REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT (TRIAL-WITHIN-A-TRIAL)

Case no: CC 11/2010

In the matter between:

THE STATE

v

TECKLA NANDJILA LAMECK **ACCUSED NO 1**
YAN FAN **ACCUSED NO 2**
JEROBEAM KONGO MOKAXWA **ACCUSED NO 3**

Neutral citation: *S v Lameck* (CC 11/2010) [2019] NAHCMD 7 (24 January 2019)

Coram: LIEBENBERG, J
Heard: 16 – 17 January 2019
Delivered: 24 January 2019

Flynote: **Criminal Procedure** – Admissibility of summons – Summonses issued in terms of s 21(5) of the Anti-Corruption Act 2003 – Sections 18(3) and 20(2) of the Anti-Corruption Act 2003 requires investigation as a pre-requisite before the issuing of summonses – The Anti-Corruption Commission

issued summonses before launching an investigation as required by ss 18(3) and 20(2) – Summonses invalid and evidence that derived from the impugned summons found inadmissible.

Criminal Procedure – Admissibility of summons – Section 27 of the Anti-Corruption Act 2003 regulates the investigation of accounts at financial institutions and s 21(5) is the 'general provision' under which any person could be summoned to furnish information – Summonses issued to three financial institution obtained under s 21(5) – Anti-Corruption Commission relied on s 21(5) – Reliance on wrong provision – Functions performed in terms of incorrect provisions invalid.

Summary: Defence counsel for the 3 (three) accused raised an objection against the admissibility of summonses issued in terms of s 21(5) by the Director-General of the Anti-Corruption Commission. The State opposed. The objections essentially are that the summonses were not issued in compliance with the relevant sections of the Anti-Corruption Act, 2003 and they were issued in a manner inconsistent with the doctrine of legality and do not comply with the requirements of intelligibility.

Held, that, Section 18(3) and 20(2) require that before summons are issued there should be pending investigation into alleged corrupt practice committed. In the present case, the affidavit that initiated the investigation was deposed to after the summonses were already issued.

Held, further that, section 21(5), which is a general provision under which any person may be summoned, is distinct to s 27 which specifically deals with a request to obtain access to accounts held at financial institutions.

Held, further that, the Anti-Corruption Commission cannot issue out summons to financial institutions in terms of s 21(5) because the legislature has purposefully inserted s 27 in order to make a clear distinction between matters subject to investigation listed under s 21(5), and accounts at financial institutions which are regulated by the latter.

ORDER

The summonses issued by the ACC on 11 June 2009 (Exhibits 'T 1-5') are invalid and evidence emanating from the impugned summonses is ruled inadmissible.

JUDGMENT *(Trial within a trial)*

LIEBENBERG J:

[1] This trial within a trial evolves from a notice of objection filed by the defence in relation to evidence the State intends presenting, arising from various summonses issued on 11 June 2009 by the Director-General of the Anti-Corruption Commission (the ACC), in terms of s 21(5) of the Anti-Corruption Act, 2003 (the Act).[1]

[2] As far as the objections raised concern the issuing of summonses, only paras 7 to 8.6 of the notice of objection find application. The preceding paras relate to the admissibility of evidence emanating from search and seizure warrants issued by the ACC that has already been decided and ruled on in an earlier judgment.

[3] The objections essentially are twofold: (a) The summonses were not issued in compliance with the relevant sections of the ACA; and (b) they were issued in a manner inconsistent with the doctrine of legality and do not comply with the requirements of intelligibility. In particular, the summonses do not specify the corrupt practices being investigated and, as far as it concerns financial institutions, it should have been issued under s 27 of the Act. Lastly,

[1] Act 8 of 2003.

ex facie, the summonses are not specific or set out the required information and are overbroad and vague.

[4] In opposition to the objections raised, the State led the evidence of Mr Paulus Noa, the Director-General of the ACC, and Mr William Lloyd, an investigating officer attached to the ACC at the time. Their evidence had not been challenged in any significant manner. According to Mr Noa the issuing of summonses by the ACC on 11 June 2009 was prompted by an affidavit deposed to by the Chief of Investigation and Prosecution at the ACC, Mr Nelius Becker, bearing the same date. Mr Lloyd, who prepared the summonses on the instruction of his senior, Mr Becker, was unable to say in what format the information was when provided to him. It is common cause that he relied on this information when drafting the summonses. Mr Becker did not testify in these proceedings and a sworn statement he deposed to was received into evidence by agreement.

[5] Based on the information furnished in Becker's statement it is evident from Mr Noa's testimony that (a) the ACC was satisfied that an investigation into an alleged corrupt practice was warranted on reasonable grounds, and (b) exercised the discretion given to it under ss 18(3) and 20(2) by assuming the responsibility for the investigation into an alleged corrupt practice. Mr Noa was unable to recall what the nature of the complaint was, and for that purpose relied on Becker's statement. Also clear from his testimony is that there was no need for a preliminary inquiry or consultation with any other authority (s 18(4)) or the need to obtain further information from the anonymous whistle-blower (s 17(3)).

[6] It is common cause that Mr Lloyd was tasked to do the investigation and it is not in dispute that he was an 'authorised officer' as defined in s 1, appointed under s 13 of the Act. The powers, functions and duties of an investigating officer are limited to what is provided for in the Act, or as may be delegated by the Director-General (s 13(2)*(a)*), and *must* be exercised in compliance with directions or instructions as may be specified orally or in

writing by the Director-General, the Deputy Director-General or any other staff member of the ACC superior in rank (s 13(2)*(b)*).

[7] Mr Lloyd's evidence is that on the morning of 11 June 2009 he was informed by Mr Becker that he had registered a case with the ACC and instructed him to complete a summons for Bank Windhoek. He had a *pro forma,* or templet of a summons issued in terms of s 21(5) of the Act, on his computer and completed same, based on the information he received from Becker. He completed all five summonses being the subject matter of this trial within a trial and personally served it on the respective persons identified therein. Three of these persons were employees at financial institutions, while the remaining two were employees of MTC and the Ministry of Home Affairs and Immigration. Upon service, the addressees read through it and, after indicating that they understood the purpose thereof, agreed to provide the required information and/or documents listed therein.

[8] In cross-examination it emerged from Mr Lloyd's evidence that a file had already been opened at the ACC against accused no 1, Ms Lameck. Mr Becker had made mention to him of moneys that were paid into her account and that information from the State President's office was pending. Mr Lloyd conceded that the summonses did not state that the information sought was in connection with an investigation, neither the alleged corrupt practice under investigation. Personally he was unaware of any corrupt practice involving the accused persons and had merely executed instructions from Becker who had earlier consulted the Director-General. He confirmed that access to bank statements were sought and obtained through the issuing of summonses under s 21(5) of the Act. Although Mr Lloyd was familiar with the provisions of s 27 pertaining to financial institutions, he was unable to say whether he had issued any summons under that section in the past.

[9] *Ex facie* Mr Becker's statement it would appear that it was only deposed to at 3:22 pm on the 11th of June 2009. In contrast thereto, the summonses were prepared and issued already during that morning and could therefore not have formed the basis for issuing the summonses. Moreover,

where the summonses were already served by Mr Lloyd before the affidavit was even deposed to. This was done on information otherwise provided by Mr Becker and probably explains the wide ambit of information sought from the banks as set out in the summonses. In cross-examination Mr Noa was asked whether he, upon the issuing of the summonses, was satisfied that an investigation was warranted in terms of s 18, to which he responded in the affirmative as *the affidavit launched the investigation*. From the above it is clear that this was not the case as the summonses were issued and signed by the Director-General well *before* Becker's statement was filed.

[10] Whereas the affidavit according to Mr Noa initiated (launched) the investigation, there was no legal basis on which the summonses could be issued. This step would have been irregular because by then the requirements set out in s 18(1)*(b)* would not have been met, namely, that the Commission *must* 'examine each alleged corrupt practice and decide whether or not an investigation in relation to the allegation is warranted on reasonable grounds'.

[11] According to Mr Lloyd he had a file on his desk which involved Ms Lameck, accused no 1. He however did not say that she was under investigation by the ACC. On the contrary, he specifically stated that he was unaware of any corrupt practices committed by any of the accused. Also that he was informed by Mr Becker in the morning that he had registered a case with the ACC. This was likely prompted by the anonymous report made to him. The mainstay of this evidence is that until then there was no decision taken by the ACC to investigate any alleged corrupt practice or act committed by the accused persons. The process had kicked off with the issuing of the summonses, followed by Mr Becker's affidavit.

[12] Incorporated into his statement, Mr Becker makes reference to documents received from the banks and which were attached as annexures.[2] The only reasonable conclusion to come to is that when Mr Becker prepared the affidavit, these documents were already obtained from the banks as a

[2] The annexures were not attached to the copy handed into evidence.

result of the summonses served. This is a further confirmation that the summonses were issued *prior* to the launching of the investigation as a result of Becker's statement. Any reasoning that the issuing of the summonses was based on Becker's statement and produced during the investigation, is contrary to the facts.

[13] Article 13 of the Namibian Constitution deals with the fundamental right of privacy and the relevant part thereof articulates that '(1) No person shall be subjected to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society … for the prevention of disorder or crime …' In terms of this Article the right to privacy of a person is not absolute and may be interfered with by law i.e. by Act of parliament. One such instance is s 27(1) of the ACA where the ACC obtains access to a person's bank account which otherwise would have been impermissible due to the right to privacy between a banking institution and its client.

[14] As to the constitutionally guaranteed rights of a person, the court in *Prosecutor-General v Lameck and Others*[3] echoed the same sentiments when stating at 172B-C:

'It cannot be emphasised enough that the powers under ss 24 and 25 are so invasive of people's constitutionally guaranteed rights and, potentially, their dignity and ultimately freedom, that this court must exact the highest standard of propriety from those whose interventions might affect those rights.'
(Emphasis provided)

[15] Mr *Namandje* for the accused submitted that the exercise of the Director-General's power in respect of summonses is not subject to judicial scrutiny as would be the case with search and seizure warrants, hence there should be strict compliance with the provisions of the Act. In this regard the

[3] 2010 (1) NR 156 (HC).

court as per Harms JA in *Special Investigating Unit v Nadasen*[4] at 610A-D said:

'A unit such as the appellant is similar to a commission of inquiry. It is as well to be reminded, in the words of Corbett JA in *S v Naudé* 1975 (1) SA 681 (A) at 704B - E, of the invasive nature of commissions, how they can easily make important inroads upon basic rights of individuals and that it is important that an exercise of powers by a non-judicial tribunal should be strictly in accordance with the statutory or other authority whereby they are created. … A Tribunal under the Act, like a commission, has to stay within the boundaries set by the Act and its founding proclamation; it has no inherent jurisdiction and, since it trespasses on the field of the ordinary courts of the land, its jurisdiction should be interpreted strictly (cf *Fey NO and Whiteford NO v Serfontein and Another* 1993 (2) SA 605 (A) at 613F - J).' (Emphisis provided)

[16] 'It is trite that the Constitution is based on the rule of law, affirms the democratic values of dignity and freedom, and guarantees the right to privacy, a fair trial and just administrative action'.[5] Because of punitive measures provided for in respect of certain provisions in the Act, it requires that the procedural powers of the ACC must be interpreted in such a way that it least impinges on the rights and values of a person. The purpose of incorporating the right to privacy in the Constitution is that no one should be subjected to unreasonable invasions of a person's liberty, privacy, property or effects. Any invasion of these rights must be authorised by law in such manner that it least intrudes those rights enshrined in the Constitution. As far as it concerns the issue at hand, the issuing of any search and seizure warrant or summons by the ACC, as provided for in the ACA, are instances where such encroachment is authorised by law.

[17] Although the ACC is empowered to investigate alleged corrupt practices that came to the attention of the ACC, its powers are not unrestricted. The ACC is a creature of statute and has no inherent powers. It

[4] 2002 (1) SA 605 (SCA).
[5] Woodlands Dairy (Pty) Ltd and Another v Competition Commission 2010 (6) SA 108 (SCA).

derives its powers directly from the Act, limiting its administrative functions as defined therein.

[18] Mr Noa in cross-examination testified that someone confided in Mr Becker without making a statement regarding the complaint or report. This prompted Becker to file an affidavit. He went on to say that *after* having read the affidavit, he was satisfied that a corrupt practice had been complained of, warranting an investigation. Also that his authorisation of the summonses issued (Exhibits 'T 1-5') was *based on the affidavit.* What appears from Mr Noa's evidence is that the decision of the ACC to investigate the anonymous whistle-blower's allegations, was based on Becker's statement. But this statement only became available *after* the summonses to obtain documentary evidence from the three banking institutions, MTC and the Ministry of Home Affairs and Immigration had been issued and served.

[19] Section 18 prescribes the procedure that has to be followed by the Commission upon receipt of information about an alleged corrupt practice engaged in, or is about to be engaged in. The interpretation to be given to s 18 and the functions and duties of the Commission under that section has been set out in *Hailulu v Director, Anti-Corruption Commission and Others*[6] and I respectfully associate myself with the findings made therein.

[20] Unlike in *Hailulu* where there was evidence before the court that the decision to launch an investigation was based on a letter and documentary evidence presented to the Commission, followed by deliberations between members of the Commission as to whether an investigation was warranted, no such evidence was presented in the present instance. In his testimony Mr Noa made no mention of any meeting by the Commission for purposes of examining the alleged corrupt practice reported to Mr Becker as provided for in s 18; neither did Becker state anything to that effect in his affidavit. On the contrary, from Mr Noa's evidence this could only have happened upon him having received Mr Becker's statement, well after the summonses were authorised and signed by him. A prerequisite of that process was a decision

[6] 2016 (4) NR 1110 (SC).

taken by the Commission that an investigation in relation to the allegation was warranted on reasonable grounds, and that the investigation would be carried out by the Commission itself (s 18(3)). That clearly did not happen.

[21] The premature issuing of the summonses is furthermore in conflict with the provisions of s 21(5) which reads 'At any time *during* an investigation the Director-General may summon any person …'. However, in this instance the Director-General summoned or caused persons to be summoned before the requirements of s 18 had been met, and the investigation authorised.

[22] What the evidence shows is that the investigation was sparked by the issuing of the summonses on the morning of 11 June 2009, and not as a result of Mr Becker's affidavit, as claimed by the Director-General. The Commission by the issuing of summonses prior to the initiation of an investigation contemplated in s 18(3), had clearly acted outside its mandate by adopting procedure not prescribed by law. As a result thereof, the summonses were invalid and the Commission unlawfully came into possession of evidence that it otherwise could only have access to by giving effect to the provisions set out in the ACA.

[23] The complete disregard by the ACC of its limited powers and functions is borne out by the procedure adopted when issuing summonses to the banking institutions. These were issued in terms of s 21(5) which reads:

> 'At any time during an investigation the Director-General may summon <u>any person</u> who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or article that has a bearing on that subject to appear before the Director-General, or any other authorised officer designated by the Director-General, at a specified time and place in order-
>
> (a) to be questioned; or
>
> (b) to deliver or produce such book, document or article.'

(Emphasis provided)

[24] Section 27 regulates the investigation of accounts at financial institutions and provides as follows:

'(1) The Director-General or Deputy Director-General, or an investigating officer or special investigator authorised in writing by the Director-General or Deputy Director-General, may require access to and investigate any bank account, share account, purchase account, expense account or any other account, or any safe box in any bank, building society or other financial institution.

(2) A person in charge of an account or safe box referred to in subsection (1) must, notwithstanding the provisions of any other law to the contrary, comply with a request made by an authorised officer referred to in subsection (1) to disclose any information or produce any book or document, including data stored in electronic form, or anything relating to an account or safe box referred to in that subsection.

(3) A person who without reasonable cause fails to comply with a request of an authorised officer in terms of subsection (2), commits an offence and is liable to a fine of N$50 000 or to imprisonment for three years or to both such fine and such imprisonment.'
(Emphasis provided)

[25] As regards the difference between the issuing of a summons under s 21(5) opposed to issuing under s 27 of the Act, Mr Noa explained that the former refers to 'any person' (which would include bank officials) and, whereas it is all embracing, it encompasses s 27. In his view neither does s 27 encroach on the general powers given under s 21(5). He explained that s 27 would be invoked when a specific document is sought; all depends what information is required. He went on to say that a summons under s 27 would be issued in instances where the investigating officer, together with a bank official, had to access bank statements at the bank.

[26] Though the provisions under s 21(5) could be construed as a 'general provision' under which any person could be summoned to furnish information or produce documentary evidence, as provided for in the section, the purview of s 27 is substantially different as it regulates access to different *accounts* at financial institutions. The Legislature purposefully inserted s 27 in order to make a clear distinction between matters subject to investigation listed under

s 21(5), and accounts at financial institutions; and for good reason. Under s 21(5) any person may be summoned to appear before the Director-General or any other authorised officer[7] designated by him, while under s 27 the Director-General or Deputy Director-General or an investigating officer or special investigator *authorised in writing* by the Director-General or Deputy Director-General, *may require access* to and investigate bank accounts etc. Section 27 makes plain that only the Director-General and Deputy Director-General *in person,* plus an investigating officer authorised in writing, may access accounts held at financial institutions. Section 27 is clearly intended to limit the invasive powers the ACC has in terms of the Act when encroaching upon a person's privacy as regards financial matters. It is thus not about the person under investigation (as Mr Noah reasoned), but the subject matter under investigation. Moreover, when bearing in mind that a client has no control over accounts held at a bank regarding information entrusted by him or her to the institution. To this end, s 27 attempts to provide some protection in this regard.

[27] On the present facts, Mr Lloyd, though being an authorised officer designated by the Director-General when he approached the three banks with summonses issued by the ACC, was not authorised in writing to access the bank accounts of the accused persons. He accordingly had no mandate to access their bank accounts and acted *ultra vires*.

[28] As stated before, the net effect of the ACC's initiation of procedure not prescribed by law exceeded its jurisdiction, whereby it unlawfully came into possession of evidential material it now seeks to produce against the very same persons whose fundamental rights have been infringed.

[29] In deciding the question of admissibility of evidence unlawfully obtained I find guidance in the words of Jafta J, in *Liebenberg NO v Bergrivier Municipality & Others*[8] (endorsed in *Zuma v Democratic Alliance and Others*[9]) where the following appears at para 93:

[7] In terms of s 13 of the ACA.
[8] 2013 (5) SA 246 (CC).
[9] 2018 (1) SA 200 (SCA).

'In our law, administrative functions performed in terms of incorrect provisions are invalid, even if the functionary is empowered to perform the function concerned by another provision. In accordance with this principle, where a functionary deliberately chooses a provision in terms of which it performs an administrative function but it turns out that the chosen provision does not provide authority, the function cannot be saved from invalidity by the existence of authority in a different provision.'

[30] In this instance the ACC, through the actions of the Director-General, chose to adopt the procedures, as it did, when issuing the summonses. The correct procedures were available, but not followed. This rendered the summonses (Exhibits 'T 1-5') invalid and renders evidence obtained consequential thereto unlawful. The Constitution guarantees an accused a fair trial – which includes pre-trial procedures – whereby the accused's dignity and interests must at all times be respected and protected by the courts. To allow evidence that was unlawfully obtained (emanating from invalid summonses) would result in a gross violation of the accused persons' fundamental rights to privacy and a fair trial, guaranteed under the Constitution.

[31] The Commission's conduct in this regard must be discouraged in the strongest of terms as the courts cannot allow persons or institutions to be subjected to an abuse of power on its part. Although the ACC fulfils an important function in society with its main purpose to fight the seemingly unending scourge of corruption in this country, the Commission must be reminded that it is also subject to the Constitution and the law, moreover, that it must give effect to the provisions of the ACA, its creator, which brought it into its existence.[10]

[32] In view of the decision reached on the validity of the summonses issued, the question of intelligibility thereof has become superfluous and need not be decided.

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[10] *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others*, 2003 (2) SA 385 (SCA).

[33] In the result, summonses issued by the ACC on 11 June 2009 (Exhibits ‘T 1-5’) are invalid and evidence emanating from the impugned summonses is ruled inadmissible.

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JC LIEBENBERG
JUDGE

APPEARANCES:

STATE:	D Lisulo (assisted by C Moyo) Of the Office of the Prosecutor-General, Windhoek.
ACCUSED NO 1 – 3:	S Namandje Sisa Namandje & Co, Windhoek.