

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**JUDGMENT**

CASE NO: HC-MD-CIV-MOT-GEN-2020/00004

In the matter between:

<b>BERNHARDT ESAU</b>	<b>1<sup>ST</sup> APPLICANT</b>
<b>SAKEUS SHANGHALA</b>	<b>2<sup>ND</sup> APPLICANT</b>
<b>JAMES HATUIKULIPI</b>	<b>3<sup>RD</sup> APPLICANT</b>
<b>RICARDO GUSTAVO</b>	<b>4<sup>TH</sup> APPLICANT</b>
<b>TAMSON HATUIKULIPI</b>	<b>5<sup>TH</sup> APPLICANT</b>
<b>PUIS MWATELULO</b>	<b>6<sup>TH</sup> APPLICANT</b>

and

**DIRECTOR-GENERAL: ANTI CORRUPTION**

<b>COMMISSION</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>ANTI-CORRUPTION COMMISSION</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>PROSECUTOR-GENERAL</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>ANDREAS NDESHIPANDA KANYANGELA</b> (In his capacity as the Officer who applied for the Search Warrants)	<b>4<sup>TH</sup> RESPONDENT</b>
<b>THE MAGISTRATE OF WINDHOEK</b>	<b>5<sup>TH</sup> RESPONDENT</b>

**INSPECTOR-GENERAL OF THE NAMIBIAN POLICE      6<sup>TH</sup> RESPONDENT**

**THE MAGISTRATE OF GOBABIS**

**7<sup>TH</sup> RESPONDENT**

**Neutral Citation:** Esau v Director-General, Anti-Corruption Commission (HC-MD-CIV-MOT-GEN-2020/00004) [2020] NAHCMD 59 (20 February 2020)

**Heard:** 04 February 2020

**Delivered:** 20 February 2020

**Flynote:** Applications – Urgency – Rule 73 (4) (a) and (b) – Requisites to be met - where a fundamental right alleged to be infringed, matter to be dealt with and heard with the utmost degree of urgency – The court should proceed from the premise that the factual allegations made on oath by the applicant in support of the application, are assumed to be correct – Non-Joinder – Judicial Officers not to file affidavits in order to maintain their impartiality and independence – Review – Rule 65 or 76 – Consequence of proceeding in terms of rule 65 – *Functus Officio* – Duty of Non-disclosure – Breach of Privilege – Discretion to determine what documents are privileged lies in the courts – Authorised Officer in terms of the ACC Act – s 6 of the Interpretation of Law Proclamation 37 of 1920 applicable – Search and Seizure Warrants – Courts to interpret them very restrictively and where possible, in favour of the subject – Same must follow the statutory prescripts.

**Summary:** The applicants approached this court on an urgent basis seeking an order to have various search and seizure warrants issued by the Magistrates of Windhoek and Gobabis respectively, reviewed and set aside as being unlawful, overbroad and unintelligible as well as setting aside any steps that may have been taken on the basis of the said search warrants. Furthermore, the applicants sought an order setting aside the said warrants based on the actions of the authorized officers in executing the warrants, which they claim, violated their rights and freedoms.

The respondents opposed the application and various points of law *in limine* were raised by the parties respectively and this include; Lack of urgency as

raised by the respondents, citing non-compliance with rule 73 (4) (a) and (b) and that the urgency of alleged by the applicants was self-created as the warrants complained of were issued already in November and December 2019 respectively and that the matter was set down for hearing some three weeks in advance; The respondents raised Non-Joinder, arguing that a certain magistrate was not cited, therefore, the court should not entertain the argument related to the said warrant, in the absence of the joinder of the Magistrate concerned. The respondents further alleged that the applicants came to court using the wrong procedure, that is in terms of rule 65 as opposed to rule 76, therefore, their application should be dismissed.

Other points of law raised include; *functus officio*, breach of the duty of non-disclosure as well as breach of privilege.

Held: that the delay that may have been occasioned by the application being lodged much later than should have been the case, was explained by the applicants and it was reasonable and detailed.

Held further that: where an infringement of a fundamental right or freedom is alleged on good grounds that should serve to move the court's machinery with less formality and more speed.

Held that: An element of urgency must always attach to alleged violations of fundamental rights and freedoms, especially to life, liberty and property. To deal with these in the ordinary course, may result in the perpetuation of the infringement, with what may appear to be the imprimatur of the court, which would be a regrettable scenario.

Held: the violation of the fundamental rights alleged by the applicants must be given weight in the handling of the matter.

Held further that: It would, in the context of this case, have been extremely unfair to afford the respondents a shorter time period, which would enable them to fully and properly canvass their case and leave no stone unturned.

Held: the applicants have succeeded in meeting the requirements of the provisions of rule 73 and the court is accordingly entitled to hear the application as one of urgency.

Held further that: this matter must be viewed from the prism of the independence and impartiality that should always exude the conduct of judicial officers.

Held that: 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 as this may place them beyond that call of duty of a judicial officer, but as litigants in the proceedings.

Held further that: it is unsightly that the Magistrates, who are judicial officers, and who occupy a special and independent position, should be represented by the same legal team, which represents the officers or offices, whose conduct is specially sought to be impugned in those proceedings for alleged violations of fundamental rights and freedoms.

Held: that judicial officers should be independently represented so as to objectively display jealous regard for their independence and impartiality.

Held further that: 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.

Held: the non-compliance with rule 76 does not *per se* render an application for review a nullity therefor.

Held that: where privilege is laid or claimed to any document or article, the document must immediately, and without having been inspected by the officers concerned, be sealed and kept in safe custody by either the Registrar of this Court, or by the sheriff of this court, or where appropriate, by a messenger of the Magistrate's Court of the district where the item is located.

The item must be kept in safety until it is placed for determination on whether or not it is privileged as claimed, before a competent court.

Held further that: It does not matter that the ACC officers may well have been correct in law in classifying the documents in issue as in fact not privileged but confidential, as they claim. That is not a call that the law has allowed to reside in their bosom. It is specially reserved for the courts to determine, the legislature crucially appreciating and understanding their independent, neutral and impartial role as arbiters in contested territory.

Held that: the ACC usurped powers that the legislature decreed should reside only in courts of law.

Held further that: the documents seized from the 3<sup>rd</sup> applicant, in regard to which a claim of privilege was made, were seized unlawfully and in violation of the letter and spirit of the Act. As such, the documents relating to Investec must forthwith be returned to the 3<sup>rd</sup> applicant, together with any copies, in whatever form, that the ACC officers and those collaborating with them may have made. The said documents may thus not be used in any further proceedings against the 3<sup>rd</sup> applicant or his interests connected therewith.

Held that: s 6 of the Interpretation of Law Proclamation No. 37 of 1920 is applicable in the circumstances.

Held further that: the persons in charge of the operation should constantly be alive to the provisions of s 25(1) of the ACC Act, which requires that the search be conducted with strict regard for decency and order.

Held that: the mere number of the officers does not *per se* indicate an abuse or a contravention of the provisions of s 25(1) and that the applicants' argument in this regard has no support from the Act.

Held further that: a case for the setting aside of the warrants was not been made out by the applicants.

Held that: because of its invasive nature and derogation it yields on a subject, courts must interpret warrants very restrictively, and where possible, in favour of the subject. This is because the issuance and execution of a warrant,

violates some rights and freedoms otherwise protected under the Constitution. It is for that reason that any authorisation of the issue and execution of a search warrant, must be closely and narrowly interpreted in order to arrest possible abuse by those in control of the levers of power.

Held further that: the warrants in question appear to follow what are statutory prescripts in s 22 in that regard and therefore, 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.

Held: the possibly offensive portion of s 22 is provided for in the enabling statute and has not been attacked on the basis of its constitutionality and it therefor stands.

Held further that: whether the authorised officer's opinion to seize items not included in the warrant in pursuance of the provision that he or she may seize items having a bearing on the investigation, involves a factual finding on the part of the court.

Held that: the proper exercise of the powers in this regard by the authorised officers should be gauged from the following factors (a) the nature of the allegations made by the authorised officers on affidavit, which lead to the issue of the warrant; (b) the charges preferred against the applicants; (c) the items authorised to be seized by the warrant and (d) the items not mentioned in the warrant but which were seized by the officers.

Held that: there must be a reasonable and rational nexus between the offences charged and the unlisted items that are eventually seized by the officers in terms of s 22 of the Act.

Held: that it would have been helpful to the court and fair to the ACC respondents, for the applicants, in this part of the leg, to point out items that in their view, do not have a bearing on the investigations, naturally pointing to the conclusion that the officers' opinion, allowed by law, was flawed.

Held further that: persons who have been charged with offences, regardless of the seriousness thereof alleged, are not only bearers of rights to dignity but they also enjoy the right to presumption of innocence.

Held that: The applicants were treated in an undignified manner from the evidence before this court but, that is not, however, a basis on which the warrant for search may be set aside.

Held further that: It has not been shown that the warrants in issue are overbroad in the terms the Magistrates allowed.

Court consequently hearing the matter as one of urgency but dismissing the application for the review and setting aside of the warrants of search and seizure issued by the Magistrates without an order as to cost.

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### **ORDER**

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1. The Applicants' application non-compliance with the Rules of Court, relating to service and time periods is hereby condoned and the matter is heard as one of urgency in terms of Rule 73 of this Court's Rules.
2. The application for the review and the setting aside of the warrants of search and seizure issued by the Magistrates in this matter, is hereby dismissed.
3. The application for the review and setting aside of the decision of the First, Second, Third, Fourth and Sixth Respondents, to execute the warrants is hereby refused.
4. The Respondents are ordered forthwith to return the documents relating to Investec Asset Management Namibia Investec (Pty) Ltd, seized from Mr. James Hatuikulipi, in respect of which privilege was claimed, including any copies made of the said documents.
5. The Respondents are precluded from making use of the documents referred to in paragraph 4 above in any future proceedings.
6. There is no order as to costs.

7. The Registrar of this Court is ordered to forward a copy of this judgment to the Magistrates' Commission for same to be forwarded to all Magistrates in this jurisdiction.
8. The matter is removed from the roll and is regarded as finalised

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## JUDGMENT

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### MASUKU J:

#### Introduction

[1] Perspective is very important. In this regard, it is critical to place this judgment in its proper legal and historical perspective. In doing so, reference will be made to lapidary writings from the 16 century, that bear heavily on the matter serving before court, as will be evident shortly in the ensuing paragraphs of this judgment.

[2] In his Virginia Declaration of Rights, Article 10 of 12 June 1776, George Mason is recorded as having stated the following:

‘That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described or supported by evidence, are grievous and oppressive and ought not to be granted.

[3] On another note, James Otis, Against Writs of Assistance, 1761, is quoted thus:

‘Now, one of the most essential branches of the English liberty is the freedom of one’s house. A man’s house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle’.



[4] Last, but by no means least, John Adams, in the Massachusetts Declaration of Rights, Article 14, 1780, said:

‘Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.’ (Emphasis added).

[5] Serving before court is an application brought on an urgent basis and in terms of which the applicants allege on oath that certain warrants of search and seizure, were issued by the Windhoek and Gobabis Magistrate Courts, respectively. They allege that the issuance and execution of the said search warrants served to violate their rights and freedoms cognisable under the Constitution of Namibia. A close examination of the applicants’ complaint, it would seem, suggests that they rely on the underlined portion of the immediately preceding paragraph.

[6] Needless to say, the respondents oppose the application and concede no blade of grass in so far as the complaints by the applicants, and the relief sought, which will be adverted to in greater detail below are concerned. In this regard, it is important to point out, the respondents raised points of law *in limine* and it is necessary that they should be dealt with for the reason that if granted, they may possibly have deleterious effect on the application proceeding on its merits.

#### Relief sought

[7] In the notice of motion, the applicants seek the following relief:

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

2. That the search warrants marked "A" issued by the fifth respondent on 23 November 2019 and the search and seizure in terms thereof by those authorised to execute same be declared invalid and unlawful and setting them aside, and setting aside any steps that may have been taken on the basis of the said search warrants;

3. That the search warrants marked as "B" issued by the fifth and seventh respondents on 09 December 2019 respectively, and the search and seizure in terms thereof by those authorised to execute same be declared invalid and unlawful and setting them aside and setting aside any steps that may have been taken on the basis of the said search warrants;

4. An order reviewing, correcting and setting side the decisions by the first, second, third and fourth respondents to apply for the search warrants attached to the applicant's (*sic*) founding affidavit as "A" and "B".

5. An order reviewing, correcting and setting aside the decisions by the fifth and seventh respondents to grant the search warrants attached to the applicant's (*sic*) founding affidavit as "A" and "B".

1. An order reviewing, correcting and setting aside the decisions by the first, second, third, fourth and sixth respondents to execute the search warrants attached to the applicant's (*sic*) founding affidavit as "A" and "B".

2. An order directing the first, second, third, fourth and sixth respondents (or any other person/s in possession of the seized items) to restore to the applicants all the items, goods and documents seized in pursuance of the impugned search warrants (including memory sticks, draft wills, vehicles, note books, computers and data thereon) to the applicants and to return any copies and or duplications made thereof within one (1) day of this Order;

3. That the respondents pay the costs of this application, such costs to include costs of employment of one instructing and two instructed counsel on a higher scale as between attorney and client.

Preliminary issues

## *Urgency*

[8] The respondents, who were represented by Mr. Van Wyk, started the hostilities by arguing that the applicants had not complied with the mandatory requirements of rule 73, particularly subrule 4, which call upon an applicant, in an urgent matter, to (a) explicitly state the reasons why the matter is urgent and (b) explicitly state why the applicants claim they could not be afforded substantial redress at a hearing in due course. In the event, the court found the matter is urgent, so the argument further ran, the court must find that any urgency that attaches, was of the applicants' own making, Mr. Van Wyk, further argued.

[9] In argument, he laid great store on the case of *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd*,<sup>1</sup> where the applicable test was set out in the following terms:

[6] The import thereof is that the procedure set out in rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims the he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will obtain substantial redress. . .

[9] It means that if there is some delay in instituting the proceedings an applicant has to explain the reasons for the delay and why despite the delay, he claims he cannot be afforded redress at a hearing in due course. I must also mention the fact that the Applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at the hearing in due course, then the matter qualifies to be enrolled and heard as an urgent application. If, however, despite the anxiety of an applicant he can be afforded substantial redress in an

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<sup>1</sup> 2011 JDR 1832 (GSJ) para 6-and 9.

application in due course the application does not qualify to be enrolled and heard as an urgent application’.

[10] It must be stated that the standard set out in the above judgment that an applicant for urgency should meet, although from a different jurisdiction, is consistent with the judgments from this court.<sup>2</sup> This is so because the language of the rules relating to urgency, is *in pari materia*. The judgment, for that reason, makes good law even in this jurisdiction.

[11] In his address, Mr. Van Wyk submitted that the applicants’ complaint is based on warrants issued around mid-December 2019 and the applicants did not, immediately after the issuance of those warrants, bring an application to have them set aside within a reasonable time. They rested on their laurels, so to speak. He further argued that if the court finds that the matter is indeed urgent, the court must find that they are the cause of the delay and that for that reason, the urgency, is of their own creation.

[12] Regarding the second leg of the enquiry, Mr. Van Wyk argued that the applicants are not without a sufficient remedy in due course. In this regard, it was his submission that the applicants can bring the application before the trial court and it would, if it agrees with them, afford the applicants substantial redress at that hearing.

[13] Mr. Narib’s argument was a different kettle of fish altogether. He argued that the application is urgent and that the applicants cannot, whatever the respondents say, be granted substantial relief in due course. He argued that the applicants have been deprived of their liberty and are, for that reason, unable to go about their normal business. He further argued that the applicants’ funds have been frozen at the behest of the respondents and besides being in custody, they have no ready access to funds to launch litigation as and when they wished.

[14] In this regard, he pointed out that the applicants had explained their difficulty in moving the application when they did. In this regard, the 1<sup>st</sup>

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<sup>2</sup> Nghimbwasha v Minister of Justice (A 38/2015) NAHCMD 67 (20 March 2015).

applicant states that immediately after the warrants were issued in mid-December 2019, the festive season started not long from there. Because they had to rely on some Good Samaritans, so to speak, to avail funds for their litigation, they had to wait until the beginning of January 2020, to lodge the applications, which is when their benefactors were back from holiday and could avail funds.

[15] I am of the view that the delay that may have been occasioned by the application being lodged much later than should have been the case, has been explained by the applicants. In my considered view, the explanation is reasonable and detailed. The court cannot, in good conscience, close its eyes to the fact that the applicants are in custody and their freedom of movement and contact is greatly curtailed. They cannot do what they want when they please. This includes communicating with their counsel, giving instructions and accessing relevant documents and information. They are not free men to do as and when they please.

[16] It is also a cold fact that they have no access to their bank accounts as these were frozen pursuant to orders issued by courts of law. In this regard, the applicants state, and they cannot be controverted on this, that they have had to rely on Good Samaritans to come to their aid, to fund their defence. It is a notorious fact that the warrants were issued very close to the festive season, which saw their benefactors going on holiday and it on their return that the applicants say they could have their application funded. Their allegations cannot, in this regard, be gainsaid.

[17] I also do not agree with Mr. Van Wyk, that the applicants have to wait until their trial begins in earnest before they can challenge the validity of the warrants of search and seizure. It will be a dark and sad day in the legal and judicial history of this country when a person, who alleges that his otherwise inviolable rights and freedoms have been violated, contrary to the presumption of innocence, cannot gain immediate redress and must await the trial to challenge what he or she perceives as do the applicants, as egregious violations.

[18] It is presently not known when the trial will commence and it is not an idle consideration to say that by the time the trial comes, a lot of water may have passed under the bridge, which if we are not careful, may include the applicants' fundamental rights and freedoms. Where an infringement of a fundamental right or freedom is alleged on good grounds, that should serve to move the court's machinery with less formality and more speed.

[19] In that regard, there can be no indefinite postponement of that crucial enquiry, waiting for some indeterminate place, time and occasion, to make that robust finding as to whether fundamental rights and freedoms were violated. It might be cold comfort for the applicants, two years down the line to be told by the court that their rights were violated when the warrants were issued and executed. The immediate benefit of that finding would, at that time, like rain water, have been swallowed by the ground.

[20] An element of urgency must always attach to alleged violations of fundamental rights and freedoms, especially to life, liberty and property.<sup>3</sup> To deal with these in the ordinary course, may result in the perpetuation of the infringement, with what may appear to the imprimatur of the court, which would be a regrettable scenario.

[21] It must also not be forgotten that the approach to urgent applications in this jurisdiction, is that the court should proceed from the premise that the factual allegations made on oath by the applicant, in support of the application, are assumed to be correct.<sup>4</sup> In this regard, the violation of the fundamental rights alleged by the applicants must be given weight in the handling of the matter.

[22] In *Sheehama v Inspector-General, Namibian Police*,<sup>5</sup> this court commented as follows:

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<sup>3</sup> Swanepoel v Minister of Home Affairs 2000 NR 93 at 95.

<sup>4</sup> *Shetu Trading v Chair of the Tender Board of Namibia and Others* (A 352/2011) [ NAHC 179 (22 July 2011) per Heathcote AJ, para 15.

<sup>5</sup> 2006 NR 106 (HC) at 108.

'It seems to me that the principal ground relied upon by the applicant on the question of urgency is the alleged violation of his fundamental and common law right to be heard which purportedly renders his suspension invalid. In my view, a claim that a fundamental right or freedom has been infringed or threatened may justify the invocation of Rule 6(12) of the Rules of the Court. I am satisfied that there is present, *in casu*, a sufficient degree of urgency to warrant the application being heard on a semi-urgent basis. Accordingly, I hold that the case for urgency has been made out.'

[23] Some argument was raised by the court regarding the fact that application was raised some three or so weeks before the hearing date and that to some extent, may be an indication that the matter is not very urgent, or at least falls within the semi-urgent category, which is a species not provided for in the rules of court and practice at this juncture. Mr. Narib countered by saying that the applicants were very much alive to the rights of the respondents to be afforded a reasonable opportunity to deal with the matter exhaustively, considering its importance.

[24] I agree with Mr. Narib in his argument on the facts of this peculiar case. The issues raised are momentous and there are a number of different actors – Anti-Corruption Officials, judicial officers and investigating officers who deposed to some affidavits that found the complaints by the applicants. It would, in the context of this case, have been extremely unfair to afford the respondents a shorter time period, which would enable them to fully and properly canvass their case and leave no stone unturned.

[25] Having said this, I must mention that the court has, of late, noticed a growing phenomenon, where applications are alleged to be urgent but they are served and file close to a month in advance, with no plausible reasons for doing so. It must be stressed that the urgency provisions must ordinarily be strictly complied with and resorted to in appropriately urgent matters. Where an applicant alleges urgency but files the application long before the hearing date, may, in appropriate circumstances, be shooting him or herself in the

foot because setting the matter down long before the hearing date may be reflection that detracts from the alleged urgency of the matter.

[26] Having regard to all the above circumstances, I come to the considered view that the applicants have succeeded in meeting the requirements of the provisions of rule 73 and the court is accordingly entitled to hear the application as one of urgency.

#### Non-joinder

[27] The respondents further argued that Magistrate Cosmos Endjala, whose seat is in Katutura, although he issued one of the warrants in this matter, was not cited as a party in this matter. This failure, the applicants claim, is fatal and that the court should not entertain the argument related to the said warrant, in the absence of the joinder of the Magistrate concerned. In the event, the court condoned the applicants' mistake in this regard, the respondents urged the court not to entertain the argument related to the warrant issued by the said Magistrate for reasons of non-joinder.

[28] The applicants' legal team argued that the issue of the non-joinder, is a red herring so to speak. Their argument was that they had cited the correct Magistrates who issued the warrants in this matter. In this regard, the court was referred to s. 2 of the Magistrate's Court Act, 32 of 1994, which creates two seats in Windhoek, namely Luderitz Street and Mungunda Street. There is no designation of the Katutura Magistracy they contend.

[29] I am of the view that the argument raised by the applicants, in the context of this matter, is highly fastidious and does not show in any event, that there is any harm that would eventuate if the warrant in question would be investigated without the Magistrate concerned having been cited or even served with the papers.

[30] This matter must be viewed from the prism of the independence and impartiality that should always exude the conduct of judicial officers,



particularly in cases where their judicial actions or orders have been challenged on review on the basis of one ground or the other. At the heart of the enquiry, must be the posture that judicial officers should assume in such matters.

[31] 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>6</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 Nhlango and Another*,<sup>7</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

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<sup>6</sup> (A 76/2015) [2016] NAHCMD 8 (20 January 2016).

<sup>7</sup> 1987 -1995 SLR 17 at 22 G-I.

upon review, if his personal conduct or reputation is being impugned but these too will be in very exceptional circumstances.' (Emphasis added).

[33] I fully align myself with the above quotation, as accurately reflective of the correct position that Magistrates even in this jurisdiction should assume where their orders or judgments are taken on appeal or review. It is thus clear that there was no allegation in the applicants' affidavits that served to impugn the reputation or question the probity of the Magistrate in question in the exercise of his powers to issue the warrant.

[34] In the premises, I come to the considered view that it was accordingly unnecessary, regard had to the facts of the matter, to have cited the Magistrate in this matter. As Hull CJ stated, the Magistrate is cited for formal reasons only. The said Magistrate does not stand to suffer any prejudice by any order the court makes, even if it sets aside his decision to authorise the warrant, nor can it be said that the court would be unable to carry out its order, if the Magistrate is not cited in these proceedings<sup>8</sup>.

[35] It is necessary, whilst still on this issue, to deal, albeit briefly, with the issue of the Magistrates who were cited and did file their answering affidavits. It must be mentioned that in the light of the authority cited above, it was ill-advised for them to have done so, considering that they were cited for formal purposes only. No allegations of bias, malice, fraud or such like epithet, were made by the applicants.

[36] What is more worrying, is that the said Magistrates not only filed affidavits, but they actually joined issue with the other respondents. They in fact filed answering affidavits not just explaining what they took into account in issuing the warrants, but they proceeded to take issue literally with every allegation made by the applicants, answering all the allegations made by the applicants.

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<sup>8</sup> Kleinans v The Chairperson of the Council for the Municipality of Walvis Bay and Others 2011 (2) NR 437 (HC) p477 para 32.

[37] The 5<sup>th</sup> respondent, for example, took unpalatable shots at the applicants. At para 18, where he answered in relation to the Magistrate having been *functus officio*, which is a legal issue that he need not have answered pound for pound, he injudiciously said in part, 'The contention by the Applicants is ill-founded in law and achieves absurdity if it applies to the granting of search warrants.'

[38] He went on to contest the urgency of the matter, which is very bizarre and asked the court to dismiss the application or remove the matter from the roll with costs. Furthermore, the learned Magistrate stated on affidavit that the applicants for 'search warrants have a statutory duty to do certain investigations'. Whilst the latter may be true, it sits ill in the mouth of a judicial officer, to mention as it appears, that his independence and impartiality is seriously compromised.

[39] In the *J B Cooling* case, Ueitele J remarked about the Magistrate filing points *in limine* and praying for the dismissal of the case with costs as follows at para 8:

'Secondly, the Magistrate has in her affidavit raised points *in limine* and added a prayer that this review application be dismissed. Although the magistrate is cited as a party to the proceedings herein, it is undesirable in my judgment, to include such a prayer in her affidavit she is not a party to the dispute and has no interest as to who succeeds or fail (*sic*) in the litigation. To do so may tend to suggest an element of bias on the part of the judicial officer concerned and this must be avoided.'

[40] It is thus clear that the wise injunctions issued by the learned Judge, some three or so years ago, fell on deaf ears as the same mistake was committed in this case, not only by the 5<sup>th</sup> respondent, but by the 7<sup>th</sup> respondent as well. Furthermore, the said respondents' legal practitioners dealt with the said respondents as ordinary clients, when they occupy an especial position, which should always exude impartiality, objectivity and independence.

[41] The last comment leads me to one other crucial issue that the applicants raised times without number in their affidavits. This relates to the fact that the Magistrates, who issued the warrants, not only made untoward remarks and made common cause with the Government respondents, whose actions are chiefly questioned, but they were represented by the same set of legal practitioners. The applicants state that this fact induced in their minds, not unreasonably, I may add, that the Magistrates made common cause with those they perceive harassed them and violated their fundamental rights and freedoms.

[42] I am of the view that the complaints by the applicants in this matter are not without foundation. Without in any manner casting aspersions on the legal practitioners of the respondents, it is unsightly that the Magistrates, who are judicial officers, and who occupy a special and independent position, should be represented by the same legal team, which represents the officers or offices, whose conduct is specially sought to be impugned in these proceedings for alleged violations of fundamental rights and freedoms.

[43] In *Visagie v Government of the Republic of Namibia*,<sup>9</sup> Damaseb DCJ, commented on the importance of the independence of the judiciary in the following compelling terms, 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.’

[44] At para 86, the learned DCJ commented on the co-operation between the judicial officer and the Government that represents him in the

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<sup>9</sup> 2019 (1) NR 51 (SC) at p72 para 85 & 86.

proceedings, where he or she has been individually sued but is defended by the State, using its resources. He stated 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?'

[45] 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 with 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 offices 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.

#### *Rule 65 or 76?*

[49] The respondents had a further attack on the procedure adopted by the applicants. They allege that the applicants came to court using the wrong vehicle, so to speak. According to the respondents, the applicants had to come to court aboard a vehicle whose registration number is marked 'Rule 76'. This, it is claimed is so because the applicants are in essence, seeking the review and setting aside of the warrants of arrest. To the extent that the applicants accessed the court using the vehicle whose registration number is marked Rule 65, they are off-side and must be unsuited therefor.

[50] In coming to this conclusion, the respondents relied on a number of judgments of this court on the subject, including *Inspector-General of Namibia Police and Another v Tjjeza*,<sup>10</sup> where the court reasoned that applications for review must be brought in terms of rule 76 and not 65 as the differences between two rules are not incidental or minor but are diverse and substantial.

[51] The applicants countered the argument advanced above by referring the court to *Namibia Financial Exchange (Pty) Ltd v The Chief Executive Officer of the Namibian Financial Institutions and Others*.<sup>11</sup> In that judgment, the Supreme Court reasoned that the non-compliance with rule 76 does not *per se* render an application for review a nullity therefor. The court stated further that 'the election not to proceed under the review rule can have

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<sup>10</sup> 2015 (3) NR 720.

<sup>11</sup> Case No. SA 43/2017 delivered on 31 July 2019.

adverse consequences for an applicant if the absence of the record leaves the court in doubt as to whether the applicant has made out a case for review . . .’

[52] In placing the sentiments of the Supreme Court in proper context, it appears that it is the applicant that makes the bed and must lie on it, regardless of the discomfort is if it turns out that its case is detrimentally affected by the absence of the record. It is in those circumstances that an applicant for review would hardly be expected to complain of burnt fingers when it plays with fire by approaching the court in terms of rule 65.

[53] It does not appear that the applicants’ case has in anyway been hampered by the absence of the record in the prosecution of their case. I say so because the Magistrates, to the extent necessary, have stated on oath (wrongly so as stated earlier) as to what considerations they took into account in issuing the warrants.

[54] In this regard, the documents surrounding the granting the warrants, namely, the affidavits filed in support of the issuance of the warrants and other documents, including in some cases the inventory of what was seized, have been placed before court. These should enable the court to decide the validity or otherwise of the warrants in question, regard had to the applicants’ complaints. This point of law does not assist the respondents and it is accordingly dismissed. If anyone has to complain about the procedure followed not yielding the desired result, it is the applicants.

[55] Having stated the above, it is appropriate to have regard to para 40 of the Supreme Court judgment in *Namibia Financial Exchange*, where the court stated in clear and categorical terms what the effect of bringing a review under rule 76 is not. The court said:

‘The review as formulated in the new rule 76 has not brought about a significant change as understood by the court *a quo*. I therefore come to the conclusion that not only is it not a requirement for a review applicant to proceed under rule 76, but there is no reason in principle now firmly embedded in our

common law should be changed. The High Court therefore misdirected itself in concluding that an applicant seeking review is compelled to proceed under the review and that the failure to do so amounts to a nullity.’

*Functus officio*

[56] In yet another attack, the applicants claim the warrants of search and seizure issued by the Magistrate Courts were invalid. Although this ground was raised in attack on the merits, it is prudent to deal with it at this preliminary stage. The applicants allege that when the warrants of search and seizure, were issued by the Magistrates mentioned earlier, the said Magistrates were *functus officio*.

[57] In this regard, so the applicants contend, the warrant marked “A” issued on 23 November 2019 by the Katutura Magistrate Court was in respect of specified property and there was, in this regard, no further warrant in relation to this property. It is the applicants’ contention that when fresh warrants were issued on 9 December 2019, by the 5<sup>th</sup> respondent, the first set of search warrants were still valid in terms of s 22(6) of the Anti-Corruption Act, ‘the Act’.<sup>12</sup>

[58] The said provision reads as follows:

‘A warrant to enter and search premises is valid until one of the following events occur –

- (a) the warrant is executed;
- (b) the warrant is cancelled by the authority who issued it or, in that persons absence, by a person with similar authority;
- (c) the purpose for issuing it has lapsed; or
- (d) the expiry of one month from the date it was issued.’

[59] I have had regard to the warrants issued in this matter, paying particular regard to the property authorised to be searched and where applicable, the identity of the person allegedly owning the place to be

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<sup>12</sup> Act No. 8 of 2003.



searched. The warrant issued on 23 November 2019, attached to the applicants' founding affidavit, and marked 'A', is for the search of premises described as Erf 91, Papageien Street, Hochland Park, Windhoek. I have not seen any other warrant issued on 9 December 2019, and in terms of which the same property, was authorised to be searched by the Magistrate. I mentioned pertinently, that no name was stated in the warrant issued on 23 November 2019 in respect of the ownership or control of the property.

[60] Although I admit that the time of the issue of the second set of warrants on 9 December 2019, was within a period of 30 days from the date of issue of the previous warrant – which would ordinarily have rendered the former still in force, unless any of the events mentioned in s 22(6) above took place, which appears not to have been the case, it appears to me that the argument that the warrants issued on 9 December were wrongly issued because the Magistrate was *functus officio*, is incorrect. This point of law is accordingly dismissed.

#### Breach of duty of non-disclosure

[61] It accordingly follows that the other point inextricably linked to the one of *functus officio*, namely, that the deponents to the warrants of search issued on 9 December 2019, breached the duty of disclosure imposed by law in *ex parte* applications<sup>13</sup>, (*uberimma fides*) falls away. It was argued that the deponents should have disclosed to the Magistrate issuing the later warrants that earlier warrants had been issued in respect of the same person and property, where applicable.

[62] I come to the conclusion stated above because as I have found and held, there were no warrants issued which I found relate to the same person and property, which were issued first on 23 November and again on 9

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<sup>13</sup> Atlantic Ocean Management v Prosecutor-General 2017 (4) NR 939 (HC).

December 2019. If there had been any such warrant, and there was non-disclosure of same to the issuing Magistrate, then I would certainly agree with the applicants in their contention. That unfortunately, is not the case as I read the papers. This accordingly disposes of the applicants' argument in this regard.

#### Alleged breach of privilege

[63] In this part of the judgment, the court will consider the implication of s 25(5) of the Act which relates to seizure of documents alleged to be privileged. The provision reads as follows:

'If the owner or person in control of any book, document or article refuses to allow the authorised officer conducting a search to inspect that book, document or article on the ground that it contains privileged information, the authorised officer may request the registrar or sheriff of the High Court, or the messenger of the magistrate's court of the area of jurisdiction where the premises are situated, to attach and remove the article or document for safe custody until a competent court determines whether or not the information is privileged.'

[64] It is alleged in the applicants' papers that there were documents that were in the 3<sup>rd</sup> applicant's custody and which the officers of the 1<sup>st</sup> respondent wanted to inspect during the search. The 3<sup>rd</sup> applicant cried foul and alleged that the said documents were privileged and confidential as they related to the 3<sup>rd</sup> applicant's former employer Investec Namibia (Pty) Ltd. Notwithstanding the notification of the alleged privileged nature of the said documents, the 1<sup>st</sup> respondent's officers seized and inspected the documents in question, giving no heed to the 3<sup>rd</sup> applicant's protestations.

[65] The respondents do not deny these facts. What they do allege in their answering affidavit, is that the 3<sup>rd</sup> applicant is, for lack of better expression, guilty of terminological inexactitude, in the sense that he seems to blur the lines between privileged and confidential information. It was the 2<sup>nd</sup> respondent's case that the said documents were confidential but not

privileged and that there was thus no bar to the ACC having access to and seizing the documents in question for purposes of their investigations.

[66] I am horrified at the response and actions of the ACC in this case. The provision of the law is clear that where privilege is laid or claimed to any document or article, the document must immediately, and without having been inspected by the ACC officers, be sealed and kept in safe custody by either the Registrar of this Court, or by the sheriff of this court, or where appropriate, by a messenger of the Magistrate's Court of the district where the item is located. The item must kept in safety until it is placed for determination on whether or not it is privileged as claimed, before a competent court.

[67] Clearly, this provision was observed in breach by those who are tasked by the legislature with implementing the Act. It boggles the mind when an entity or organisation tasked with implementing legislation turns to violate that very instrument. It does not matter that the said entity is probably well-intentioned and impelled by the instinct to prevent crime and corruption in doing so. It amounts to a shepherd becoming a wolf and this is unacceptable.

[68] It does not matter that the ACC officers may well have been correct in law in classifying the documents in issue as in fact not privileged but confidential, as they claim. That is not a call that the law has allowed to reside in their bosom. It is specially reserved for the courts to determine, the legislature crucially appreciating and understanding their independent, neutral and impartial role as arbiters in contested territory.

[69] What the ACC officers did, in the circumstances, is despicable. They usurped powers that the legislature decreed should reside only in courts of law. The ACC in this case, became prosecutor, judge and executioner, in its own cause, something that is anathema and should not be allowed or tolerated in a democratic state like Namibia.

[70] By parity of reasoning, one expects a pastor or priest in a Christian church to know, understand and apply the verses in the Bible, as should a

Muslim preacher know, understand and properly apply the Quran. They should act strictly in terms of what is allowed or forbidden by the law that governs them. This is the same with the ACC. People who act in the manner they have in religious circles, are normally excommunicated for bringing their sacred organisation into disrepute.

[71] The fact of the matter, is that the provision in question does not prevent the ACC from accessing the document at all, if their claim that it is not privileged is subsequently upheld by the competent court. Their ability to collect information that may be incriminating is not thereby denied or frustrated forever. It is merely a temporary deprivation, until a competent court rules on the correctness of the privilege claimed. This does their investigation no setback once the court rules in their favour ultimately.

[72] In view of the findings above, which are, in my considered view, inevitable in the circumstances, I find and hold that the documents seized from the 3<sup>rd</sup> applicant, in regard to which a claim of privilege was made, were seized unlawfully and in violation of the letter and spirit of the Act. As such, the documents relating to Investec must forthwith be returned to the 3<sup>rd</sup> applicant, together with any copies, in whatever form, that the ACC officers and those collaborating with them may have made. The said documents may thus not be used in any further proceedings against the 3<sup>rd</sup> applicant or his interests connected therewith.

#### Meaning to be ascribed to 'authorised officer'

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[73] It may well be that the question for determination in this part of the judgment, is inelegantly captured in the heading above. The question arises as follows – the applicants contend that the respondents fielded about 16 officers during the execution of the warrants. They claim that this is inconsistent with the provisions of the Act, considering in particular, the meaning ascribed by the legislature to the word 'authorised officer'.

[74] The definition section of the Act defines 'authorised officer' to mean (a) the Director; (b) Deputy Director; (c) an investigating officer appointed under section 14; or (d) a special investigator appointed under section 14 of the Act. The applicants argued that the term authorised officer, must be given a restricted meaning for the reason that if Parliament had intended to refer to officers rather than an officer, it would have stated so in clear terms.

[75] The applicants also submitted that the interpretation of the word must be given in the light of the issue of accountability during the search and seizure, so that there is one person in charge and open for accountability in case anything goes wrong or missing or indeed where questions are raised about what took place at the scene.

[76] The respondents had a short and simple answer – that s 6 of the Interpretation of Law Proclamation,<sup>14</sup> which states that 'In every law, unless the contrary intention appears (a) words importing the masculine gender shall include females; and (b) words in the singular number shall include the plural, and words in the plural number shall include the singular'.

[77] I am of the considered opinion that the provisions of the Proclamation cited above apply. Investigations and searches and seizure differ amply in size and nature. There may of course be cases where a single officer is necessary to enter and conduct a search and there may well be others where because of the nature of the investigation; the nature of the items sought; the size of the place to be searched, may require more than one or even 10 officers to conduct the search.

[78] In this regard, it must be stressed that in deciding the modalities required for the particular search to be conducted, that the persons in charge of the operation should constantly be alive to the provisions of s 25(1) of the Act, which requires that the search be conducted with strict regard for decency and order. Placing too many officers in a small house to conduct the search, may well violate this requirement. A proper balancing act between the

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<sup>14</sup> No. 37 of 1920.

numbers necessary and the decency and order required by the occupants should not be upset. An equilibrium in this regard must be struck.

[79] I am of the considered view that the mere number of the officers (16) does not *per se* indicate an abuse or a contravention of the provisions of s 25(1). Particulars of the size of the premises and the items identified for search, may be a useful indicator as to whether the equilibrium mentioned above has been disturbed. Each case should be viewed in the light of its own peculiar circumstances. In one case, three officers may be too many, where as in another 25 may be too few.

[80] I am of the considered view that in dealing with this argument, sight should not be lost of the provisions of s 24(3), which have the following rendering:

‘A person conducting an entry and search of premises under this Act may be accompanied and assisted by any other authorised officer or a police officer, or by any other person authorised by the Director for that purpose.’

This section appears to authorise the search and related activities being carried out by more than one person and to that extent, I am of the considered view that the applicants’ argument in this regard, has no support from the Act.

[81] I am not persuaded that the applicants have made a case for the finding that there was a violation in the instant case. Of course when even one and more so if many officers enter one’s house and sanctuary, so to speak, to conduct a search, there is a natural sense of anger, repulsion and revulsion that accompanies that invasive act. This is natural considering the sanctity and integrity of one’s castle, as it were. This must however, be viewed against the need to conduct investigations into allegations of crime which is permitted by law when done in the strict confines of the enabling legislation. I find that a case for the setting aside of the warrants in this respect has not been made out by the applicants.

Invalidity of search warrants – vague, overbroad and unintelligible?

[82] The last part of the applicants' point of assault, was the validity of the warrants of search that were authorised by the Magistrates. The applicants alleged that the said warrants were vague, overbroad and unintelligible and thus liable to be set aside therefor. Are they correct in this contention?

[83] Before undertaking this serious exercise of determining the validity and sustainability of the applicants' argument, it is necessary to first consider the basics that should inform the exercise. This is the approach that courts take to determining the validity of search warrants. In this regard, the quotations at the beginning of the judgment bear much resonance.

[84] The applicants, in their heads of argument, commenced with a very insightful quotation reproduced below;

'A search warrant is not some kind of mere "interdepartmental correspondence' or 'note'. It is, as its very name suggests, a substantive weapon in the armoury of the State. It embodies awesome powers, as well as formidable consequences. It must be issued with care, after careful scrutiny by a magistrate or justice, and not reflexively upon a mere "checklist approach'.<sup>15</sup>

[85] It must be mentioned in this regard, that because of its invasive nature and derogation it yields on a subject, courts interpret warrants very restrictively, and where possible, in favour of the subject. This is because the issuance and execution of a warrant, violates some rights and freedoms otherwise protected under the Constitution. It is for that reason that any authorisation of the issue and execution of a search warrant, must be closely and narrowly interpreted in order to arrest possible abuse by those in control of the levers of power.<sup>16</sup>

[86] It is fair to say that when one has regard to the applicants' complaints, they appear to be in two distinct categories. First, they complain about the very issue of the warrants, alleging that the Magistrates, who issued the

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<sup>15</sup> Heaney v S (A464/2015) [2016] ZAGPPHC 257 (19 April 2016) at paragraph 30

<sup>16</sup> Powell N.O. and Others v Van der Merwe and Others 2005 (1) SACR 317.

warrants, merely did so as a matter of course and routine and did not carefully scrutinise them. Secondly, the applicants complain about the manner in which the execution of the warrants was conducted. They claim that it smacked of abuse, fishing expeditions and raw abuse of power by the ACC investigators. I intend to start with the first.

[87] Is the attack on the manner in which the Magistrates dealt with the warrants justified in the circumstances? I am of the view that the starting point in returning an answer to this question, is the Act. Section 22(4)(a) and (b) of the Act reads as follows:

‘A judge or a magistrate to whom an application for a warrant is made in terms of subsection (3) may issue a warrant authorising entry and search of the premises concerned if it appears to the judge or magistrate from the information furnished that there are reasonable grounds for believing that –

- (a) a corrupt practice has taken place, is taking place, or is likely to take place; and
- (b) that anything connected with the investigation into that corrupt practice is on or in the premises.’

[88] I do not read the applicants to specifically challenge any aspect in this regard. In my reading, the applicants appear to claim that the warrants were overbroad in their terms. This is because the warrants, and I have read them all, authorise named authorised officers to enter and search named premises and where appropriate, name the owner thereof (being one or other of the applicants); they also mention the property to be search and seized – these include large sums of money, desktop computers, laptops, i-pads, memory sticks; cellular phones, documents, financial statements, to mention but a few.

[89] The possibly contentious portion of the warrants, as far as I could gather, is the last portion before the date and signature. In that portion, the warrant, authorises the named persons ‘to enter and search in accordance with sections 24 and 25 of the Anti-Corruption Act, 2003, between 6:00 and 18:00 the aforementioned premises and seize the mentioned items and any other items on the premises that may in the opinion of the authorised officers



have a bearing and be connected with the investigation into the said corrupt practices.' (Emphasis added).

[90] 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.

[93] In *Powell*, Cameron JA stated the general principles applicable to warrants of search. He stated, among other things that, 'If a warrant is too general, or its terms go beyond those the authorising statute permits, the Courts will refuse to recognise it as valid, and will set it aside.' As indicated, the possibly offensive portion discussed above, is provided for in the enabling statute and has not been attacked on the basis of its constitutionality. It therefor stands.

[94] Whatever misgivings one may harbour regarding the wide nature of the powers given to authorised officers by the above section, it is a fact that the matter before court is not for the said section to be declared unconstitutional for one reason or the other. The applicants question the exercise of the powers given to the Magistrates in authorising the issue of the warrants. In the event, it has been shown that the Magistrates duly complied with the statutory prescripts and they cannot, for that reason be faulted in my view.

[95] This is, however, not the end of the enquiry. The next issue to consider, is the complaint by the applicants that in the exercise of their powers imbued by s 22 of the Act, cited above, the authorised officers, in executing the warrants, went overboard, probably exploiting to the fullest extent, the words 'anything having a bearing on the investigation' appearing on face of the warrants.

[96] It must be stated that when one has regard to s 22, the court has to engage in a factual enquiry, namely whether the authorised officers in this case, properly exercised the powers and more importantly, that their opinion was based on correct and accurate facts, excepting an omnibus seizure that will allow them, at their leisure, to eliminate the unconnected seized items one by one.

[97] I am of the considered view that the proper exercise of the powers in this regard by the authorised officers should be gauged from the following factors (a) the nature of the allegations made by the authorised officers on affidavit, which lead to the issue of the warrant; (b) the charges preferred against the applicants; (c) the items authorised to be seized by the warrant and (d) the items not mentioned in the warrant but which were seized by the officers.

[98] An example in this regard would do. If a person is charged with corruption related to a tender, where he siphoned money from the State for instance and is alleged to have channelled the money into his bank account and that of his company and a warrant of search and seizure is authorised,

one would have regard to the nature of the charge and the allegations against him in order to determine whether the items seized have a sufficient bearing on the investigation. If the officers find and seize an old and dilapidated set of South African Law reports, from 1949 to 1980, would one come to a plausible view that the items seized have a bearing on the investigation? I think not.

[99] I am of the considered view that the items in question, from a close and proper reading of s 22, considering also that these sections must be restrictively interpreted, that the words 'on the investigation' must refer to the investigation that has caused the officers to apply for the issue of the warrant in question and no other. There must thus be a reasonable and rational nexus between the offences charged and the unlisted items that are eventually seized by the officers in terms of s 22 of the Act.

[100] The applicants' complaints in this case are numerous regarding the exercise of the powers by the officers and the rationality of the seizure of some items, regard had to the offences preferred, the items listed for search and seizure and the items eventually seized. I am of the considered view that the applicants' complaints are not unjustified and this will be apparent below.

[101] I have, in para 87, mentioned the items that were, in respect of most of the warrants issued, specifically mentioned in the body of the warrant. The inventories issued, however, show a worrisome trend in which some items were seized and would not, on the face of it, have 'a bearing on the investigation'. For instance, a financial magazine was seized, a firearm, Zimbabwean Dollars, which are no longer legal tender and some other inconsequential amounts of foreign currency were seized by the officers.

[102] The money seized, even in respect of the warrant, must in my view, have a substantial bearing on the 'large sums of money' the officers were specifically authorised to seize, if found. There were other items like cameras, a firearm and others that were taken and properly construed, they do not appear from an objective view, to have a bearing on the investigations relating to the alleged corrupt practices the applicants are alleged to be guilty of.

[103] I am of the considered opinion that this being a factual matter, it is not easy nor proper for the court, in these proceedings, to determine with the requisite standard of precision what items were seized that could have been a violation of the provisions of the Act in the regards I have mentioned. The items mentioned above, although they may appear to me and the applicants on first impressions, not to have a bearing on the investigations, the officers may have a full answer that may, if tendered, convince the court that the items seized, despite the court's earlier misgivings, do have a bearing on the investigation.

[104] To this end, I am of the considered view that it would have been helpful to the court and fair to the ACC respondents, for the applicants, in this part of the leg, to point out items that in their view, do not have a bearing on the investigations, naturally pointing to the conclusion that the officers' opinion, allowed by law, was flawed. Once these items are pointed out, the court could be properly placed in a position to make a judgment call, based on the correct information. In this regard, the court should be wary of making such judgment calls based on a paucity of information, in the absence of the full facts and rationalisation for the seizure.

[105] The 1<sup>st</sup> and 2<sup>nd</sup> applicants also complained about being 'abducted' by the ACC officers and forced to attend a search at their respective properties. In this regard, the applicants wrote and signed documents in which they waived their rights to be present during the proposed search. The ACC officers, after an agreement was reached between the said applicants' lawyers and a senior official at the ACC, to allow them their wish not to travel, having waived their rights to be present during the search, nevertheless took the said applicants against their will to the properties in question.

[106] I am of the view that persons who have been charged with offences, regardless of the seriousness thereof alleged, are not only bearers of rights to dignity but they also enjoy the right to presumption of innocence. The behaviour by the officers from the ACC in this regard, is despicable. The

applicants were treated in an undignified manner from the evidence before me. That is not, however, a basis on which the warrant for search may be set aside, having found that they survived the attacks levelled by the applicants. The affected applicants may, if so advised, pursue appropriate proceedings to redeem, to the extent possible, their dignity, which may have been assailed thereby.

[107] Another issue of complaint raised by the applicants, relates to the seizure for instance of their motor vehicles as a result of the warrants. The applicants complained that the ACC officers abused the warrants by seeking to attach items that would otherwise fall for attachment under the Prevention of Organised Crimes Act.<sup>17</sup> It is not necessary to make a ruling on this particular issue considering that it may also be a factual issue whether the officers have a reasonable belief that the said vehicles have a bearing on the investigations.

### Conclusion

[108] In the premises, it appears to me that save in the terms traversed in the judgment, the applicants' application should fail. It has not been shown that the warrants in issue are overbroad in the terms the Magistrates allowed, as alleged. Although the warrants may be said to be worrying in terms of the factual enquiry of the belief of the officer as to whether all the items seized had a bearing on the investigation, the applicants have not identified the items which cause spasms in their papers to enable the respondents to explain, thus placing the court in a proper position to make an appropriate finding.

### Costs

[109] It is now settled law that the issue of costs remains one within the court's discretion, which is to be exercised judicially, depending on the circumstances of the particular case. I am of the considered view that both parties have been successful and unsuccessful in parts of the case. For that

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<sup>17</sup> Act No 29 of 2005.

reason, it appears that the proper order to issue in the circumstances, is that each party is to pay its own costs.

### Commendation

[110] The court would like to express its profound gratitude to the respective sets of counsel who summoned their industry and diligence in assisting the court in dealing with this rather novel and challenging matter. That it was to be dealt with on urgency, and within stringent time limits, has added to the weight on the court's shoulders and which counsel alleviated considerably.

### Erratum

[111] In the process of reading the order this morning, I erroneously read from a previous draft which included an order that was to be removed. This was in relation to the applicants' being granted leave to file an application on papers duly amplified in relation to the execution of the warrants. The error is regretted.

### Order

[111] In the premises, the appropriate order to grant in this matter, is the following:

1. The Applicants' non-compliance with the Rules of Court, relating to service and time periods is hereby condoned and the matter is heard as one of urgency in terms of Rule 73 of this Court's Rules.
2. The application for the review and the setting aside of the warrants of search and seizure issued by the Magistrates in this matter, is hereby dismissed.
3. The application for the review and setting aside of the decision of the First, Second, Third, Fourth and Sixth Respondents, to execute the warrants is hereby refused.

4. The Respondents are ordered forthwith to return the documents relating to Investec Asset Management Namibia (Pty) Ltd, seized from Mr. James Hatuikulipi, in respect of which privilege was claimed, including any copies made of the said documents.
5. The Respondents are precluded from making use of the documents referred to in paragraph 4 above in any future proceedings.
6. There is no order as to costs.
7. The Registrar of this Court is ordered to forward a copy of this judgment to the Magistrates' Commission for same to be forwarded to all Magistrates in this jurisdiction.
8. The matter is removed from the roll and is regarded as finalised.

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T.S Masuku  
Judge

## APPEARANCES:

APPLICANTS: G. Narib (with him G. Kasper)

Instructed by: Murorua Kurtz & Kasper, Windhoek.

T. Chibwana (with him A. Shimakeleni)

Instructed by: Appolos Shimakeleni Lawyers, Windhoek.

RESPONDENTS: P.A Van Wyk SC (with him S. Makando)

Instructed by: The Office of the Government Attorney