

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. HC-MD-CIV-MOT-GEN-2018/00018

In the matter between:

NEW FORCE LOGISTICS CC

APPLICANT

and

THE ANTI CORRUPTION COMMISSION

RESPONDENT

Neutral Citation: *New Force Logistics CC v The Anti-Corruption Commission* (HC-MD-CIV-MOT-GEN-2018/00018) [2018] NAHCMD 28 (14 February 2018)

CORAM: MASUKU J

Heard: 1 February 2018

Delivered: 14 February 2018

Flynote: Urgent Application - Criminal Procedure – procedure – search, seizure and attachment of property in terms of s. 23 of the Anti-Corruption Act – legality of search, seizure and attachment without a warrant – grounds for search, search and attachment without a warrant – reasonable suspicion –

what constitutes reasonable suspicion. Civil Procedure - Necessity of person who conducts the search, seizure and attachment of property to depose to affidavit regarding the issues that persuaded him or her to act in terms of the Act without a warrant. Applicability of Rule 32 (9) and (10) of the High Court Rules to urgent applications.

Summary: In this application, the respondent seized and attached property belonging to the applicant, namely trucks, containers and their contents and certain permits. The applicant therefor sought an order from the court declaring that the conduct of the respondent's agents of searching, seizing and attaching the trucks, consignment, documents and keys belonging to the applicant, is unlawful.

Held that: The applicant brought the case on the basis of what is referred to as commercial urgency. The court found that the matter is sufficiently urgent to merit the abridgment of the rules applied for.

Held that: In matters where fundamental rights and freedoms are concerned, the courts, as a rule, strictly construe legislation that is invasive in character and affects the enjoyment of rights and freedoms.

Held further that: Because respondent relied on s. 23 of the Anti-Corruption Act, the person(s) responsible for the search, seizure and attachment, without a warrant, must disclose to the court what considerations led them to conclude that there was indeed a reasonable suspicion of the commission of a crime and the reasons why, in their peculiar circumstances, they did not find it necessary or expedient to obtain a warrant. In that premise, the court held that the Head of Investigations, who was not involved in the actions complained of, deposing on oath to issues relating to the state of mind of an officer on the ground and who has to taken steps that serve to violate some constitutionally protected rights is insufficient and inadmissible.

Held that: In so far as a functionary relies for its actions on particular provisions of an Act, which are invasive and violative of fundamental rights of

an individual, the courts must hold the middle ground and ensure that where crime is suspected to have been committed, those suspected are treated fairly and strictly in terms of the law.

Held further that: The respondents, in their affidavits, did not state that they informed the applicant's employees regarding their right to legal representation and the exercise thereof as mandatorily required by s.25 of the Anti-Corruption Act. That omission, the court held, renders the action taken by the respondents in violation of this section unlawful.

Held that: There was no need for the applicant to comply with the requirements of Rule 32 (9) and (10), before launching these proceedings, as the application in question was not interlocutory in nature and/or effect.

The application was consequently granted with costs on a party and party scale.

ORDER

1. The Applicant's non-compliance with the Rules of Court pertaining to time periods and service, as well as giving notice to the Respondent, as contemplated in Rule 73 of the Rules of Court is hereby condoned and the application for the matter to be heard as one of urgency is hereby granted.
2. It is declared that the search, seizure and attachment of the Applicant's V8 R500 Scania Truck, bearing registration number N158099W, and a R410 Scania Truck, bearing registration number N19902W, with four (4) containers with timber and permits, without a warrant by the Respondent's agent is declared unlawful and is hereby set aside.

3. The Respondent is ordered to immediately restore possession of all the items particularised in paragraph 2 above to the Applicant forthwith.
4. The Respondent is ordered to pay the costs of the application on the ordinary scale.
5. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] At the turn of the New Year, on 2 January 2018, officers of the respondent seized and attached certain property belonging to, or in the hands of the applicant, which property is described in paragraph 2 below. The said property was seized and attached at Walvis Bay in this Republic.

[2] Dissatisfied with the legal propriety of the respondent's aforesaid action, the applicant approached this court on an urgent basis and applied for the following relief:

'1. Condoning the applicant's non-compliance with the Rules of this Court pertaining to time period and service of the application, as well as giving notice to parties, as contemplated in terms of Rule 73 of the Rules of this Court, and directing the application to be heard on an urgent basis.

2. That a rule nisi is hereby issued calling upon the respondents to show cause, if any, on a date to be determined by this Honourable Court, why an order in the following terms should not be granted.

3. Declaring that the warrantless search, seizure and continued detention of Applicant's V8 R500 SCANIA TRUCK with registration number N 158099 W and R410 SCANIA TRUCK with registration number N 19902 W truck, 4 containers with Timber consignment and permit documents by the agent of the first respondent on the 2 January 2018 as unlawful and setting it aside.

4. Directing the first respondent to immediately restore possession of the Applicant's V8 R500 SCANIA TRUCK with registration number N 158099 W and R410 SCANIA TRUCK with registration number N 19902 W truck, 4 containers with Timber consignment and permit documents to Applicant.

5. Directing the respondent to pay the applicant's cost of suit on the scale as between attorney-own-client.'

The parties and representation

[3] The applicant is an incorporated entity established in terms of the Close Corporation laws of this Republic and it operates as a duly registered transport and logistic outfit, in terms of the Road and Traffic Act.¹ Its offices are, for purposes of this application, those of its legal practitioners Messrs. Khadila Amoomo Legal Practitioners, 18 Adler Street, Windhoek West.

[4] The respondent, the Anti-Corruption Commission is an entity established in terms of the provisions of s.2 of the Anti-Corruption Act.² Its offices are situate at Mont Blanc & Groot Tiras Street Eros, Windhoek.

[5] Mr. Khadila Amoomo appeared on behalf of the applicant, whilst Mr. Kashindi, from the office of the Government-Attorney, appeared on behalf of the respondent. The court records its indebtedness to them for the assistance they rendered to the court in argument.

Approach to the matter

¹ Act No. 22 of 1999.

² Act No. 8 of 2003.

[6] It must be pointed out from the onset that although the applicant, in its notice of motion, applied for the issuance of a *rule nisi* issued in this matter, none was however, granted. The papers were served on the respondent and the latter was, within stringent time limits, which were extended by the court at the respondent's behest, allowed to file the full set of papers and the matter became ripe for argument, in which case a final order may be issued, whichever way the court finds.

Issues for determination

[7] A reading of the papers suggests that there are two principal issues for determination. The first relates to the urgency of the matter. The respondent takes issue with the hearing of the matter as one of urgency and contends that the matter is not urgent, alternatively, that it is not one in respect of which abridged time limits were apposite.

[8] On the merits, the main issue for determination, is whether the respondent acted properly and in terms of the relevant legislation in searching, seizing and attaching the applicant's aforesaid property. The applicant contends, in particular, that the search, seizure and attachment of the goods in question, which it is common cause between the parties, was dealt with without a warrant, was in violation of the applicable legislation. I must, in this connection, mention, that Mr. Kashindi submitted and quite forcefully too, that his client did not search the property. The correctness of that contention will be examined in the judgment. I now proceed to deal with the matters in contention.

Urgency

[9] In dealing with urgency, the applicant alleged in its affidavit, deposed to by a Mr. Jason Mathews, described as the Managing Director of the applicant, that the applicant had been deprived of its property in an unlawful manner and particularly in violation of its constitutional rights to privacy, ownership of

property and the freedom to trade. This, it was alleged, on its own, rendered the matter urgent.

[10] It was also stated that the trucks seized by the respondent were the only ones at the applicant's disposal and as such the applicant was suffering a substantial loss of income as a result of the respondent's unlawful action and that this justified the matter being dealt with on an urgent basis. As a result of what the applicant alleges is unlawful behaviour by the respondent, it stood to suffer the payment of penalties amounting to N\$ 1 000 per day for the container fees it was liable to pay.

[11] The applicant further deposed that if the matter was dealt with in the ordinary course, the applicant would suffer irreparable harm as the matter, attended in the ordinary course, would take a period of about nine months to finalise, not to mention the time needed for the court to deliver judgment at the conclusion of the case. Furthermore, the applicant stated that it had about 150 orders from its clients that it had been scheduled to attend to and hiring alternative transport would be more costly to the applicant than the profit it would make in that circumstance. For the foregoing reasons, the applicant alleged that it had no other recourse than to approach the court on an urgent basis.

[12] What was the respondent's response to these allegations regarding urgency? What I should mention is that ordinarily, issues of urgency are, by their very nature, largely decided on the basis of the allegations made by the applicant on affidavit. In this regard, it is not uncommon for a respondent, hauled before court on an urgent basis, to shoot from the hip as it were, and argue the matter off the cuff, without having filed affidavits or even points of law, countering the case made by the applicant.

[13] This is, however, not such a case. I say so for the reason that the respondent was served with the papers and was granted an opportunity to file answering affidavits, which it did. As indicated, there was an application for an extension of time sought by the respondent, reasoning that the matters giving

rise to the application occurred well outside of the capital and collating and collecting all the relevant information in its defence mounted a hurdle. The court extended the time for filing by a further day, appreciating the precarious circumstances the respondent found itself.

[14] In its answering affidavit, the respondent complained that there was an unreasonable period between the time of the occurrence of the events leading to the application and the actual bringing of the application by the applicant. In this regard, it was contended that Mr. Amoomo, the applicant's legal practitioner, contacted the respondent on 3 January 2018, negotiating the release of the trucks. The respondent accordingly argued that if there was any urgency in this matter, it was of the applicant's own making, as it did not bring the matter to court as timeously as it should have given the circumstances of the matter.

[15] In reply, it was argued on the applicant's behalf that the applicant attempted to have the matter resolved amicably hence the telephone call to the respondent. It was also stated that the applicant's legal practitioner was away from Windhoek and was in the North when the events giving rise to the application occurred and his offices were closed because of the Christmas vacation. In the circumstances, he could only be available to take full instructions on his return to Windhoek on 15 January 2018 and to this end, worked tirelessly to bring the application as he did around 24 January 2018.

[16] I am of the considered view that although there is some merit in the respondent's complaint regarding the noting of the complaint as it were, and the actual launching of the application, the court cannot, however close its eyes to the notorious fact that during the festive season, many legal practitioners, having carried the yoke of representing their clients throughout the year, do and must take time off to recharge their batteries in preparation for the yokes they have temporarily put down and new ones to be placed on them in the coming year.

[17] It must be recalled that in allowing or disallowing matters to be dealt with on an urgent basis, the court exercises a discretion, which it must exercise judiciously and judicially. In the peculiar circumstances of this case, although one may argue that an alternative legal practitioner may have been enlisted, the court cannot lose sight of the notorious fact that the time in question fell during the festive season and most law firms close at this time of the year, thus constituting an acceptable extenuating circumstance in the premises.

[18] Furthermore, any harm that may have been occasioned to the respondent, was ameliorated by the fact that the respondent was afforded a reasonable time to prepare and file its papers, which from the look of things, are quite comprehensive and as stated, they were afforded an extension of time. I accordingly find that the matter, though brought much later than would be accepted in normal situations, the applicant has put up a reasonable explanation, which in exercise of my discretion, I find, merits the matter being dealt with on an urgent basis.

[19] For that reason, the applicant's objection to the urgency of the matter is overruled and I find that the applicant has set out a case, which in the circumstances, meets the requirements set out in Rule 73. Properly considered, the applicant has brought the case on the basis of what is referred to as commercial urgency in *Swanepoel v The Minister of Home Affairs*.³ I accordingly rule that the matter is sufficiently urgent to merit the abridgments applied for.

[20] I should mention, albeit in passing, that the applicant's allegation in its founding affidavit that if the matter were not be dealt with in the ordinary course and not as one of urgency, it would take a period of about nine months, is rather exaggerated and is no accurate reflection of what happens on the ground. I say so in the light of the positive effects wrought by judicial case management in the early finalisation of matters. I take it that the

³ Case No. A 120/2000, per Silungwe J.

applicant is ill informed in his suggestion which unnecessarily casts the performance of the court in a dim light. I will say nothing more of the issue.

Legality of the search, seizure and attachment of the applicant's property

[21] I now turn to consider the argument advanced by Mr. Amoomo, on behalf of the applicant regarding his attack on the validity of the actions of the respondent. Needless to say, the respondent argues and quite strongly too, that all its actions were above board and were fully grounded in the legislative powers granted to it. It therefor pours scorn on the allegations that it acted in a manner that violated the constitution of this Republic and the applicable laws.

[22] As indicated earlier, Mr. Amoomo launched his offensive from the position that the respondent did not have a warrant, authorising it to do what it did. To use his exact language, the search, seizure and attachment of the applicant's goods, was 'warrantless'. In this regard, he argued, the laws applicable to searches and seizure without a warrant must apply and in his argument, the respondent fell seriously foul of the provisions that they sought to rely upon and merely paid lip service thereto, so to speak.

[23] In his argument, Mr. Kashindi, although conceding that there was no warrant regarding the search, seizure and attachment, submitted that there was no need for a warrant to have been issued as the respondent relied on the provisions of s. 23 of the Anti-Corruption Act in carrying out the action complained of. What does the said section say?

[24] The said section reads as follows:

'1. Notwithstanding section 22, an authorised officer may without a warrant of entry and search referred to in that section enter and search premises, other than a private dwelling, except where it is used also for business purposes, for the purpose of attaching and removing, if necessary, any book, document or article, if –

- (a) the occupier of the premises or any other person in control of the premises consents to the entry, search, seizure and removal of the book, document or article concerned; or
- (b) the authorised officer on reasonable grounds believes –
 - (i) that a warrant of entry and search will be issued if application therefor were made under section 22; and
 - (ii) that the delay in obtaining a warrant would defeat the object of the entry and search.’

[25] Properly understood, the respondent’s case appears to be that although it would ordinarily have been expected to obtain a warrant for search, seizure and ultimately the attachment of the applicant’s property, the circumstances attendant to the case were such that the authorised officer had reasonable grounds to believe that the circumstances set out in (b) (i) and (ii), above were extant. For that reason, the respondent would argue that although it did not have a warrant, as required in s. 22, the attendant circumstances, were such that search, seizure and attachment were authorised by the provision of s. 23 of the Anti-Corruption Act.

[26] It must also be mentioned that the respondent also contended that the applicant had contravened the provisions of the Forestry Act,⁴ and the regulations made thereunder. In particular, it was alleged that the provisions of ss. 43, 45, and the Regulations made thereunder, were contravened by the applicant. I do not find it necessary to enmesh myself in the case alleged regarding the contraventions of this Act.

[27] In my considered opinion, the main question, which may be dispositive of the entire matter, is whether the respondent complied with the provisions of its own Act when it searched, seized and attached the applicant’s property. Mr. Amoomo strongly argued, with all the powers of persuasion at his command that the respondent violated its own law and that the attachment and seizure should be set aside. Is this contention viable in the circumstances?

⁴ Act No. 12 of 2001.

[28] I need to start this treatise on a cautionary note. In this regard, two general propositions, which may have a bearing, if not a decisive one on this case, need to be pointed out and this early in the judgment. These were helpfully cited by Mr. Amoomo in his heads of argument. The first nugget of wisdom in this regard was served by the Supreme Court in *Rally for Democracy v Electoral Commission*,⁵ where the court expressed itself thus on the principle of legality:

'The exercise of any public power should be authorised by law – either by the Constitution itself or by any other law recognised by or made under the Constitution. The exercise of public power is only legitimate where lawful. If public functionaries purport to exercise powers outside the parameters of their authority, they in effect usurp powers of State constitutionally entrusted to legislative authority . . .'
(Emphasis supplied).

[29] The second nugget fell from the lips of the presiding Judge in the case of *Mbangi v Minister of Safety and Security and Others*,⁶ where the court expressed itself as follows in relation to the interpretation of legislation that is invasive of human rights and freedoms in particular:

'Further, in view of the fact that search and seizure constitute a diminution of an entrenched right to own/possess property in terms of s. 25 of the Constitution, restrictive interpretation of the law that permits warrantless searches and seizures should be favoured. So, the circumstances which prevailed at the time of the seizure of the motor vehicle will be decisive in this matter.'

[30] I will examine the relevant facts of the matter and then decide whether these two principles are applicable and if they are, decide how they impact, if at all, on the search, seizure and attachment of the applicant's property in this matter.

⁵ 2010 (2) NR 487 at p. 507 at para. 23.

⁶ (862/09) [2010] ZAECMHC 18 (8 April 2010).

[31] Before I carry out the above exercise, it is perhaps necessary to deal with an argument Mr. Kashindi raised and which I referred to above, namely, that his clients did not search the applicant's property. This proposition seems, in my view, to fly in the face of logic and common sense. What is unmistakeable in this matter is that the applicant's property, including the trucks, were seized and attached by the respondent. What is also obvious is that there was timber found in the containers that has been alleged to have been procured in violation of certain provisions of the Forestry Act and the Anti-Corruption Act as well.

[32] The million-dollar question is: how did the respondent find this property that was otherwise securely kept in the containers, if they did not conduct a search of the contents of the bowels of the containers found in the applicant's vehicles? Did these items, namely, the timber, miraculously fall out of the vehicles due to an act of God, to the respondent's delight and simultaneously, to the applicant's chagrin? I think not! I have no doubt that this argument is self-serving and has no foundation in fact or in law. As they normally say, if it walks like a duck, quacks like a duck, then it is indeed a duck! From all indications, the procedure that was followed had all the hallmarks of a search and so a search it was. I therefore so find in the premises.

[33] I should pertinently mention that another issue that Mr. Amoomo took issue with was that the officials from the respondent do not, in law, have powers to act in terms of the Forestry Act, as they purported to do. In this regard, I should mention that the Forestry Act, contains provisions similar to those in s. 23 of the Anti-Corruption Act, which entitle an authorised officer, without a warrant, to search, enter and inspect any land or premises in which activity licensed under the said Act is taking place and may, where they entertain a reasonable cause to suspect that a vehicle is carrying forest produce, obtained in contravention of the Forest Act, stop and search the vehicle in question. This power extends to searching persons as well.⁷

⁷ S. 43 of the Forestry Act.

[34] The first question to determine has to do with the lawfulness of the search, seizure and attachment of the applicant's vehicles and goods. In this regard, what has to be ascertained, is whether the respondent's officers properly carried out their duties in terms of their Act, particularly in terms of s. 23. In this regard, it is important to point out at this very nascent stage of this enquiry that the person who deposed to the respondent's main affidavit is Mr. Nelius Becker, who describes himself as the Head of Investigations of the respondent.

[35] In his affidavit, he gives a background regarding the events leading to the present application. In particular, he deposed that the respondent lawfully seized the trucks in question while they were at the premises of the Road Authority. In this regard, he deposed further that the applicant had contravened provisions of the Forestry Act and the Regulations made thereunder. It was his contention that the timber seized was part of an ongoing investigation into alleged corruption and that the release of the items by the respondent would seriously hamper the investigations as the items might be dissipated or they may disappear as a result of acts of God, thus hamstringing the successful prosecution of those who perpetrated the illegal activities alleged.

[36] The one issue of concern that I raised with Mr. Kashindi, related to the fact that it was Mr. Becker, who deposed to the affidavit, including the portions regarding the actual search, seizure and attachment, complained of, yet he was not at the scene, from a consideration of his affidavit, read in its entirety. The question I posed was whether or not his affidavit, in that particular regard, contains admissible evidence. His answer was to say that the applicant is guilty of having done the same because the affidavits of the drivers, from whom the vehicles were seized, did not depose to the founding affidavit but merely filed confirmatory ones. This does not amount to a proper answer. Two wrongs never make a right, it must be stated in this connection.

[37] I am of the considered view that although there is similarity in the approach by both parties, generally speaking, regarding the main affidavits

they filed, there are certain nuances in relation to the respondent that stand out and render their position markedly different from that of the applicant. I say so for the reason that the respondent exercises power that has the potential to impinge on fundamental rights as encapsulated earlier.

[38] The power to search, seize and attach property, without a warrant, and as happens also with the Forestry Act, where the authorised officers may do similar acts, including conducting a bodily search of a suspect, without a warrant, are invasive and have far-reaching consequences indeed. They cannot be equated with a case like that of the applicant, whose managing director made straight-forward allegations regarding the search, seizure and attachment, duly supported in material respects, by the drivers, who were present when the acts complained of took place.

[39] It is, in my considered opinion, very important and actually crucial and critical that the state of mind of the person, in the context of this case, who searches, seizes and attaches property without a warrant, is laid bare for the court to assess. I say so for the reason that the acts complained of in this case negate certain fundamental rights. In particular, the officers of the respondent, both under the respondent's Act and the Forestry Act, have to disclose to the court what considerations led them to conclude that there was indeed a reasonable suspicion of the commission of a named offence and the reasons why, in their peculiar circumstances, they did not find it necessary or feasible to obtain a warrant.

[40] Once that is not done, I am of the view that the very exercise of the powers under the relevant Acts is rendered nugatory. A person, even though he be a director or even the Commissioner himself, cannot properly depose to issues relating to the state of mind of an officer on the ground and who has to taken steps that serve to violate some constitutionally protected rights. As to what considerations he took into account and the peculiar circumstances that informed the decision to search, arrest, seize or attach, must come directly from the mouth of the officer involved in those acts and not some other person, even the one in charge of the entire establishment, writing from the

serenity and comfort of his office, about matters he has no personal and/or intimate knowledge of.

[41] To this extent, I am of the considered firm view that even a confirmatory affidavit of the officer on the ground cannot cure this defect, particularly if, as here, it merely confirms what the deponent to the answering affidavit says, without giving the particular information that caused him to exercise the power to carry out the acts complained of without a warrant. Only one person can do so and it is the one at the coalface, as it were, of the illegal activity alleged. I accordingly find that there is no admissible evidence before court to show or suggest that the provisions of s. 23 of the Anti-Corruption Act, were complied with by the respondent's officers.

[42] I have read the confirmatory affidavit of the officer on the ground, Mr. Kangameni. It is couched in the normal manner, merely confirming the contents and reference to him made by Mr. Becker in the answering affidavit. That in my view is not enough. As pointed out earlier, the considerations that applied on his mind to cause him to act without a warrant must be stated to enable the court to come to a view whether he was justified in taking the steps he did, considering the invasive nature of the actions the respondent engaged in.

[43] I must, in this connection, also state that a mere regurgitation of the wording of the relevant section, namely s. 23, as the respondents have done *in casu*, is insufficient. In this regard, the court must be taken into the officer's confidence by stating what the prevailing facts were; what information was at his disposal; what caused the suspicion and why it was reasonable in the circumstances, together with the reasons why a warrant could not be applied for in the circumstances. I say these to just mention a few of the issues that must be traversed in the affidavit of the officer conducting the search and related activities.

[44] To this extent, I am of the considered opinion that the applicant has raised an issue that is unassailable regarding the lawfulness of the search,

seizure and attachment of the applicant's goods. The onus is on the respondent, not only to show that they have attached the goods but most importantly, to show that they have done so in full conformity with the law of the land. In this regard, the nugget of wisdom referred to earlier comes to haunt the respondent. Issues of search, seizure and attachment, must be strictly construed and all the relevant statutory requirements must be met. In this case, I am of the view that the respondent fell short of the standards imposed on it by the Legislature and it must accordingly fall on its sword in the circumstances.

[45] Mr. Amoomo had another missile in his arsenal. He argued that the search, seizure and attachment of the applicant's goods were also unlawful for the reason that the officers of the respondent purported to act as 'authorised officers' in terms of the Forestry Act. It was his contention that the respondent's officers, in purporting to exercise powers under the Forestry Act, were barking the wrong tree and their actions should be set aside as unlawful and consequently result in the release of the applicant's property, because it was illegally attached by persons, who, in terms of the law they purported to use, had no power to do so.

[46] In his heads of argument, Mr. Kashindi, conceded and correctly so, in my view, that the respondent's officers, are not 'authorised officials' in terms of the Forestry Act. This is eminently correct for the reason that the said Act defines an authorised officer as ' . . . a forest officer, an honorary forest officer, a licensing officer or a member of the police appointed under Police Act, 1990.' There is no intimation or evidence suggesting that the respondent's officers involved in this matter, fell within the rubric of authorised officers as defined in the said Act.

[47] It is accordingly clear that the respondent's officers, in so far as they purported to exercise any powers of search, attachment or seizure, in terms of the Forestry Act, were on a wild and unlawful crusade. In this regard, the actions that the respondent's officers took as stated in para 8.27 of their

answering affidavit, allegedly in pursuance of the provisions of the Forestry Act were unlawful.

[48] In the premises, it appears to me that the applicant's property was not searched, seized or attached in terms of either the Anti-Corruption Act nor the Forestry Act, as none of the relevant provisions entitling the respondent or the authorised officers in terms of the latter Act, to search, seize and attach the property were followed.

[49] In an interesting turn of events, the respondent sought to argue that the applicant had not complied with the provisions of rule 32 (9) and (10) before launching these proceedings. In this regard, the 'usual suspects' i.e. judgments dealing with this issue, namely *Appollos v Mukata*,⁸ *Visagie v Visagie*,⁹ were cited in support of the proposition advanced. It must be pertinently observed that rule 32 (9) and (10) applies in matters which are interlocutory, i.e. in the course of dealing with what are the major issues in a case, particularly in action proceedings. The procedure falls under Part 3 of the rules of court, which deal with judicial case management, particularly of action proceedings.

[50] I am of the considered view that ordinarily, a party seeking to bring an urgent application in respect of what it considers to be a violation of its constitutional rights, is not under a legal obligation to follow rule 32 (9), with the result that the application is to be struck out for non-compliance. As indicated above, the rule, wherever it has been said to apply, has generally been in respect of action proceedings in which an interlocutory issue has arisen ahead of the main issue in contention and the focus of the court's determination.

[51] There is nothing interlocutory about this application, as the applicant seeks a final order for the release of its goods, which were, in its view,

⁸ Case No. I 3396/2014.

⁹ (I 1956-2014) [2015] NAHCMD 117 (26 May 2015).

unlawfully seized and attached by the respondent. To such an application, rule 32 (9) and (10), does not readily apply, at least not to the extent that a matter can be struck off for non-compliance therewith.

[52] Another issue that loomed large and in respect of which I intend to devote very little time and attention, relates to the provisions of s. 25 of the Anti-Corruption Act. The said section reads as follows:

'1. A person who enters and searches any premises under section 22 or 23 must exercise those powers with strict regard for the decency and order, and with regard for each person's right to dignity, freedom, security and privacy.

2. The search of a person under section 24 (1) (c) may be conducted only by a person of the same gender as the person to be searched.

3. A person who enters and searches premises under section 22 or 23 must, before questioning any person –

- a) advise that person of the right to be assisted by a legal practitioner; and
- b) allow that person to exercise that right.

4. A person who removes anything from premises being searched must –

- a) issue a receipt for it to the owner or other person in control of the premises;
and
- b) return it as soon as practicable after achieving the purpose for which it was removed.'

[53] I have had occasion to read the contents of Mr. Becker's affidavit regarding how they dealt with the eventual confiscation of the applicant's trucks and other property. What is starkly absent, are allegations, under oath, to the effect that the provisions recorded above were followed. In this regard, there is no allegation that the applicant's drivers were informed of their right to legal representation and that they were also afforded an opportunity to exercise same. It is clear that the applicant's drivers gave whatever

information they did to the respondent, without having been advised of their statutory rights, which it appears from the language of the section quoted above, is couched in peremptory terms.

[54] Furthermore, there is no allegation that the provisions of subsection (4) above were followed, regarding the documents that were seized. In terms thereof, a receipt of the items taken must be prepared and given to the person from whom the items are seized. Furthermore, these must be handed back to the person from whom they were seized, as soon possible after the purpose for which they were taken has been fulfilled. In this regard, Mr. Kashindi stated that he had no submissions to make, which I construed as an admission that his clients did not act in terms of the law in that regard. This is another serious breach by the respondent's officers of the very law that should guide them. This is a further reason why I find that the applicant is entitled to the relief it seeks.

[55] The respondent, at paras 5.33 and 53.4 of its heads of argument, makes the following submissions and in respect of which I find myself in duty bound to comment. Mr Kashindi expresses himself as follows:

'5.33 I submit that the Respondent is by law authorised to initiate and investigate allegations of corrupt practices. This Court has no authority to put a stoppage on the lawful investigation currently being conducted by the respondent. I submit that he respondent has initiated the investigation and the items seized trucks, containers, timber and documents are now exhibits, which are subjects (*sic*) of that investigation. In any event there was not need to obtain warrant as the respondent has permission to enter the premises from the owner. (Emphasis supplied).

5.34 It is respectfully submitted that the applicants are seeking an (*sic*) incompetent relief which cannot be granted by this Court.'

[56] I find it disconcerting for counsel to make such submissions, which, as it appears, have no foundation in the papers and the law applicable thereto. A proper reading of the notice of motion and the affidavits filed in support

thereof does not indicate anywhere that the applicant seeks an order stopping the respondent from continuing with its investigations into what it may suspect are acts of corruption relating to the timber seized. To then suggest that the court is minded or persuaded to stop the respondent in its tracks, so to speak is singularly misleading to a reader, who may not have read the entire papers filed.

[57] Secondly, I find this argument, or more precisely characterised, this admonition to the court, totally unwarranted and geared, in my view to causing the court to have compunctions regarding granting the application. This is to be so even if the circumstances and the law applicable, in unison suggest that the granting of the applicant's application is condign and the only proper course. It must be recorded in this judgment, as I hereby do, that courts, like ordinary members of the society, are naturally concerned when there are acts of criminality or corruption that are alleged to take place.

[58] That notwithstanding, the Constitution of this Republic grants suspects and accused persons certain pre and trial rights, which include the presumption of innocence, right against self-incrimination and kindred rights and freedoms. More importantly, the Legislature has, in the Anti-Corruption Act and other kindred pieces of legislation, which seem to bear on human rights and freedoms, sought to strike a balance that ensures that fundamental rights, even in the face of accusations of commission of serious crimes, are maintained and observed.

[59] It is in this regard that for instance, rights to search, seize and attach property have been subjected to stringent safeguards, including the issuance of warrants and where circumstances so demand, the carrying out of those necessary actions without a warrant, but under extreme safeguards, that seek to balance the interests of the society in arresting and dealing with crime and the rights of an individual to be treated fairly and in a just manner.

[60] It would be a sad day in this Republic, if the courts, because of the undeniable need to arrest the ubiquitous incidence of serious crime, including

corruption, would close their eyes to the constitutional safe guards, thus sacrificing the rule of law and individual rights and freedoms guaranteed in the Constitution and the laws of this Republic, on the altar of bringing suspects to book, by hook or by crook. This great edifice, under which all persons in this great country seek and find refuge, might fall if that were to be the accepted approach.

[61] In this regard, the courts must hold the middle ground and ensure that where crime is suspected to have been committed, those suspected or implicated, are treated fairly and strictly in terms of the law. Where the functionaries responsible therefor fail or neglect to follow the dictates of the law that should ordinarily guide them in their actions, they should know and expect that the courts will not turn a blind eye and give priority to the arrest and prosecution of suspects, throwing the strict requirements of the law into the dustbin as it were. The courts cannot and should not be party to a law-breaking enterprise, even if it is perceived, in religious, political or social circles, to be for the common good. The end should never justify the means.

[62] In this regard, although in a different context, I find it imperative to cite with approval the wise injunctions that fell from the lips of Mr. Justice Brandeis of the United States of America in *Olmstead v The United States*.¹⁰ The learned Justice said:

'Our government is the omnipotent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes the law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of criminal law the end justifies the means – to declare that the government may commit crimes in order to secure a conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.'

[63] In this regard, it would be wrong and unconscionable for the court to be complicit in the contravention of the laws of this Republic and in this wise

¹⁰ 227 US 438 (1928).

allow the seizure and attachment of the applicant's property to prevail when the law that underpins and should guide the respondent in doing so has been violated by the respondent's very charges. In the premises, whatever the implications may be, the finding of the court is that the applicant's property was not seized and attached strictly in terms of the laws of this Republic and that being the case, there can be no right on the part of the respondent to continue holding this property under attachment in the illegal setting the respondent, with its eyes wide open, set in motion.

[64] When one has regard to the Mission of the recently established Office of the Judiciary, it conveys the sentiments expressed above. The said statement reads as follows regarding the mission of this third organ of State, namely:

'To uphold the Constitution and to promote the rule of law through administering justice in a fair, timely, accountable and accessible manner.' (Emphasis supplied).

In the premises I am fortified that the approach that the court has adopted in this judgment, is in line with the ethos that guide the judicial institution in this Republic and it is one we should unflinchingly stick to, uphold and promote at all times.

Costs

[65] The applicant sought an order for the respondent to pay costs, if unsuccessful, on the scale between attorney and client. It has become accepted that costs on this scale are not lightly granted and certainly, not merely for the asking. There must be some conduct on the part of the party sought to be so mulcted, which is mean, despicable, malicious, mendacious, reprobate, scandalous or 'cow boyish', to mention but a few epithets that qualify for this type of censure.¹¹

¹¹ Lazarus v The Minister of Safety and Security No. 2

[66] A wrong application or interpretation of the law by a respondent or a Government functionary, whilst performing its duties in good faith, cannot, without more, justify the court in issuing an order for punitive costs. To do so, may have negative and unintended consequences, that public officials may not perform their duties with the necessary vigour and commitment for fear of reprisals by an adverse and punitive costs order. That would result in public officials performing the functions of their offices with trembling fingers, which may be inimical to the common and public good. In the instant case, I am not satisfied that there is any conduct or act, on the respondent's part, that justifies the court in issuing punitive costs against the respondent. Ordinary costs therefor suffice in this case.

Recent developments

[67] On the eve of the delivery of the judgment, my attention was drawn to two supplementary affidavits filed by the respondent. They are both dated 5 February 2018 and are deposed to by Mr. Kangameni and Mr. Kashindi, respectively. I shall have no regard whatsoever to the contents of these affidavits as they were filed out of time and more importantly, without leave of court having been sought nor granted. In this regard, the respondent took the law into its own hands and did as it pleased.

[68] As far as the record shows, a full set of affidavits was filed and in terms of the timetable agreed to by the parties and as endorsed by the court. I must register, as I hereby do, my strong disapproval at this type of litigation, where parties arrogate upon themselves the right to file affidavits at will, which may result in matters continuing *ad infinitum*. This is totally out of order and shall not be countenanced by the court, even for a moment.

Disposal and conclusion

[69] In view of the conclusion I have arrived at, which I consider inexorable in the circumstances, I am of the view that it is not necessary to deal with the other issues that have been raised by both parties as they would not change

or otherwise influence or jaundice the conclusion that this court has reached on what are important and fundamental issues.

[70] In the premises, I am of the considered view that the applicant has demonstrated that it is entitled to the relief it seeks as a result of the respondent having violated provisions of the law applicable, and in material respects, if I may add.

Order

[71] In the circumstances, I am of the view that the applicant's application should succeed. I accordingly issue the following order:

1. The Applicant's non-compliance with the Rules of Court pertaining to time periods and service, as well as giving notice to the Respondent, as contemplated in Rule 73 of the Rules of Court is hereby condoned and the application for the matter to be heard as one of urgency is hereby granted.
2. It is declared that the search, seizure and attachment of the Applicant's V8 R500 Scania Truck, bearing registration number N158099W, and a R410 Scania Truck, bearing registration number N19902W, with four (4) containers with timber and permits, without a warrant by the Respondent's agent is declared unlawful and is hereby set aside.
3. The Respondent is ordered to immediately restore possession of all the items particularised in paragraph 2 above to the Applicant forthwith.
4. The Respondent is ordered to pay the costs of the application on the ordinary scale.
5. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCE:

APPLICANT: K. Amoomo
Of Kadhila Amoomo Legal Practitioners, Windhoek

RESPONDENT: M. Kashindi
Of Government Attorney, Windhoek