

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: CC 24/2012

In the matter between:

CHARLES VAN RENSBURG

FIRST APPLICANT

MELANIE VAN NIEKERK

SECOND APPLICANT

JEREMIA VAN NIEKERK

THIRD APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *Van Rensburg v S* (CC 24/2012) [2017] NAHCMD 44 (22 February 2017)

Coram: SIBOLEKA J

Heard on: 17 January 2017

Delivered on: 22 February 2017

Flynote: Criminal law: Search warrant – requirements for validity – order of

invalidity does not render the same to the facts placed before this court emanating from the evidence unrelated to seizures. Application to declare a search warrant invalid granted – discharge of applicants in terms of section 174 of the Criminal Procedure Act 51 of 1977, dismissed.

Summary: The applicants operated a cash loan business and exceeded the licence limits, resulting in the withdrawal thereof. About N\$11 458 372.24 was lost by the investors during the existence of the business.

Held: Search warrant did not comply with the requirements and is declared invalid. The application for the discharge of the applicants in terms of section 174 of the Act is dismissed.

VERDICT

In the result I make the following order:

1. The search warrant issued by the Magistrate at Oranjemund on 25 September 2006 is declared invalid for failure to comply with the requirements set out in sections 21(1)(a), (2) and 25(1)(b)(i)(ii); of the Act as amended. The seizures of exhibits AA 235 to AA 428 are also declared invalid and not accepted as evidence before this court for the same reasons.
 2. The application for the discharge of the applicants in terms of section 174 the of Act is dismissed.
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JUDGMENT

SIBOLEKA J

[1] The three applicants are requesting this court to act as follows in their favour:

(a) To declare the search warrant issued by the Magistrate at Oranjemund on 25 September 2006 invalid; for failure to meet requirements discharge to in terms of section 174 of the Criminal Procedure Act 51 of 1977 as amended.

[2] The applicants are facing charges of fraud 256 counts; alternatively theft read with section 100 of the Act, 255 Counts; contravening section 5 read with sections 1, 6, 7, 9 and 72 of the Banking Institutions Act 2 of 1998 (Prohibition on conducting of banking business by unauthorized persons). The alleged amount lost by investors is N\$11 458 372.24.

[3] The request to declare the search warrant invalid is based on the following reasons:

Background

(a) The residence of Accused two and three was searched and an unknown number of goods and/or documents were seized and removed from the premises to somewhere. This was done after the authorities obtained a search warrant, which warrant on reasons to follow, is to be declared invalid. This will have a devastating effect on the State's case;

- (b) Despite what the purported search warrant stipulates, the goods seized were never brought to a magistrate (See bottom part of warrant, a copy annexed hereto marked Annexure “A”);
- (c) The search was conducted on the strength of a purported search warrant by employees of Bank of Namibia, Namfisa and a member of the Namibian Police. It appears that the roll of the police officer was non-existent in the search process;
- (d) It is common cause that the specific name of the police officer is not mentioned in the warrant. Furthermore, that he was not involved in the investigation. This is per se a ground to declare the warrant invalid¹;
- (e) The Bank of Namibia and Namfisa’s employees seized the articles and *not* (own emphasis) the Police. Bank of Namibia and Namfisa acted ultra vires;
- (f) It cannot be denied by the State, that some of the documents not disclosed of the business of the Accused, which were seized, might have exculpatory value. For instance, Annexure “B” was not disclosed by the State. This document has serious relevance to the charges of theft insofar it relates to the intent to deprive permanently;
- (g) The Police also cherry-picked the documents they deemed with probative value. What happened to the others? Can it be excluded that the evidence/documents were not disclosed? If so, why was full disclosure not done?; and
- (h) The Police also decided which witnesses were to be contacted, bearing in mind that only one person complained. The question arises how many persons that could give evidence to the benefit of all the accused, were not

¹ See: *Minister of Safety and Security v Van Der Merwe* 2011(2) SALR 301 CC at 50.

called, and why not?

[4] The application for a discharge of the applicants is based on article 12(1)(e) of the Constitution.

(a) This Application for Discharge however goes further than the normal application for discharge as normally entertained by the Courts, as it also pertains to Article 12 rights that were violated or infringed by the investigating team (See paragraph 6 *infra*).

(b) Article 12(1)(e): All persons shall be afforded adequate time and facilities for the *preparation and presentation of their defense, before the commencement of* (own emphasis) and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.

(c) The issue therefore is that a possibility exists that various witnesses and/or documents exist that could benefit Accused two and three. Could the Accused prepare themselves properly, taking into account the non-closure?

[5] I will now look at the relevant sections of the Criminal Procedure Act governing the issuing of a search warrant by a magistrate or justice.

The State may in terms of section 20 of the Act seize anything (an article):

(a) which is concerned in or is on reasonable grounds believed to be concerned with 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; and

(c) which is or intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence'.

[6] The State may in terms of section 21 effect the seizure of the articles referred to in section 20 only by virtue of a search warrant.

(a) Section 21(1)(a) of the Act provides that a magistrate or justice, shall issue a search warrant if it appears from information on oath that there are reasonable grounds for believing that such article is in the possession or under the control of or upon any person or upon or at any premises within the area of jurisdiction of such magistrate or justice.

(b) Section 21(2) provides that a search warrant shall require *a police official to seize the article in question and shall authorize such police official to* (own emphasis) search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises. The requirement in section 21(2) is directly connected to section 29 which pertinently requires that a search must be conducted in a decent and orderly manner. It is obvious that only a particularized police officer can credibly give a proper account of how a search has been conducted.

[7] Section 25(1)(b) of the Act states that:

'25 Power of police to enter premises in connection with State Security or any offence:

(1) If it appears to a Magistrate or justice from information on oath that there are reasonable grounds for believing;

(a) ...

(b) That an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises within his area of jurisdiction, *he may issue a warrant authorizing a police official to enter the premises in question at any reasonable time for the purpose*

- (i) *of carrying out investigations ...*
- (ii) *of searching the premises ...'* (own emphasis)

[8] It follows from the above that since the search warrant before court was addressed "To all policemen" instead of citing the full names of a particular police officer who conducted the search, it failed to meet the basic requirement.

[9] I will now look at the applicant's second prayer, being that of discharging them at the close of the State's case in terms of section 174 of the Act:

According to applicants one, two and three's counsel the basis for the application for a discharge in terms of section 174 is the following:

- (a) the search warrant is invalid and the seizure of exhibits as a result thereof is invalid *ex tunc* and therefore no evidence to convict accused one, two and three exists on all charges of fraud and theft.
- (b) The thrust of the argument on behalf of accused two and three is that they were deprived of their constitutional right to a fair trial due to the illegal and unlawful search. This resulted in pretrial and trial prejudice as a possibility exists that relevant exculpatory documents existed, which possible non-disclosure, is seriously prejudicial to the article 12(1)(e) of the Constitution.

[10] Regarding the section 174 application for the discharge of the three accused, I want to make the following observations. Section 174 of the Act as amended reads:

'Accused may be discharged at close of case for prosecution - If, at the close of the case for the prosecution at any trial, the court is of the opinion *that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.*' (own emphasis)

[11] It has been held in various judgments related to this application that the discharge can only follow if at the close of the State's case no prima facie case requiring an answer from the accused has been established by the prosecution. Basically the Court must ask itself the following questions:

- (a) If the proceedings were to be halted (stopped) here and then, could a reasonable court acting carefully convict the accused on the available evidence. If the answer is yes, the application should fail. If the answer is *no* it means the trial court has no legal basis not to discharge the applicants because there is no case against them to which they would be required by law to furnish an answer.

[12] On the matter before court several witnesses among them pensioners have testified how they entered into written, signed contracts with the accused to the fact that they will receive their capital back in addition to the monthly interest of 15% which they will receive on their capital. They invested the little they had of their pension monies in the hope that it will grow as it was apparent from the contracts themselves, only to lose everything. Some of the investors opted not to receive any interest but instead re-invested all in order to boost their capital, but in the end they lost everything, because the cash loan company West Coast Financial Aid CC failed to act in terms of the contracts they had issued to them.

[13] Forty six contracts of investors were handed in court as exhibits. These are on the same format as those of the witnesses who testified before court. It is common knowledge and indeed not in dispute that these contracts were also entered into between the accused and the investors cited therein. This is what the charges preferred against the applicants are all about. The alleged amount lost by all the investors is N\$ 11 458 372.24. It is on this basis that the respondent has established a prima facie case against the applicants.

[14] Andreas Kanyangela, a former Commercial Crime Unit investigator was

the only police officer called to testify by the prosecution. He stated that he was not there at the time the search was conducted on the property (house) belonging to accused two and three. He is not aware whether a statement under oath was filed with the magistrate, Luderitz before the search warrant was issued.

[15] Kanyangela had not yet left the Commercial Unit when the matter was reported to their Unit by officials from the Bank of Namibia. He was one of the police team that did the initial investigation of the matter. The report related to this matter was that West Coast Financial Aid CC was asking people to invest money in their company while it was not registered as an investment company.

[16] Some investors came to the police to complain about the financial losses they have suffered. They also mentioned others whom they knew to have done business with the accused. That was how the police team was able to locate and obtain statements from the investors who came to testify in court. According to Kanyangela, the seizures relate to exhibits handed in court as AA 235 to AA 428.

[17] As a foretasted the rest of the exhibits were those acquired by way of statements from investors who lost their dues in the said investments. As pointed out before the search warrant did not meet the basic requirement and as such the search that was conducted on the premises owned by accused 2 and 3 was illegal. It violated the accused's rights to privacy.

[18] In the result I make the following order:

1. The search warrant issued by the Magistrate at Oranjemund on 25 September 2006 is declared invalid for failure to comply with the requirements set out in sections 21(1)(a), (2) and 25(1)(b)(i)(ii); of the Act as amended. The seizures of exhibits AA 235 to AA 428 are also declared invalid and not accepted as evidence before this court for the same

reasons.

2. The application for the discharge of the applicants in terms of section 174 of the Act is dismissed.

A M SIBOLEKA

Judge

APPEARANCES:

FIRST APPLICANT:

Mr. J Van Vuuren

SECOND and THIRD APPLICANT:

Mr. C Mostert

Directorate of Legal Aid

RESPONDENT:

Ms. I Husselmann

Office of the Prosecutor-General,

Windhoek