISTRIBUTORS (PTY) LTD AND OTHERS, supra* in paragraphs [54 and [55] holds true for search and seizure provisions the context of an investigation conducted in terms of the provisions of the Anti-Corruption Act:

> *"...There is no doubt that search and seizure provisions, in the context of a preparatory investigation, serve an important purpose in the fight against crime. That the State has a pressing interest which involves the security and freedom of the community as a whole is beyond question. It is an objective which is sufficiently important to justify the limitation of the right to privacy of an individual in certain circumstances. The right is not meant to shield criminal activity or to conceal evidence of crime from the criminal justice process. On the other hand, State officials are not entitled without good cause to invade the premises of persons for purposes of searching and seizing property; there would otherwise be little content left to the right to privacy. A balance must therefore be struck between the interests of the individual and that of the State, a task that lies at the heart of the inquiry into the limitation of rights.*
> *On the proper interpretation of the sections concerned, the Investigating Directorate is required to place before a judicial officer an adequate and objective basis to justify the infringement of the important right to privacy. The legislation sets up an objective standard that must be met prior to the violation of the right, thus ensuring that search and seizure powers will only be exercised where there are sufficient reasons for doing so. These provisions thus strike a balance between the need for search and seizure powers and the right to privacy of individuals. Thus construed, s 29(5) provides sufficient safeguards against an unwarranted invasion of the right to privacy. It follows, in my view, that the limitation of the privacy right in these circumstances is reasonable and justifiable."*

[41] The information provided to the magistrate could not have persuaded him that there are reasonable grounds for the suspicion that a corrupt practice as envisaged in section 43 had been committed or is about to be committed as there was not a single allegation contained in the affidavit of Mr Oelofse which supported a reasonable belief that the applicant had awarded the contract to Professor Mbigi to obtain some form of gratification.

[42] Moreover, the magistrate indicated in the first search warrant that:

> *"... there are reasonable grounds for believing that there is upon or at the premises of the Ministry of Works and Transport, Office of the Permanent Secretary, 8th floor, Bell Street, Snyman Circle, Windhoek, or under the control of or upon any person within on or (sic) such premises within the Magisterial district of Windhoek, there ... are reasonable grounds for believing that:*
>
> (a) *a corrupt practice has taken place, is taking place or is likely to take place;*

A corrupt practice is defined as any conduct contemplated in Chapter 4 of the act. Chapter 4 creates a number of offences inclusive of attempts and conspiracies. The fact that the generic phrase and not the specific corrupt practice was mentioned, despite the fact that it was mentioned in the affidavit of Mr Oelofse, leaves little doubt that the magistrate had given proper consideration to what evidence was required to establish an offence in respect of section 43.

[43] This failure alone would render the issuing of the warrant fatally defective.

[44] In addition to the above the applicant raised the fact that the warrant itself was defective in that it was addressed to "*All Authorised Officers*." The response to this by the Director was that it could only have been authorised officers of the ACC and there could have been no legal uncertainty as to who was being referred to. In SAMCO IMPORT & EXPORT CC AND ANOTHER v MAGISTRATE OF EENHANA AND OTHERS 2009 (1) NR 290 (HC) Hoff J in para [24] and [27] had the following to say in respect warrants authorised in respect of section 21 of the CPA:

> *"...a magistrate when authorising a search warrant should satisfy herself or himself with the relevant statutory provisions.*
>
> *and*
>
> *"Search warrants which are addressed to 'all police officials' and not to a specific officer or specific officers do not comply with the provisions of s 21 and are for that reason alone, invalid. (See Smit v Maritz Attorneys at 158a.)"*

[45] Section 22(5)(b) is very explicit in this regard. It reads as follow;

> *" A warrant to enter and search premises may be issued on any day and must specifically-*
>
> *(b) authorise <u>an authorised officer mentioned in the warrant</u> to conduct the entry and search of the premises*." [my emphasis]

[46] I agree with Mr Namandje that this alone would have been sufficient reason for the warrants to be set aside.

[47] The applicant also took issue with the fact that a laptop was seized from the 6th floor (IT office) whereas the warrant specifically mentions the 8th floor of the

premises of the Ministry of works and Transport, Office of the Permanent Secretary. This issue was not in dispute. The Director however opined that it was under the control of the applicant. The warrant stipulated *"under control of or upon any person within on or (sic) such premises*." This cannot be construed to mean that it included any person who was not on the 8th floor and in the offices of the Permanent Secretary. Suffice it to say that the act require of the warrant to specifically identify the premises that may be entered and searched (see section 22(5)(a)). The provisions contained in section 22(5)(a) and (b) are specific safeguards to ensure that searches are conducted in a decent and orderly fashion with minimum infringement of each person's right to dignity, freedom, security and privacy. Both these provisions were not complied with.

[48] The failure by the Magistrate to properly apply his mind to establish whether reasonable grounds existed for believing that the applicant had contravened section 43 of the Act and to comply with the provisions of section 22 (5)(b), rendered both warrants fatally defective. The execution of the warrant outside the premises specified on the first warrant fell outside the scope of the said warrant and was therefore unlawful.

[49] Having determined that the two search warrants were invalid for lack of compliance with the provisions of the Act, it would not be necessary to deal with the further issues raised by the applicant. I pause to mention that the letter and spirit of the Act clothe the Commission with wide powers, given the nature of the offences, but it at the same cautions it to have strict regard to each person's right to dignity freedom, security and privacy. Authorised officers should opt for the least invasive manner to conduct their investigation and should be guided by the Act when conducting searches into data contained on computers, laptops and other devises containing personal information as well as information relevant to the investigation. Furthermore it should be noted the Court will always pay close attention to the terms of the warrants to ensure that they are neither too general, vague or overboard in accordance with well established case law. (*See Powell No and other v Van der Merwe NO and others 2005 (5) SA 62 (SCA*).

[50]. The applicant submitted that the matter was one of urgency. I was satisfied that the applicant made out a case in respect hereof. The application was essentially opposed by the 2nd and 3rd respondents and for this reason only these two respondents were ordered to pay the costs by applying the general rule pertaining to costs.

TOMMASI, J