

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: HC-MD-CIV-MOT-REV-2019/00397

In the matter between:

<b>MICHAEL AMUSHELELO</b>	<b>FIRST APPLICANT</b>
<b>AMUSHE HELLO INVESTMENT CC</b>	<b>SECOND APPLICANT</b>
<b>AMUSHE ADVERTISING AND DESIGN CC</b>	<b>THIRD APPLICANT</b>
<b>PINK FLORA PETALS CC</b>	<b>FOURTH APPLICANT</b>
<b>MICHAEL AMUSHILELO N.O.</b>	<b>FIFTH APPLICANT</b>
<b>GLOBAL GROWTH NAMIBIA (PTY) LTD</b>	<b>SIXTH APPLICANT</b>
<b>VAN DER WALT TRAILER MANUFACTURING CC</b>	<b>SEVENTH APPLICANT</b>
<b>AMUSHE INTERNATIONAL HOLDINGS (PTY) LTD</b>	<b>EIGHTH APPLICANT</b>
<b>TAIMI AMUSHELELO</b>	<b>NINTH APPLICANT</b>

and

<b>THE MAGISTRATE, WINDHOEK</b>	<b>FIRST RESPONDENT</b>
<b>PROSECUTOR-GENERAL</b>	<b>SECOND RESPONDENT</b>
<b>BANK OF NAMIBIA OF NAMIBIA</b>	<b>THIRD RESPONDENT</b>
<b>DIRECTOR: FINANCIAL INTELEGENGE CENTRE</b>	<b>FOURTH RESPONDENT</b>
<b>INSPECTOR-GENERAL: NAMIBIAN POLICE</b>	<b>FIFTH RESPONDENT</b>
<b>COMMANDING OFFICER: ANTI-MONEY</b>	
<b>LAUNDERING SUBDIVISION OF THE NAMIBIAN POLICE</b>	<b>SIXTH RESPONDENT</b>

**Neutral citation:** *Amushelelo v The Magistrate, Windhoek* (HC-MD-CIV-MOT-REV-2019/00397) [2020] NAHCMD 559 (4 December 2020)

**Coram:** RAKOW, J  
**Heard:** 24 October 2020  
**Delivered:** 04 December 2020

**Flynote:** Review Applications - Answering affidavit of a judicial officer deposed to by the investigating officer in the matter under review – impartiality of a judicial officer - Justice must not only be done, but seen to be done – Article 12(8) – Right to a Fair Trial – Search and Seizure - Criminal Procedure Act, 51 of 1977 - Section 21(2) - section 22(2) – Requirements for a valid search warrant restated - Article 13 – Right to Privacy - Banking Institutions Act 2 of 1998 - Section 5, 55A and section 93 - Prevention of Organized Crime Act 29 of 2004 - Section 83.

**Summary:** The applicant was arrested on 10 October 2019 and appeared in the Magistrate's Court of Windhoek on charges of Prohibition on conducting of banking business by an unauthorized person, contravening s 5(1)(a), (b) and (c) read together with s 72(1)(a) of the Banking Institutions Act 2 of 1998. Under the same act, count two deals with a contravention of s 55A(1), running a Pyramid scheme. Count 3 and count 4 are charges under s 4(a)(i) and 6, read with ss 1,5,6 and 11(1) of the Prevention of Organized Crime Act 29 of 2004. These offences relates to the crime of money laundering.

It is alleged that the first applicant and his co –accused are operating a business which receives deposits from members of the public as a regular activity and then use the said deposits to pay other depositors as their investments mature and become payable. As part of his investigation, the investigating officer applied for and was granted two search and seize warrants in accordance with which he seized motor vehicles, laptops, computers, cell phones, iPads, iPhones, investment contracts, cash money and other documents at the premises of the applicants, which he claims can afford evidence in the court.

The applicants brought an application to set aside and declare the two warrants of search and seizure authorized by the Magistrate Windhoek upon application by the Warrant officer Daniel Lilata of the Anti-Money Laundering Sub-Division of the Namibian police, on 9 October 2019 and 10 October 2019 invalid.

The first, second, fifth and sixth respondents opposed the application and an answering affidavit, deposed to by the investigating officer in the criminal case, and was filed in support of their opposition. The first respondent deposed to a confirmatory affidavit confirming the contents of the opposing affidavit filed on its behalf. The first respondent later filed a supplementary answering affidavit in which the Magistrate explained that he was satisfied that a case was made out for the authorization of the said warrants.

The applicants further challenge the fifth respondent's decision to commence investigation in terms of section 5 and 55A of the Banking Institutions Act and section 83 of POCA.

Held that, impartiality of the judiciary is one of the principal corner stones of seeing justice done. It is therefore of utmost importance for judicial officers to maintain their independence.

Held further that, where search warrants appear to have been obtained in an impartial manner, same cannot be allowed to stand.

Held that, the challenge against the fifth respondent's decision to commence investigation in terms of section 5 and 55A of the Banking Institutions Act and section 83 of POCA has no basis.

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### **ORDER**

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1. Condonation is granted for the late filing of the supplementary answering affidavit of the first respondent.
  
2. The Court sets aside the decision of the first respondent to authorize the two search warrants of 9 October 2019 and 10 October 2019 for searches and seizures to be conducted at the following premises:
  - Erf 1407 Mersey Street Wanaheda, Katutura, Windhoek, Erf 43 Gamsa Street, Kleine Kuppe, Windhoek Namibia, Unit 11 Aviva court, Pelican Street, Hochland Park, Windhoek, Namibia

- Wealth Club Namibia, Maerua Mall, Office NO: 404 4th floor Windhoek, Namibia

3. The Court declares the two warrants of search and seizure issued by the First Respondent dated 9 October 2019 and 10 October 2019 as invalid and of no force in law and setting aside all processes and steps taken in accordance with such warrants.

4 The application to review and set aside the decision of the Fifth and Sixth Respondents to commence and institute investigation of contravention of sections 5 and 55A of the Banking Institutions Act against the Applicants is dismissed.

5. The application to review, correct and set aside the decision of the Firth Respondent to authorise investigation and collection of information in terms of section 83 of POCA alternatively declaring such a decision as invalid and of no effect in law and setting aside such a decision, is dismissed.

6. Each party to carry its own costs.

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## REVIEW JUDGMENT

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RAKOW, AJ:

### Introduction

[1] The applicants approach the court initially on an urgent basis on 24 October 2019 seeking an order in two parts, Part A, which is the application before court during the urgent application and Part B, a part that will have to be decided on at a later stage:

#### 'PART A

1. Condoning the Applicant's non-compliance with the Rules of Court relating to service and time periods for exchanging pleadings and hear the matter as one of urgency as contemplated in terms of Rule 73 of the Rules of the High Court.

2. An order directing the Fifth and Sixth Respondents (and any other Respondents currently in possession, custody and control of the Applicants' properties and goods seized herein) to immediately return all goods, properties, items etc. including vehicles, computers, cell phones, iPads etc. to the Applicants within 1 (one) day of this Court order and restore possession of such properties to the Applicants forthwith.
3. Pending the finalization of Part B of this application the orders under paragraph 2 above serves as an interim interdict with immediate effect pending the finalisation of Part B of this application.
4. Costs against any of the Respondents opposing the interim relief application.
5. Further and/or alternative relief.

#### PART B (which was amended)

An order calling upon the Respondents to show cause why the following orders should not be made:

6. An order reviewing, correcting and setting aside the decision by the First Respondent to issue the two warrants of search and seizure, attached to the Applicant's Founding Affidavit as Annexures A and B.
7. An order declaring the two warrants of search and seizure issued by the First Respondent (Annexures A and B to Applicants' Founding Affidavit) as invalid and of no force in law and setting aside all processes and steps taken in accordance with such warrants.
8. Reviewing and setting aside the decision of the Fifth and Sixth Respondents to commence and institute investigation of contravention of sections 5 and 55A of the Banking Institutions Act against the Applicants.
9. Declaring the institution and commencement of the investigation of contravention of section 5 and 55A of the Banking Institutions Act by the Fifth and Sixth Respondents against the Applicants as unlawful and invalid and setting the same aside.
10. An order reviewing, correcting and setting aside the decision of the Firth Respondent to authorise investigation and collection of information in terms of section 83 of POCA alternatively declaring such a decision as invalid and of no effect in law and setting aside such a decision.
11. An order that all the process and steps taken in pursuance of the two warrants of search and seizure are set.
12. Costs of suit against any of the Respondents that opposes this order.
13. Further and/or alternative relief.'

[2] The urgent application was dismissed for lack of urgency but the review application remained and was eventually heard on 24 October 2020.

[3] The first applicant, Michael Amushelelo brings this review application on behalf of the other 8 applicants, Amushe Hello Investment CC, Amushe Advertising and Design CC, Pink Floral Petals CC, Michael Amushelelo N.O. in his capacity as a trustee of Amushelelo Family trust, Global Growth Namibia (Pty) Ltd, Van Der Walt Trailer Manufacturing CC, Amushe International Holdings (Pty) Ltd and Taimi Amushelelo.

[4] The review application is brought against the Magistrate, Windhoek, the Prosecutor-General of the Republic of Namibia, Bank of Namibia, Director: Financial Intelligence Centre, Inspector-General: Namibian Police and Commanding Officer: Anti-Money Laundering sub-division of the Namibian Police. Respondents one, two, five and six oppose the application.

[5] The applicant was arrested on 10 October 2019 and appeared together with a co-accused in the Magistrate's Court of Windhoek on charges of Prohibition on conducting of banking business by an unauthorized person, contravening s 5(1)(a), (b) and (c) read together with s 72(1)(a) of the Banking Institutions Act 2 of 1998. Under the same act, count two deals with a contravention of s 55A(1), running a Pyramid scheme. Count 3 and count 4 are charges under s 4(a)(i) and 6, read with ss 1,5,6 and 11(1) of the Prevention of Organized Crime Act 29 of 2004. These offences relates to the crime of money laundering.

[6] At the core of this application however, is the determination of the validity of two search and seizure warrants authorized by the Magistrate Windhoek upon application by the Warrant officer Daniel Lilata of the Anti-Money Laundering Sub-Division of the Namibian police, on 9 October 2019 and 10 October 2019. When executing these warrants, a number of electronic devices, written agreements and vehicles, to mention but a few items, were attached. The answering affidavit of the respondents contains a whole inventory of items that were attached.

[7] The application was supported by an affidavit of the first applicant, who indicated that he was authorized to bring the said application on behalf of the other applicants. The application was opposed by the first, second, fifth and sixth

respondents and an answering affidavit in support of their opposition was filed by Daniel Lunyazo Lilata, a Detective Warrant Officer employed by the Ministry of Safety and Security and the investigating officer in the criminal case. He states that he is duly authorized to depose of the said affidavit on behalf of the first, second, fifth and sixth respondents.

[8] The application therefore boils down to two themes or areas proposed by the applicants, the first that the two warrants of search and seizure are invalid and must be set aside and the next dealing with the fifth respondent's unlawful decision to commence investigation in terms of section 5 and 55A of the Banking Institutions Act and section 83 of POCA.

#### The impartiality of the Magistrate

[9] The first issue raised by the plaintiffs is that it is inappropriate and unlawful for Mr. Daniel Lunyazo Lilata to depose of the answering affidavit in circumstances where the decision of a judicial officer is being reviewed. The first respondent is at all times required to be objective, fair and neutral and in this instance Lilata is the investigating officer in the criminal case against the first applicant and cannot be expected to be objective at all. To package the opposition of the first, second, fifth and sixth together in one affidavit by itself, indicate possible bias on the side of the magistrate. At the time of hearing the review application, the Government Attorney only filed heads of argument on behalf of the second, fifth and sixth respondents and Mr. Boonzaaier argued it on their behalf. The first respondent filed an affidavit separately and Mr. Diedericks also filed a note for consideration on behalf of the first respondent.

[10] Mr Namandje argues that it was necessary for the Magistrate to depose of an affidavit himself to explain his state of mind. Initially the Magistrate himself did not depose to an affidavit but the investigation officer deposed to one on his behalf. He only deposed to a confirmatory affidavit confirming the affidavit by Lilata in which he supports the contentions therein and confirm the contents thereof in so far as it relates to him. He later filed a supplementary answering affidavit belatedly, for which he seeks condonation. In this affidavit the Magistrate explained that he in fact did apply his mind and was satisfied that a case was made out for the authorization of the said warrants.

[11] The current position in our law was expressed in *Esau v Director-General: Anti-Corruption Commission* where <sup>1</sup> Masuku J, said the following:

‘It is generally inadvisable that judicial officers should join issue and in particular, file affidavits in matters where their decisions or orders are taken up on review. This is so for the reason that the court should not be seen as an active protagonist in a matter that involves its judgment or application of the law. Once that happens, the court appears to lose its independence and objectivity as an arbiter and this may place the particular judicial officer beyond the call of duty of a judicial officer, but a litigant in the proceedings and others involving the same litigant in future.

[32] The proper approach to this situation by judicial officers was adopted and restated by Ueitele J in *J B Cooling and Refrigeration CC v Willemse t/a Windhoek Armature Winding*.<sup>2</sup> In doing so, the learned Judge quoted with approval the remarks made by Hull CJ in *Director of Public Prosecutions v The Senior Magistrate Nhlanguano and Another*<sup>3</sup>, where the learned Chief Justice made the following lapidary remarks:

“Criminal trials, and applications for review, are of course not adversarial contests between the judicial officer and the prosecutor. It is wrong and unseemly that they should be allowed to acquire that flavour. Ordinarily on review, the judicial officer whose decision is being called into question is cited as a party for formal purposes only. He will have no need to do anything beyond arranging for the record to be sent up to the High Court, including any written reasons that he has or may wish to give for his decision.

It may be necessary, very occasionally, for him to make an affidavit as to the record. This is, however, to be avoided as far as possible. It is generally undesirable for a judicial officer to give evidence relating to proceedings that have been taken before him. In principle, there may be a need for a Magistrate to be represented by counsel upon review, if his personal conduct or reputation is being impugned but these too will be in very exceptional circumstances.’ (Emphasis added). “

[12] It is clear that Magistrates should in general desist from filing affidavits in matters where their decisions or orders are taken up on review. What however is a concern for the court in the current matter is that the Magistrate joined forces so to say with the investigating officer who was authorized to depose of the answering

<sup>1</sup> 2020 (1) NR 123.

<sup>2</sup> (A 76/2015) [2016] NAHCMD 8 (20 January 2016).

<sup>3</sup> 1987 -1995 SLR 17 at 22 G-I.



affidavit on behalf of the magistrate, Mr Venatius who authorized the said warrants. In an attempt to rectify this, a supplementary affidavit was filed by the first respondent. The situation is further compounded by the Government Attorney appearing for all of the respondents although different counsel were eventually instructed to argue the matter. The old saying “Justice must not only be done, but seen to be done” comes to mind here. Impartiality of the judiciary is one of the principal corner stones of seeing justice done.

[13] In *Visagie v Government of the Republic of Namibia and Others*,<sup>4</sup> Damaseb DCJ remarked on importance of the independence of the judiciary, citing the Judicial Office for Scotland with approval:

‘In order for decisions of the judiciary to be respected and obeyed, the judiciary must be impartial. To be impartial, the judiciary must be independent. To be independent the judiciary must be free from interference, influence or pressure. For that, it must be separate from other branches of the State or any other body.

The principle of the separation of powers of the State requires that the judiciary, whether viewed as an entity or in its individual membership must be, and seen to be, independent of the executive and legislative branches of government.’

[14] In the same judgement, Damaseb DCJ also commented on the relationship between a judicial officer and the government attorney representing him or her where he or she has been sued in their own name but is being defended by the state, using state resources. He remarked that:

‘... the two will have a common interest to resist the claim. They will most likely cooperate in the preparation of the case and develop joint legal strategy. If the claimant has a very good case against the judicial officer, the marshalling of resources between the judicial officer and the state can have dire consequences for the claimant. It will be the claimant's resources pitted against the state's enormous resources. If, because of that, a judicial officer survives the suit, would it be far-fetched to think he or she owes a debt of gratitude to the government of the day? How could reasonable members of the public not form the view that such a judge would be favourably disposed to the government in disputes involving it?’

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<sup>4</sup> 2019 (1) NR 51 (SC).

[15] Masuku J in *Esau v Director-General: Anti-Corruption Commission*<sup>5</sup> remarked as follows on the decision in *Visagie v Government of the Republic of Namibia and Others*:

‘Although the judgment speaks to a different set of facts, namely, where the state represents a judicial officer who has been personally sued for violating rights of a litigant either maliciously or in a grossly negligent manner, what is plain is that if the judicial officer is represented by the state, the impregnable shield of independence that should cover the judicial officer appears to be ruptured, thus causing reasonable members of the public to look at the judicial officer askance.

[46] I am of the considered view that the applicants in this matter have a legitimate reason to feel that the magistrates made common cause with the other respondents, not only because of what they stated in their affidavits, but also because they share the same legal team — their strategy with the officers against whom the applicants have complained, is the same, as seen in the papers. This does not reflect positively on the judicial officers and their independence in the circumstances.

[47] I would accordingly advocate for a situation where in cases like the present, judicial officers should be independently represented so as to objectively display jealous regard for their independence and impartiality. Where as in the present case, they make common cause and adopt the same legal strategy and team up with the respondents at the heart of the complaints by the applicants, the independence and impartiality of their office is unwittingly compromised, a development we can ill afford.

[48] To shield the independence of the judiciary from undue attacks and vicissitudes, the office of the Government Attorney should ensure that an independent set of legal practitioners is secured to represent the judicial officers so that their independence, impartiality and accountability in the eyes of the complainants, remains intact despite the proceedings in issue.”

[16] I fully agree with the sentiments expressed by Masuku J. Article 12(a) of the Namibian Constitution guarantees that ‘(i)n the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court’. This guarantee is surely extended to any judicial process involving the granting of authority to the State to interfere with people’s privacy.

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<sup>5</sup> Supra.

[17] The standard in these circumstances would not be whether the applicants were treated fairly when the Magistrate applied his mind to authorize the warrants, but whether it was reasonable for them, armed with the fact that the investigating officer deposed of an affidavit on behalf of the Magistrate and the Magistrate being represented by the same legal practitioners as the Prosecutor-General, the Inspector-General of the Namibian Police and the Commanding Officer: Anti-Money Laundering Sub-Division of the Namibian Police, to form the reasonable suspicion that the Magistrate was not impartial, nor acting independent when he authorized the said warrants.

#### The search and seizure warrants

[18] The background to the issuing of the said warrants is contained in an affidavit of Daniel Lunyazo Lilata which was handed to the first respondent, together with a copy of the front page of the docket, a statement from Brian Eiseb and a copy of the Banking Institutions Act, 2 of 1998. In the statement of Lilata he explained that on or about the 24 June 2019 Nampol and the Bank of Namibia received information of a possible money pyramid scheme taking place after several suspicious transactions were observed in the account of the first applicant. The Bank of Namibia conducted its own investigations and as a result of the said, a criminal docket was registered with the Namibian Police for further investigations and was referred to the Anti-Money Laundering Sub-Division.

[19] Preliminary investigations indicated that the first applicant and a certain Mr. Cloete are operating a business whereby they receive deposits from members of the public as a regular activity and then use the said deposits to pay other depositors as their investments mature and become payable. The so called suspect have registered Amushe Hello Investment CC and Global Growth Investment CC with the Ministry of Finance but has no authority to conduct a business as a banking institution from the Bank of Namibia. It then proceeds and provide a bank account analysis of the various bank accounts held by the so called suspects, which are 11 accounts in total. It also sets out a list of motor vehicles purchased from funds in the said bank accounts as well as transfers of money to amongst others the Amushelelo Family Trust.

[20] The statement further describes three premises where the first applicant, the ninth applicant and a certain Mr. Cloete reside. It indicates that articles to be seized at these addresses includes motor vehicles, laptops, computers, cell phones, iPads, iPhones, investment contracts, cash money and any other documents at these premises which may afford evidence in the court. It also lists the names of the persons who will conduct the search and seizure operation.

[21] Upon being presented with the above, the warrants were authorized by Mr Venatius, a Magistrate for the district of Windhoek on 9 and 10 October 2019. It seems that the warrant of 10 October 2019 was authorized using the same documents and statements as for the one of 9 October 2019. It is pro-forma forms that were used with parts typed into the warrant by the person preparing the warrant. The first warrant reads as follows (I attempted to recreate the warrant as far as possible with the various spelling and other mistakes):

**'TO: 04302 Detective Chief Inspector Stanely Awarab, 08076 Detective Inspector Beauty Mukuwa, 05675 Warrant Officer Mcjoseph Mundia, 010675 Detective Warrant Officer Daniel Lilata: Anti-Money Laundering Sub-division, Namibian Police Force Head Quarter. Windhoek, 09432 Sergeant Lea Henock Kasita: Asset Forfeiture Unit, Namibian Police Force Head Quarter, Windhoek (specify name of Police Officer)**

Whereas it appears to me on complaint made under oath that there are reasonable grounds for suspecting that there is \*upon any person/in a receptacle/to wit/upon or at the premises situated at: Erf 1407 Mersey Street Wanaheda, Katutura, Windhoek, Erf 43 Gamsa Street, Kleine Kuppe, Windhoek Namibia, Unit 11 Aviva court, Pelican Street, Hochland Park, Windhoek, Namibia

- (a) stolen property
- (b) a reasonable suspicion exist that an offence has been committed,
- (c) a reasonable suspicion exist of something in respect of which an offence is suspected to have been committed,
- (d) a reasonable suspicion exist that there are grounds for believing that it will afford evidence as to the commission of an offence,**
- (e) a reasonable suspicion exist that there are reasonable grounds for believing that it was used for the purpose of or in connection with the commission of an offence,**
- (f) a reasonable suspicion exist that there are reasonable grounds for believing that it is intended to be used for the purpose of committing and offence,

to wit\*\*\* Motor vehicles (FOREX NA, BMW 1 SERIES MODEL 1181A BLUE IN COLOUR, VIN **WBA1A32020E638444**, FOREX 2 NA, LAND ROVER RANGE ROVER SERIES MODEL 5.0L V8, VIN number **SALWA2EE8EA326758** WHITE IN COLOUR, FOREX 3 NA MERCEDES-BENZ W176 MODEL A200BE RED IN COLOUR, VIN number **WBA3A52010F113180**, FOREX 4 NA, BMW 3SERIES 32I BLACK IN COLOUR, VIN number **WDD1760522J296509**, FOREX 6 NA, AUDI A4 SILVER IN COLOUR, VIN number **WAUZZZ8K7CA103998**, FOREX 12 NA, MERCEDES BENZ E212, E63 AMG S, VIN number **WDD2120752B131084**, BROWN IN COLOUR), laptops, computers, cell phones, iPads, iPhones, investment contracts, cash money and any other documents at these premises which may afford evidence in the court.

In connection with the offence of: Fraud, Contravention of section 5(1), 6, 7, 9, 55A and 72 of the Banking institutions Act, act 2/1998 as amended, Contravention sections 4,5, and 6 of the Prevention of organized Crime act 29/2004.

THESE ARE THEREFORE to direct you to search during daytime the said \*person/receptacle/premises and any person found in or upon such premise and seize the said: Motor vehicles (FOREX NA, BMW 1 SERIES MODEL 1181A BLUE IN COLOUR, VIN WBA1A32020E638444, FOREX 2 NA, LAND ROVER RANGE ROVER SERIES MODEL 5.0L V8, VIN number SALWA2EE8EA326758 WHITE IN COLOUR, FOREX 3 NA MERCEDES-BENZ W176 MODEL A200BE RED IN COLOUR, VIN number WBA3A52010F113180, FOREX 4 NA, BMW 3SERIES 32I BLACK IN COLOUR, VIN number WDD1760522J296509, FOREX 6 NA, AUDI A4 SILVER IN COLOUR, VIN number WAUZZZ8K7CA103998, FOREX 12 NA, MERCEDES BENZ E212, E63 AMG S, VIN number WDD2120752B131084, BROWN IN COLOUR), laptops, computers, cell phones, iPads, iPhones, investment contracts, cash money and any other documents at these premises which may afford evidence in the court.

If found to take if before a magistrate to be dealt with according to law.

Given under my hand at Windhoek this 09 day of October 2019

Signature

Designation

\*Delete words not applicable

\*\*Delete (a),(b),(c),(d),(e),(f) as the case may be

\*\*\*Insert nature of goods.'

[22] Nothing was deleted on the warrant except that (d) and (e) were encircled in pen.

[23] The warrant authorized on the 10<sup>th</sup> of October 2019 looked slightly different. It was also authorized by Mr. Venatius but for different premises. It read as follows:

*'TO: 04302 Detective Chief Inspector Stanely Awarab, 08076 Detective Inspector Beauty Mukuwa, 05675 Warrant Officer Mcjoseph Mundia, 010675 Detective Warrant Officer Daniel Lilata: Anti-Money Laundering Sub-division, Namibian Police Force Head Quarter. Windhoek, 09432 Sergeant Lea Henock Kasita: Asset Forfeiture Unit, Namibian Police Force Head Quarter, Windhoek (specify name of Police Officer)*

Whereas it appears to me on complaint made under oath that there are reasonable grounds for suspecting that there is \*upon any person/in a receptacle/to wit/upon or at the premises situated at: Wealth Club Namibia, Maerua Mall, Office NO:404 4<sup>th</sup> floor Windhoek, Namibia

- ~~(a) stolen property~~
- ~~(b) a reasonable suspicion exist that an offence has been committed,~~
- ~~(c) a reasonable suspicion exist of something in respect of which an offence is suspected to have been committed,~~
- (d) a reasonable suspicion exist that there are grounds for believing that it will afford evidence as to the commission of an offence,
- (e) reasonable suspicion exist that there are reasonable grounds for believing that it was used for the purpose of or in connection with the commission of an offence,
- (f) a reasonable suspicion exist that there are reasonable grounds for believing that it is intended to be used for the purpose of committing and offence,

to wit\*\*\* laptops, computers, cell phones, iPads, iPhones, investment contracts, cash money and any other documents at these premises which may afford evidence in the court.

In connection with the offence of: Fraud, Contravention of section 5(1), 6, 7, 9, 55A and 72 of the Banking institutions Act, act 2/1998 as amended, Contravention sections 4,5, and 6 of the Prevention of organized Crime act 29/2004.

THESE ARE THEREFORE to direct you to search during daytime the said \*person/receptacle/premises and any person found in or upon such premise and seize the said: laptops, computers, cell phones, iPads, iPhones, investment contracts, cash money and any other documents at these premises which may afford evidence in the court.

If found to take it before a magistrate to be dealt with according to law.

Given under my hand at Windhoek this 10 day of October 2019

Signature

Designation

\*Delete words not applicable

\*\*Delete (a),(b),(c),(d),(e),(f) as the case may be

\*\*\*Insert nature of goods.'

[24] On this warrant (a),(b),(c) and (f) were crossed through.

[25] Mr. Namandje argued that these warrants are impermissible, overbroad and ambiguous in material aspects and this is clear ex facie the warrants. The first applicant alleges that the first respondent was given an already typed up form, upon which he only placed his signature and the date. The terms thereof was dictated by the person who brought the application for the warrants. It is further argued that as the first respondent did not set the ambit and terms of the warrant, he unlawfully delegated his functions to the members of the Namibian Police.

[26] With regard to the part “\*upon any person/in a receptacle/to wit/upon or at the premises situated at” nothing was deleted. It was expected from the magistrate to elect which of these choices are applicable but this was not done. The instructions next to the \* on the warrant also indicates that the person granting the warrant is to delete the part not applicable. The same applies regarding the list of possibilities for the complaint made under oath that there are reasonable grounds for suspecting certain things then listed from (a) to (f). In the first warrant these were not deleted or crossed out, all options seems to be applicable except that two were encircled. This renders at least the first warrant overly broad.

[27] It was further argued that the list of items to be seized lists a number of vehicles, all owned by the first applicant and co-applicants, laptops, computers, cell phones, iPads, iPhones, investment contracts, cash money and any other documents that are found at these premises which may afford evidence in the Court. This includes an overly broad list of items, without determining whether they relate to the charges or not. The warrants further did not say exactly what offences are being investigated as it only broadly refers to certain sections of the Banking Institutions

Act, some which cannot be conceivably contravened in the circumstances of the matter. It also just lists the sections under POCA without naming the specific offences. Mr. Namandje argued that this demonstrates a complete lack of application of the mind by the first respondent.

[28] Section 21(2) of the Criminal Procedure Act, 51 of 1977 further requires that you identify the person who should be searched. The current warrants only refer to the "said person" without identifying a specific person. The only person that is not required to be identified in a warrant, is the person found at the identified premises, but this is clearly not the person referred to as the "said person".

[29] On behalf of the first respondent it was argued that he explained in his affidavit that he exercised his judicial discretion in that he was satisfied with its ambit and terms. He further indicated that he encircled items (d) and (e) as he was satisfied that they were the most applicable. The complaint that the warrant was broadly and indiscriminately as it referred to various items can also not stand as the first respondent was satisfied that the items sought to be searched for was meaningfully depicted in the documents that served as support for the application for the warrants.

[30] For the second, fifth and sixth respondents it was argued that the first respondent indeed applied his mind. Mr Boonzaaier used the analogy that in court proceedings draft court orders are routinely filed by parties seeking the said order but only becomes an order of court when the presiding judge applying his mind to the relief sought, grants it. The presiding judge is at liberty to change the said order or to refuse it. In a similar way the current warrants were prepared and handed to the magistrate for him to apply his mind to either authorize it or not. The investigating officer is the one who, for administrative convenience and expedience will complete the warrant of search template form which will only become a warrant of search once the magistrate has appended his/her signature and stamp to it, after considering the application on the merits.

[31] Regarding the searching of an identified person, it is argued that section 22(2) of the Criminal Procedure Act, 51 of 1977 allows for two separate options, one being to search an identified person or to search an identified premise. In this instance the intention of Nampol was to search identified premises and not an identified person.



[32] In dealing with the argument that the warrant allows for seizure of an indiscriminate list of goods that are sought to be searched, the court was referred to the matter of *Esau v Director-General, Anti-Corruption Commission*<sup>6</sup> where Masuku J remarked as follows regarding the phrase: 'and any other item on the premises that may in the opinion of the authorized officers have a bearing and be connected with the investigation into the said corrupt practices' – which is similarly to the phrase in the warrants before court – and any other documents at these premises which may afford evidence in the court. He said:

'The underlined portion above, in my view, raises spasms of disquiet as it literally entitles the authorised officer to seize 'any other items on the premises that in his opinion may be connected to the investigation, and this the applicants argued, is an open-ended licence that cannot be checked as to what the authorised officer takes.

[91] It must be mentioned in this regard, that the phrase underlined above does not appear to have been an invention by the Magistrates but it is in fact a statutory licence given by the Act to the said officers. Section 22 is explicit in this regard. It provides the following:

'An authorised officer may enter any premises and there –  
(a) make such investigation or inquiry; and  
(b) seize anything;  
which in the opinion of the authorised officer has a bearing on the investigation'.

[92] I am of the considered opinion, in the circumstances, that the warrants in question appear to follow what are statutory prescripts in that regard. For that reason, I am of the considered opinion that the attack that the Magistrates issued warrants that were overbroad in the circumstances, is not correct when full regard is had to the powers that the legislature gives in clear terms to the authorised officers who execute the warrants.'

[33] In the founding affidavit the allegation was made that the warrants were applied for without an affidavit. This was subsequently dealt with by the respondents when they disclosed both in the answering affidavit and the review record that the warrant was applied for on affidavit and also disclosed the specific affidavit. Regarding the argument that the sections referred to in the warrants in relation to the offences that were allegedly committed, of which some sections do not create

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<sup>6</sup> Supra.

criminal offences and cannot be contravened, it is argued that although section 72 of the Banking Institutions Act creates the offence, the prohibitive sections are section 5(1) and 55A and therefore creates the offence which is clearly identified in the warrant. Although sections 6, 7 and 9 does not constitute an offence, it is important provisions to read with the sections criminalizing certain conduct. The argument is therefore mere technical and without any substance.

### The legal principles and consideration

[34] Persons are constitutionally protected from interference with the privacy of their correspondence, communication and homes. Article 13 of the Namibian Constitution, dealing with Privacy, reads as follows:

'(1) No persons shall be subject 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 in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.

(2) Searches of the person or the homes of individuals shall only be justified:

(a) where these are authorised by a competent judicial officer;

(b) in cases where delay in obtaining such judicial authority carries with it the danger of prejudicing the objects of the search or the public interest, and such procedures as are prescribed by Act of Parliament to preclude abuse are properly satisfied. "

[35] The drafters of our Constitution were very aware of the great danger the misuse of authority under the exercising of search warrants pose and therefore specifically included article 13 in the Namibian Constitution.

[36] Section 21 of the Criminal Procedure Act, 51 of 1977 deals with the requirements for a search warrant and reads that articles referred to in section 20 shall be seized only by virtue of a search warrant issued –

'(1)(a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in

the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or

(b) by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence at such proceedings.

(2) A search warrant issued under subsection (1) shall require a police official to seize the article in question and shall to that end authorize such police official to 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.'

[37] It is therefore true that there must be a specific election of whether the warrant authorize the search of a person on the one hand, and that person should then be identified, or on the other hand authorize the search of any premises and persons found on such premises. Whether the failure by the magistrate to make such an election on its own will amount to rendering the warrants invalid, is however not discussed in this judgement.

[38] In *SAMCO Import and Export and Another v Magistrate of Eenhana and Others*<sup>7</sup> Hoff J, as he was then quoted Cameron JA in *Powell NO and Others v Van der Merwe NO and Others*<sup>8</sup> with approval regarding the principles adopted in our courts on the validity of warrants:

'(a) Because of the great danger of misuse in the exercise of authority under search warrants, the courts examine their validity with a jealous regard for the liberty of the subject and his or her rights to privacy and property.

(b) This applies to both the authority under which a warrant is issued, and the ambit of its terms.

(c) The terms of a search warrant must be construed with reasonable strictness. Ordinarily there is no reason why it should be read otherwise than in the terms in which it is expressed.

(d) A warrant must convey intelligibly to both searcher and searched the ambit of the search it authorises.

(e) If a warrant is too general, or if its terms go beyond those the authorising statute permits, the Courts will refuse to recognise it as valid, and it will be set aside.

<sup>7</sup> (APPEAL-2009/25) [2009] NAHC 9 (18 February 2009).

<sup>8</sup> 2005 (5) SA 62 (SCA).

(f) It is no cure for an overbroad warrant to say that the subject of the search knew or ought to have known what was being looked for: The warrant must itself specify its object, and must do so intelligibly and narrowly within the bounds of the empowering statute.’

[39] In *Minister for Safety and Security v Van Der Merwe and Others*<sup>9</sup> the South African Constitutional court said the following regarding the common law requirement of intelligibility:

‘The intelligibility requirement is a common law principle introduced by the courts and is quite separate and distinct from the requirements of sections 20 and 21. As the name suggests, intelligibility is on the one hand about ensuring that the police officer understands fully the authority in the warrant to enable her to carry out the duty required of her, and on the other that the searched person also understands the reasons for the invasion of his privacy.’

[40] The requirements for a valid warrant and guidelines for persons assessing warrants was formulated as follows in *Minister for Safety and Security v Van Der Merwe and Others*<sup>10</sup>:

‘What emerges from this analysis is that a valid warrant is one that, in a reasonably intelligible manner:

- states the statutory provision in terms of which it is issued;
- identifies the searcher;
- clearly mentions the authority it confers upon the searcher;
- identifies the person, container or premises to be searched;
- describes the article to be searched for and seized, with sufficient particularity; and
- specifies the offence which triggered the criminal investigation and names the suspected offender.

In addition, the guidelines to be observed by a court considering the validity of the warrants include the following:

- the person issuing the warrant must have authority and jurisdiction;
- the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts;
- the terms of the warrant must be neither vague nor overbroad;
- a warrant must be reasonably intelligible to both the searcher and the searched person;

<sup>9</sup> (CCT90/10) [2011] ZACC 19; 2011 (5) SA 61 (CC); 2011 (9) BCLR 961 (CC); 2011 (2) SACR 301 (CC) (7 June 2011).

<sup>10</sup> *Supra*.

- the court must always consider the validity of the warrants with a jealous regard for the searched person's constitutional rights; and
- the terms of the warrant must be construed with reasonable strictness.

[41] When applying the requirements for a valid warrant as set out in Van der Merwe above the court finds that the warrants indeed states the statutory provision in terms of which it was issued. It also identifies the searchers and it identifies the premises that need to be searched. It does however not identify any person to be searched although it refers to "any person". If this part – upon any person/in a receptacle/to wit – was not applicable, it should have been deleted. The non-deletion in the first warrant of items (a), (b), (c) and (f) dealing with the reasonable ground for suspecting that there is on the said premises stolen property and/or a reasonable suspicion exist that an offence has been committed and/or a reasonable suspicion exist of something in respect of which an offence is suspected to have been committed and/or a reasonable suspicion exist that there are reasonable grounds for believing that it is intended to be used for the purpose of committing an offence, will render the warrant vague.

[42] The warrants described the vehicles with sufficient particularity but in more general terms the other items. The warrants specify to some extent the offences which were triggered although such reference includes sections where no offence was created as part of the description of the said offences. It does however not contain the name or names of the suspected offenders although their names were known to the investigating officer and as such conveyed to the magistrate in the affidavit supporting the request for the authorization of a search warrant.

[43] In considering the validity of the two warrants the court must be sure that the person authorising the warrant satisfied himself that the affidavit which was used to support the request for a warrant contains enough information to allow for the warrants to be authorized in the terms and with the specific instructions as they were. In this instance it is not clear to the court as to why the residential premises of the ninth defendant should be searched for anything other than the vehicle as the affidavit that was used in support of the search warrant does not allege that she was in any way involved in the business of the first respondent and the only allegation it contains is that one of the vehicles purchased initially by the first applicant was later registered on her name.

[44] The premises stipulated in the second search warrant, that of Wealth Club Namibia, Maerua Mall, Office no 404 4th floor Windhoek Namibian, was also not referred to in the affidavit of Lilata that accompanied the request for the first search warrant and which was seemingly used in support of the request for the second search warrant also. Although it was subsequently explained that he only learned about the said address whilst conducting the search on the first warrant. He should however have filed an additional affidavit dealing specifically with the information he received relating to the premises situated in Maerua Mall. For this reason alone, the second warrant of 10 October 2019 should be declared invalid as there was no basis laid to the magistrate to authorize a search of the specific premises and he could not have applied his mind to the authorization of the second search warrant.

[45] Taken into account that there is a reasonable suspicion that the Magistrate was not impartial, nor acting independent when he authorized the said warrants due to the arguments set out above as well as the number of blunders observed with the terms of the search warrants as well as the evidence supporting the issuing of these warrants, the court cannot conclude that the magistrate applied his mind. The court finds that it is in the interest of justice that these warrants cannot stand.

The fifth respondent's decision to commence investigation in terms of section 5 and 55A of the Banking Institutions Act and section 93 of the Prevention of Organized Crime Act.

[46] The first applicant ask for an order to declare the decisions made by the fifth respondent to commence and institute investigations under section 5 and 55A of the Banking Institutions Act as well as the authorization given by him under section 83 of the Prevention of Organised Crime Act invalid and to set them aside.

[47] It is perhaps necessary to give a short synopsis of the relevant facts. On or about 24 June 2019 the Bank of Namibia received information from an informer of a possible pyramid scheme taking place. Mr Eiseb in his affidavit states that the Bank of Namibia then conducted their own investigation into these transactions and discovered that the first applicant had a number of accounts with banking institutions where money was deposited into. After they concluded that there is cause for a possible criminal charge under section 5 of the act, he contacted the Namibian police

and requested police investigation and prosecution for a contravention of section 5 of the Banking Institutions Act.

[48] A meeting took place between Eiseb and Lilata and after receiving the information from Eiseb and from the informer, an application was made to the fifth respondent for authorization in terms of section 83 of the Prevention of Organised Crime Act to investigate an alleged offence of money laundering. This authorization was given on 22 August 2019 and on 3 September 2019 the third respondent laid a criminal complaint with Nampol for the investigation of alleged offences in contravention of the Banking Institutions Act.

[49] The first applicant in his supplementary affidavit sets out the basis for this contention. It is argued that the fifth and sixth respondents were not entitled in law to commence and institute investigation on offences under section 5 and 55A of the Banking Institutions Act as section 6 of the said act only allows for the Namibian Police to assist an officer of the Bank of Namibia who was pertinently authorized in writing to do such investigation.

[50] The investigation in terms of this act could only be commenced by the Bank of Namibia, not the Namibian Police, if the Bank had reason to believe at the time that a person is conducting a banking business in contravention of section 5 or section 55A of the said act. The Bank of Namibia would then have to authorize an officer of the Bank to investigate the matter and a member of the Namibian Police may only be involved if required by the Bank of Namibia's authorized officer to assist. In the absence of the authorization in writing of the Bank official and a subsequent request by the said officer, the impugned actions by the Namibian Police is completely invalid.

[51] It is argued that the Bank of Namibia must have "reason to believe" that a person is conducting a banking business in contravention of section 5 or section 55A of the said act, then if the first requirement is met, the Bank of Namibia will in writing authorise an officer of the Bank of Namibia to, amongst others, enter any premises which the Bank of Namibia or the authorised officer has reason to believe is occupied or used by any persons for the purpose of or in connection with the conducting of banking business in contravention of section 5 or section 55A.

[52] In terms of section 6(a) the power of such authorized officers will be carried out *mutatis mutandis* in accordance with Chapter 2 of the Criminal Procedure Act as if the officer concerned were a police officer referred to in that Act. The officer so authorized will be able to produce a written authority referred to under section 6(1) of the Banking Institutions Act and the only way members of the police will be involved is if the Bank of Namibia authorized officer under section 6(2)(i) requests a police officer for assistance in the performance of his or her duties.

[53] The court was referred to *Namibia Competition Commission v Puma Energy Namibia (Pty) Ltd*<sup>11</sup> and was invited to make a similar finding regarding the authority granted to investigators appointed by the Namibian Competition Commission. It is their submission that the Namibian Police would not have authority to conduct searches under the Competition Act, 2 of 2003. Similarly, it is argued that members of the Police, unless requested by an authorized officer of the Bank of Namibia would have no right to commence and institute investigation for the alleged contravention of section 5 and section 55A of the Banking Institutions Act.

[54] It is further argued that the fifth respondent authorized investigations under section 83 of the Prevention of Organised Crime Act, 29 of 2004 before he had reasonable grounds to do so as this was done already on 22 August 2019 whilst the affidavit of Lilata was only deposed on 9 October 2019 and that of Eiseb (bank official) only on 3 September 2019. In terms of section 83 of the Prevention of Organised Crime Act the fifth respondent can exercise his power when he have reason to believe that a person may be in possession of information relevant to the commission or the intended commission of an offence under the POCA legislation or may be in possession or control of documentary material relevant to that offence. Should this be the case, the fifth respondent is then entitled to authorize a particular member or members of the police to investigate the specific offence.

[55] The allegation is that the fifth respondent stated that 'we have reasonable grounds to believe that some of the applicants might have contravened certain provisions of POCA' in a letter dated 22 August 2019 but he never produced a single iota of evidence as to what was available to him on 22 August 2019 as a basis of his authorization under section 83. All the statements produced in this matter were made

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<sup>11</sup> (SA 67-2018) [2020] NASC 33 (08 September 2020).



after 22 August 2019. The fifth respondent never explained himself in an affidavit but authorized Lilata to rather depose to the affidavit.

[56] On behalf of the fifth respondent it was argued that police officers' authority to investigate an offence emanates from the provisions of section 13 of the Police Act, 19 of 1990. It was submitted that the applicant did not show on what basis they allege the fifth respondent failed to exercise his discretion or provided any grounds why they say the fifth respondent acted *mala fide*. They also failed to provide any tangible grounds to show that the fifth respondent's decision was motivated by improper consideration.

[57] It was also argued on behalf of the second, fifth and sixth respondents that the applicant had to make out a case on his founding affidavit why a discretionary decision of the fifth respondent should be reviewed and what the basis is for such review. The allegation is that there were no objective and cogent facts before the fifth respondent when he took the decision to authorize an investigation in terms of section 83 of the Proceeds of Organised Crime Act. In fact, the answer of the applicant indicates that he contends that there was no legal basis, regard being had to the poor record produced by the fifth respondent for the fifth respondent to issue the said authorization.

[58] It was pointed out that this issue was only raised in an amended founding affidavit after the record was already filed by the respondents. The applicants were at liberty in terms of rule 76(6) of the High Court rules to ask for further documents which they did not do. Therefore the court must consider the available evidence before it regarding the information received by the Namibian Police.

[59] Mr. Boonzaaier further pointed out that from the affidavits of the applicant it is not clear what case the respondents have to meet. The facts stated by the applicants do not support the contention that the fifth and sixth respondents took a decision to commence investigations in term of the Banking Institutions Act and there are further no facts to support the vague allegation that the fifth respondent did not have reason to believe an alleged offence was committed. It is therefore submitted that the applicant failed to prove that the fifth and sixth respondents took an unlawful decision to commence with an investigation in terms of the Banking Institutions Act and that

the applicant also failed to prove that the fifth respondent's decision to authorize a member to investigate was unlawful.

### The applicable law and application

[60] From studying the founding affidavits and subsequent replying affidavits of the applicant it appeared that there was merit in the submission made in the answering papers that there was an absence of specific allegations in the applicants' papers in regard to how the fifth respondent failed to act reasonably. The applicant further elected at its own peril not to request for further documentation in terms of rule 76 for the review record to include the record of proceedings before the Inspector-General.

[61] In a Supreme Court judgement of *Nelumbu and others v Shikumwa and others Damaseb*<sup>12</sup> DCJ gave a summary of what aptly called the "discipline of motion proceedings":

[40] Evidence in motion proceedings is contained in the affidavits filed by the parties. In motion proceedings the affidavits constitute both the pleadings and the evidence and the applicant cannot make out a particular cause of action in the founding papers and then abandon that claim and substitute a fresh and different claim based on a different cause of action in the replying papers: *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A). It has been held that:

'A cause of action ordinarily means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court.'<sup>13</sup>

[41] Since affidavits constitute both the pleadings and the evidence in motion proceedings, a party must make sure that all the evidence necessary to support its case is included in the affidavit: *Stipp & another v Shade Centre & others* 2007 (2) NR 627 (SC) at 634G-H. In other words, the affidavits must contain all the averments necessary to sustain a cause of action or a defence. As was stated in *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*:<sup>14</sup>

'It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues

<sup>12</sup> (SA-2015/27) [2017] NASC 14 (13 April 2017)

<sup>13</sup> *Mackenzie v Farmers' Cooperative Meat Industries Ltd* 1922 AD 16 at 23; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 815 (A) at 838E-G

<sup>14</sup> 1999 (2) SA 279 (T)

between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits.’

As the adage goes, in motion proceedings you stand or fall by your papers.

[42] When reliance is placed on material contained in annexures, the affidavits must clearly state what portions in the accompanying annexures the deponent relies on. It is not sufficient merely to attach supporting documents and to expect the opponent and the court to draw conclusions from them. In that regard, practitioners will do their clients a great service by heeding the following warning by Cloete JA in *Minister of Land Affairs and Agriculture v D & F Wevell Trust*:<sup>15</sup>

‘It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. . . . A party cannot be expected to trawl through lengthy annexures to the opponent’s affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush is not permitted.’<sup>16</sup>

[43] O’Regan AJA stated in *Standard Bank Namibia Ltd & others v Maletzky & others* 2015 (3) NR 753 (SC) at 771B-C para 43 that it is not sufficient for a litigant to attach an annexure without identifying in the founding affidavit the key facts in the annexure upon which the litigant relies.

[44] It is not open to a litigant merely to annex to an affidavit documentation and to invite the court to have regard to it in support of the relief sought or the defence raised: What is required is the identification of the portions in the annexures on which reliance is placed and an indication of the case which is sought to be made out on the strength of those portions.

[45] In review proceedings applicants are aided by the procedure set out in rule 76 of the High Court Rules (formerly rule 53). The procedure enables the person aggrieved by administrative decision-making to require the administrative decision-maker to produce the record, which should include the reasons if available. The applicant for review may upon receiving the record of proceedings amend, add to or vary the review grounds raised in the founding papers. In a borderline case, the failure to require the production of the record to

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<sup>15</sup> 2008 (2) SA 184.

<sup>16</sup> *Minister of Land Affairs and Agriculture* (n 22) at 200C–E.

the court (which is an important part of the evidence in review proceedings), could well prove decisive against the applicant especially where the respondent places in dispute the facts relied on by the applicant. (*Compare SACCAWU v President, Industrial Tribunal* 2001 (2) SA 277 (SCA) para 7). In these proceedings the respondents, at their peril, elected not to proceed in terms of rule 76 and did not require a copy of the complete record of the decision taken on review.

[62] The court will in any event briefly deal with the allegations that there is no legal basis for the Inspector-General to allow investigations under the Banking Institutions Act as well as to authorize an investigation in terms of section 83 of the Prevention of Organized Crime Act. Section 13 of the Police Act, 19 of 1990 as amended by Act 3 of 1999 sets out what the functions of the Force shall be:

- '(a) the preservation of the internal security of Namibia;
  - (b) the maintenance of law and order;
  - (c) the investigation of any offence or alleged offence;
  - (d) the prevention of crime; and
  - (e) the protection of life and property.
- [section 13 amended by Act 3 of 1999]'

[63] They therefore have the duty to investigate any offence or alleged offence. The contravention of section 5 and 55A of the Banking Institutions Act are criminal offences. These are not the only offences that the first applicant is being investigated for. According to the search warrants that were authorized on 9 and 10 October 2019, the applicant is also being investigated for fraud and a contravention of the Prevention of Organised Crime Act.

[64] Section 6 in the Banking Institutions Act deals with investigations. The relevant parts reads as follows:

'(1) This section, in so far as it provides for a limitation on the fundamental rights contemplated in Subarticle (1) of Article 13 of the Namibian Constitution by authorizing interference with the privacy of any person's home, correspondence or communication, is enacted upon the authority conferred by Subarticle (2) of that Article.

(2) The Bank may, if it has reason to believe that a person is conducting banking business in contravention of section 5 or section 55A, in writing authorise an officer of the Bank to -

(a) *mutatis mutandis* in accordance with Chapter 2 of the Criminal Procedure Act, 1977 (Act 51 of 1977), at any time and without prior notice -

(i) enter any premises which the Bank or the officer has reason to believe is occupied or used by any person for the purpose of or in connection with the conducting of banking business in contravention of section 5 or section 55A;

(ii) search for any book, record, statement, document or other item used, or which is believed to be used, in connection with the banking business referred to in subparagraph (i); or

(iii) seize or make a copy of any book, record, statement, document or other item referred to in subparagraph (ii), or seize any money found on the premises, as if the officer were a police official referred to in that Act and the book, record, statement, document or other item were used in the commission of a crime;

(b) question any person who is present on the premises referred to in paragraph (a) (i), or the auditors, directors, members or partners of any person conducting business on the premises, in connection with the conducting of the business on the premises;

(c) direct that the premises referred to in paragraph (a)(i), or any part of, or anything on, the premises, be left undisturbed for as long as it is necessary to search the premises for any book, record, statement, document or item referred to in paragraph (a)(ii);

(d) by notice in writing addressed and delivered to any person who has control over or custody of any book, record, statement, document or other item referred to in paragraph (a)(i), require the person to produce the book, record, statement, document or other item to the officer of the Bank addressing the notice, at the place, on the date and at the time specified in the notice;

(e) examine any book, record, statement, document or other item referred to in paragraph (a)(i), and may require from any person referred to in paragraph (b) an explanation regarding any entry in the book, record, statement, document or other item;

(f) by notice in writing delivered to a banking institution, instruct such banking institution to summarily freeze any banking account or accounts of any person referred to in this subsection with such banking institution, and to retain all moneys in any such banking account or accounts, pending the further instructions of the Bank;

(g) by notice in writing delivered to any person referred to in this section, direct that the business of such person be summarily suspended, pending the investigation by the Bank under this section;

(h) if any person has been convicted of an offence in terms of section 5 or section 55A, close down the business of such person; or

(i) require a member of the Namibian Police Force, or may request any other person, to assist him or her in the exercising, performance or execution of his or her powers, duties or functions under this section.

[65] What is clear from the section is that there rests a discretion on the Bank to authorize an officer to perform the actions listed under subsection 2 if the Bank has reason to believe that a person is conducting banking business in contravention of section 5 or section 55A. The legislator used the word “may” which allows for a discretion on the side of the Bank. The Bank therefore can appoint an officer specifically for the purpose of entering premises, conducting a search or seize certain items. Such an officer can then continue to examine various documents.

[66] The authorized official can further summarily freeze any banking account or accounts of any person referred to in at a banking institution, as well as direct that the business of person be summarily suspended. When exercising these functions, listed under section 6(2), the authorised official can also ask for assistance from the Namibian police. In the current circumstances it is clear that the Bank elected not to conduct the search and seizure through an appointed official but to formally lay a complaint with the Namibian Police which they was then obliged to investigate, and which they so did.

[67] Section 83 of the Prevention of Organised Crime Act allows for the Inspector-General of the Namibian Police to authorize investigations under this act. It reads:

‘(1) Whenever the Inspector-General of Police has reason to believe that any person may be in possession of information relevant to the commission or intended commission of an alleged offence in terms of this Act, or any person or enterprise may be in possession, custody or control of any documentary material relevant to that alleged offence, he or she may, prior to the institution of any civil or criminal proceeding, under written authority, direct a particular member of the police to investigate a specific offence.

(2) The member of the police authorised in terms of subsection (1), or any other authorised member of the police may -

- (a) exercise any power under any law relating to the investigation of crime and the obtaining of information in the course of an investigation, for the purpose of enabling the Prosecutor-General to institute and conduct proceedings in terms of Chapter 5 and 6 of this Act; and
- (b) serve any document for which service is required in terms of this Act.’

[68] The requirement for directing a particular member of the police to investigate a specific offence is simply that the Inspector-General must have “reason to believe”. In this instance the information from Eiseb as well as the informer was made available to the police at least by 3 September 2019 when the Bank laid the formal criminal complaint. Lilata, who is a member of the Namibian Police seemingly followed a process to apply for permission to investigate as he was of the opinion that there is indeed enough information available to merit an investigation and permission was so granted by the Inspector-General.

[69] The test therefore is whether there was enough information available at that stage to allow the Inspector-General to believe that any person may be in possession of information relevant to the commission or intended commission of an alleged offence in terms of this Act, or any person or enterprise may be in possession, custody or control of any documentary material relevant to that alleged offence.

[70] Dealing with the issue of costs, the usual premise is that costs follow the result. In this instance however the applicants was partially successful in that their review application against the magistrate’s decision but the application reviewing the decision of the Inspector-General was not successful. The court therefore makes an order that each party is to carry its own costs.

[71] I therefore make the following orders:

1. Condonation is granted for the late filing of the supplementary answering affidavit of the first respondent.
2. The Court sets aside the decision of the first respondent to authorize the two search warrants of 9 October 2019 and 10 October 2019 for searches and seizures to be conducted at the following premises:
  - Erf 1407 Mersey Street Wanaheda, Katutura, Windhoek, Erf 43 Gamsa Street, Kleine Kuppe, Windhoek Namibia, Unit 11 Aviva court, Pelican Street, Hochland Park, Windhoek, Namibia
  - Wealth Club Namibia, Maerua Mall, Office NO:404 4th floor Windhoek, Namibia

3. The Court declares the two warrants of search and seizure issued by the First Respondent dated 9 October 2019 and 10 October 2019 as invalid and of no force in law and setting aside all processes and steps taken in accordance with such warrants.

4 The application to review and set aside the decision of the Fifth and Sixth Respondents to commence and institute investigation of contravention of sections 5 and 55A of the Banking Institutions Act against the Applicants is dismissed.

5. The application to review, correct and set aside the decision of the Firth Respondent to authorise investigation and collection of information in terms of section 83 of POCA alternatively declaring such a decision as invalid and of no effect in law and setting aside such a decision, is dismissed.

6. Each party to carry its own costs.

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E Rakow  
Judge



## APPEARANCES

APPELLANT:

S Namandje  
Of Sisa Namandje & Co. Inc  
Windhoek

RESPONDENT:

J Diedericks  
Instructed by office of the Government Attorneys  
Windhoek

RESPONDENT:

M Boonzaier  
Of the office of the Government Attorneys  
Windhoek