REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2020/00281

In the matter between:

KRISTI NDESHIPEWA NANTINDA **1ST APPLICANT**

JACOB GEBHARD EBENEZER **2ND APPLICANT**

and

THE MINISTER: MINISTRY OF SAFETY AND SECURITY **1ST RESPONDENT**

THE INSPECTOR-GENERAL: NAMIBIAN POLICE **2nd RESPONDENT**

THE STATION COMMANDER: OKATOPE POLICE STATION **3RD RESPONDENT**

Neutral citation: *Nantinda v The Minister: Ministry of Safety and Security* (HC-MD-CIV-MOT-GEN-2020/00281) [2022] NAHCMD 450 (31 August 2022)

Coram: **GEIER J**

Reserved: Determined on the papers

Delivered: **31 August 2022**

Flynote: Delict – Liability – Liability of police – Whether state liable for the return of liquor seized in terms of Regulation 7(4) read with Regulation 7(1)(b) of the Stage

2 – State of Emergency COVID-19 Regulations per Government Gazette No. 7203 of 2020 – The framers of the regulations never intend that all stocks of liquor – that would – in the normal course of business be found in any liquor outlet - would simply become liable to seizure, without more. If that would have been intended the framers of the regulations could have easily said so, which they didn't. Some act or omission, i.e. some act of 'selling' or 'purchasing' would at least be required for the regulation to come into play. Such scenario was simply not given in the instant case as far as the first applicant's stock was concerned. Court accordingly finding that the first applicant's stock was unlawfully seized and had to be returned.

Delict – Damages for loss of profit – as a result the first applicant also claimed damages for loss of profits suffered as a result of the unlawful seizure of her liquor stocks – Court finding that the first applicant had failed to quantify such claim in the absence of an independent valuation of the stock by an expert, indicating at least that the values claimed for each respective item was fair and reasonable and/or market related. Court finding also that the profit margins should have been disclosed and that the total monthly income and expenditure should have been disclosed. As the first applicant had also not disclosed what expenses were deducted from the total income which calculation would then have indicated whether a profit or a loss was made the first applicant had failed to quantify this leg of her claim, which claim was thus refused.

a) Practice – Applications and motions – Dispute of fact – Approach of court – Established principles restated – Not designed to determine probabilities and illiquid claims – it remains incumbent on any litigant, at the outset of any intended litigation, to make the fundamental election whether or not to proceed by way of action or motion – and – that the election to proceed by way of motion always harbors the inherent possibility of the dismissal of the application, should a material dispute of fact have been foreseeable, save in those cases where motion proceedings are mandatory;

Rule 67 (1) – *In limine* objection raised that material disputes of fact where foreseeable and that the second applicant's resort to motion proceedings was thus

improper which should result in the dismissal of the claims – after an analysis of the issues court finding that material disputes of fact where indeed validly raised which could not be determined on the papers – the question thus arose whether or not the court should, in terms of Rule 76(1) refer the matter to trial or, secondly, direct, that oral evidence be heard on specified issues with a view to resolving the disputes of fact which had arisen in this case, or thirdly, whether the court, in its discretion, should dismiss the second applicant's application, should it find that when launching the application, the second applicant should have realised that a serious dispute of fact, incapable of resolution on the papers, was bound to develop. Court finding that the second applicant should have foreseen this – and after considering whether or not the first two options which so came to the fore should be resorted to, the court concluded that – in the circumstances – it was apposite to exercise its discretion against the second applicant in which circumstances then the second applicant's claims where dismissed with costs in accordance with the third available option.

Summary: The facts appear from the judgment.

ORDER

Ad the first applicant:

1. The seizure of the First Applicant's goods on 14 May 2020 is hereby declared unlawful.

2. The First, Second and Third Respondents are hereby directed to return the First Applicant's goods, as listed in Annexure FA-KNN1 within 30 (thirty) days of this Order.

3. The first applicant's claim for loss of profit is refused.

4. The First, Second and Third Respondents are to pay the First Applicant's costs of suit jointly and severally, the one paying the others to be absolved.

Ad the second applicant

5. The claims are dismissed with costs.

JUDGMENT

GEIER, J

[1] During the Covid pandemic members of the Namibian police force 'spotted a number of "*boys*" who were found to have liquor in their possession, namely two bottles of 750ml *Tassenberg* red wine.[1] When they asked the "*boys*" as to where they acquired the liquor from, the boys informed them "*that they … purchased (the) liquor at Omo Mini Market*", being the First Applicant's business.'

[2] The two bottles of *Tasssenberg* where confiscated in terms of Regulation 7(4)[2] read with Regulation 7(1)(b) of the Stage 2 and State of Emergency COVID-19 Regulations per Government Gazette No. 7203 of 2020 which prohibited the sale and purchase of liquor during that period.

[3] The *'boys'* were then taken to the *Omo Mini Market* which was at that point closed.[3] The Respondents relied on section 26 of the Criminal Procedure Act, 51 of 1977 ('the CPA') to enter the *Omo Mini Market*. The police officers were led to the Second Applicant who had been identified by 'the boys' as the person who had sold the liquor to them.[4] The Second Applicant apparently "*voluntarily verbally admitted to have sold the liquor to the boys after we had asked him if he had sold liquor to the boys*".[5] The second applicant was then arrested without a warrant in terms of section 40(1)(h) of the Criminal Procedure Act [6] .

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1 See paras. 5.1 to 5.3 of the Respondents' Answering Affidavit.

2 But such Regulations only permit seizure of liquor "*sold or purchased*".

3 See para. 5.6 of the Respondents' Answering Affidavit.

4 See para. 5.8 of the Respondents' Answering Affidavit.

5 See para. 5.8 of the Respondents' Answering Affidavit. Such an admission is inadmissible on the basis of section 217 of the CPA which requires an unequivocal admission of commission of an offence (a confession) to be in writing.

6 They must still prove that the arrest was appropriate and necessary.

[4] The police officers further seized all liquor found in the First Applicant's business as, according to them, they had a reasonable suspicion that same was being 'sold'.[7]

[5] The second applicant thereafter spent four days in custody before he was released by the Ondangwa Magistrate. His case was struck from the roll. Subsequently however he paid an admission of guilt fine in the amount of N$ 2000.00

[6] The scenario sketched above gave rise to two claims.

[7] The first applicant is seeking:

2. An order declaring the search and seizure of the First Applicant's goods on 14 May 2020 as unlawful.

3. An order compensating the First Applicant in the amount of N$25,000.00 being prospective profits loss on the sale of goods seized.

4. An order ordering the First, Second and Third Respondents' members to return the First Applicant's goods within 2 (two) days of the Court Order.

5. Costs of suit.

[8] The second applicant is seeking:

1. An order declaring the Second Applicant's arrest and detention as unlawful.

2. Compensation to the Second Applicant in the amount of N$100,000.00.

3. Costs of suit.

[7] See para. 5.11 of the Respondent's Answering Affidavit.

[9] The claims where uncharacteristically instituted by way of motion proceedings and where opposed by the respondents on the merits. It will further have been noted that both applicants, in addition to declaratory relief, also seek 'compensation'. This elicited a point *in limine* that the applicants' resort to motion proceedings, in the circumstances, was inappropriate.

The first applicant's claims

Was the first applicant's stock unlawfully seized?

[10] It is clear in this regard that essentially this claim was instituted on the basis that the first applicant's stock was inappropriately seized and confiscated in terms of the relied upon Regulation 7(4)[8] read with Regulation 7(1)(b) of the Stage 2 and State of Emergency COVID-19 Regulations per Government Gazette No. 7203 of 2020.

[11] It is further clear from the factual matrix set out above and from the answering papers that the respondents' case is that the regulations prohibited the sale of liquor, that the stock was 'sold', as was evidenced by receipts found in the till of the Mini Market, as annexed as 'A1 – A12'. In any event, so it was contended, it was common cause, that the two bottles of *Tassenberg* had been sold in contravention of the regulations. As regulation 7(4) expressly empowered the law enforcement agencies to seize liquor, which was sold in contravention of the regulations without a warrant, the first applicant's stock was seized lawfully.

[12] On behalf of the first applicant the point was taken that in this regard the respondents had not raised a good defence as the regulation only authorised the confiscation of liquor which was suspected as having been *'sold'* or *'purchased'* and while that held true for the two bottles of *'Tassenberg'*, this did 'not apply to all liquor found at the *Omo Mini Market*.

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[8] But such Regulations only permit seizure of liquor "*sold or purchased*".

[13] The respective cases will thus have to be determined with reference to regulation 7(4). It provides that

'(4) An authorised officer who is a peace officer within the meaning of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) may, without a warrant, seize any liquor that is suspected to have been sold or has been purchased in contravention of this regulation and the seized liquor must, subject to changes required in the context, be dealt with in accordance with the provisions of the Liquor Act, 1998 (Act No. 6 of 1998) as if it were liquor seized in terms of that Act.' (my underlining)

[14] It was contended further that the regulation does not apply to stock on which, in any event, a notice[9] had been placed that it was not for sale.

[15] This contention must be correct. The framers of the regulations did surely never intend that all stocks of liquor - that would - in the normal course of business be found in any liquor outlet - would just simply become liable to seizure, without more. If that would have been intended the framers of the regulations could have easily said so, which they didn't. Surely some act or omission, ie. some act of 'selling' or 'purchasing' would at least be required for the regulation to come into play. Such scenario was simply not given in the instant case as far as the first applicant's stock was concerned.

[16] It so becomes apparent, that while the police officers in question, had a case in respect of two bottles of red wine, in the sense that they found the 'boys' in contravention of the regulations, they simply had no business in- or authority for confiscating the first respondent's liquor stocks without anything more. Also the relied upon till slips/receipts take the respondents' case no further. At best these receipts would/could have pointed to the fact that unrelated 'sales' and 'purchases' of liquor might have occurred – the beginning point of a possible investigation – at best – but surely - it would have been most unlikely that such liquor would still be found on the premises of the *Omo Mini Market* or would still constitute 'stock' once sold.

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[9] on the first applicant's version.

[17] It so becomes apparent that the respondents indeed did not raise a good defence in regard to this part of the case in respect of which I believe that the other legs of the first respondent's case, in view of the above core finding, no longer require determination and from which the conclusion must be drawn that the first applicant's stock was unlawfully seized and must be returned.

Did the first applicant suffer a loss of profit?

[18] It follows also that the first applicant, having unlawfully been deprived of stock, could very possibly have suffered a loss of profit as a result.

[19] The first applicant's case in this regard is that, in total, liquor to the value of some N$ 73 109.47 was confiscated, which would 'on average' have raised a profit of N$ 25 000.00 or more. If regard is had to the answering papers this particular aspect was denied with reference to annexure 'B'. Annexure 'B' is a handwritten list of various items of liquor to which no particular value for each item was assigned. The annexure however reflects a total value of N$ 53 673.04. How this amount was arrived at and who calculated the total, with reference to what, does not appear from the respondents' papers. An inventory, of the seized liquor, which was apparently drawn up at the time of the confiscation, was however not produced by any party. It appears that the evidence advanced by the respondents in this regard has no probative value and thus cannot raise a real dispute of fact incapable of resolution in motion proceedings. The first applicant's case thus stands essentially uncontradicted in this regard.

[20] Damages may be claimed in undefended motion proceedings, a weekly occurrence in our residual courts, but even then expert evidence will be required. The first applicant's quantification, even as proprietor, can thus simply not be accepted at face value. The stock should have been valued by an (independent) expert, indicating at least that the amounts reflected in 'FA-KNNI' for each item are fair and reasonable and/or market related. The profit margin should have been disclosed. The total monthly income was also not disclosed. The total monthly expenses are not disclosed and it was not disclosed what expenses were deducted from the total income. The first applicant's papers should have contained the

necessary calculation showing the difference between the total expenses and the total income, which calculation would then have indicated whether a profit or a loss was made. All this was not disclosed. Not much more needs to be said, save to say that the first applicant has woefully failed to quantify this leg of her claim.

Was the second applicant's resort to motion proceedings appropriate?

[21] It will already have been noted that this aspect was raised on behalf of the respondents as an *in limine* objection.

[22] The court was referred to *Shangadi v Andreas (*A 03/2014) [2019] NAHCMD 428 (4 October 2019) where Masuku J had occasion to deal with a similar objection. He summed up the position as follows :

'[24] The applicable rule to cases where a dispute of fact may be said to exist, is rule 76(1), which is quoted below. It reads as follows

> "Where an application cannot properly be decided on the affidavits the court may dismiss the application or make any order the court considers suitable or proper with the view to ensuring a just and expeditious decision and in particular, but without affecting the generality of the foregoing, it may –
>
> > (a) Direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or her or any other person to appear personally or grant him leave for him or her or any other person to be subpoenaed to appear and to be cross-examined as a witness; or
> >
> > (b) Refer the matter to trial with appropriate directions as to pleadings, definition of issues or any other relevant matter'.

[25] On an accurate reading of the above rule, it is evident that the provision confers a discretion on the court in applications involving serious factual disputes. As in all other cases, such a discretion must be exercised judicially and in tune with the justice of the particular case. What appears dominant from the rule is that the court should, as far as

possible, ensure a just and speedy resolution of the dispute. Options at the court's disposal where a dispute arises, include dismissing the application; referring it or certain portions of it to oral evidence or referring the entire matter to trial.

[26] In *Mahe Construction (Pty) Ltd v Seasonaire,*[10] the Supreme Court articulated itself on this discretion as follows:

> "Obviously the cases stress the fact that an applicant must be so aware at the launching of the application because that is a factor which the Court would consider in the exercise of its discretion in regard to what further steps should be taken and could also possibly influence the order of costs made by the Court. If an applicant was not so aware at the launching of the application and could also not reasonably foresee that a dispute would develop then an applicant cannot be blamed for proceeding by way of motion and the Court, instead of dismissing the application, may take other steps."

[27] Our deep-rooted and entrenched principle in motion proceedings is that a party will stand or fall by its papers, which means that the affidavits, which are both the pleadings and the evidence, must make out a case for the relief sought by the respective parties.[11] Therefore it is imperative that when the applicant makes an election to proceed by way of application that he or she must only do so if he or she does not, reasonably foresee genuine disputes of fact arising on the affidavits.

[28] In *National Director of Public Prosecutions v Zuma* [12] at para 26 stated that

> "Motion proceedings, unless concerned with interim relief are all about the resolution of legal issues based on common-cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities"[13].

[29] It is therefore safe to say that where disputes of fact are foreseen, the safer course for the applicant to adopt, is to proceed by way of action proceedings so that the parties'

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10 *Mahe Construction (Pty) Ltd v Seasonaire* 2002 NR 398 (SC) at 408 A.

11 *Mbanderu Traditional Authority and Another v Kahuure and Others* 2008 (1) NR 55 (SC); *Nelumbu and Others v Hikumwah and Others* 2017 (2) NR 433 (SC).

12 *National Director of Public Prosecutions v Zuma* 2009 2 All SA 243 (SCA)

13 *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 at 290 para 26.

respective versions can be tested under cross-examination. That explains the statement that application proceedings are designed for the resolution of common cause facts[14].'

[23] The argument in support of the objection was then generally that the use of motion proceedings in this instance was improper in so far as there exist material disputes of fact which cannot be properly decided in these proceedings. Some of these where then listed and with reference to which it was then submitted that the case should be dismissed with costs,

[24] On behalf of the applicants it was strenuously contended that this was not so as there was no genuine dispute of facts and that accordingly the real issues could be determined on the papers and which would enable the court to determine whether or not the search and seizure was lawful and particularly, as far as the second applicant was concerned, whether or not his arrest and detention was unlawful. Interestingly it was submitted that the court would then be in the position to order compensation.

[25] Reliance was placed on *Minister of Police and Another v SA Metal and Machinery Company (Pty) Ltd* 2015 (1) SACR 107 (SCA) where the court had stated:

'[12] As to the appropriateness of motion proceedings in a claim under the *actio ad exhibendum*, reference may be made to the decision of this court in *Cadac (Pty) Ltd v Weber-Stephen Products Co and Others* 2011 (3) SA 570 (SCA) where Harms DP said the following:

> "The first issue to decide is whether the proceedings launched by *Cadac* for an inquiry into damages is competent because, as was argued by Weber-Stephen, it is not at all permissible to bring an illiquid claim by means of motion proceedings. This much was said by Murray AJP in *Room Hire*.[15] The main reason for the statement is, in general terms, unobjectionable. It is that motion proceedings are not geared to deal with factual disputes — they are principally for the resolution of legal issues — and illiquid claims by their very nature involve the resolution of factual issues.'[16]

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14 *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 at 290 para 26.
15 *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).
16 Paragraph 10.

[13] Three paragraphs later in the judgment Harms DP continued:

> "I cannot see any objection why, as a matter of principle and in a particular case, a plaintiff who wishes to have the issue of liability decided before embarking on quantification, may not claim a declaratory order to the effect that the defendant is liable, and pray for an order that the quantification stand over for later adjudication. It works in intellectual property cases, albeit because of specific legislation, but in the light of a court's inherent jurisdiction to regulate its own process in the interests of justice — a power derived from common-law and now entrenched in the Constitution (s 173) — I can see no justification for refusing to extend the practice to other cases.
> . . .
> Once the principle is accepted for trial actions, there is no reason why it cannot apply to application proceeding. In *Modderklip*, which was brought on notice of motion, this court issued an order for the determination of the quantum of damages based on the formulation used in Harvey Tiling.'[17]

On the issue of the quantum of damages the court below held that because there was no bona fide dispute as to the value of the goods it saw no reason why it 'cannot entertain the claim in these application proceedings'. We agree.'

[26] Before then turning to a closer examination of the issues I believe that some comment on the above would be in order, namely :

a) that there can be no issue with the in principle finding made in *Cadac* that, '… as a matter of principle and in a particular case, a plaintiff who wishes to have the issue of liability decided before embarking on quantification, may not claim a declaratory order to the effect that the defendant is liable, and pray for an order that the quantification stand over for later adjudication…';[18]

b) that this is however not the position in this case where both applicants also seek the quantification of their claims in the current proceedings;

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[17] Paragraphs 13 – 14.

[18] Compare incidentally *Mineworkers Union of Namibia v Namdeb Diamond Corporation (Pty) Ltd* (HC-MD-LAB-MOT-GEN-2020/00227) [2022] NALCMD 33 (8 June 2022) at [24][d].

c) that the point of departure remains that '… motion proceedings are not really geared to deal with factual disputes — they are principally for the resolution of legal issues — and that illiquid claims, by their very nature, usually involve the resolution of factual issues;'

d) that this general principle is not of application in undefended illiquid claims, or in situations where the underlying facts are common cause for instance. After all such claims are regularly entertained in the residual courts, provided that the damages claimed are properly quantified and supported, where necessary, by suitable expert evidence;

e) that it remains incumbent on any litigant, at the outset of any intended litigation, to make the fundamental election whether or not to proceed by way of action or motion – and – that the election to proceed by way of motion always harbors the inherent possibility and risk of a dismissal of the application, should a material dispute of fact have been foreseeable, save in those cases where motion proceedings are mandatory;

f) that generally the basic principles set in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) are still of application and which Murray AJP formulated as follows:

'It is obvious that a claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist. In that event (as is indicated infra) the Court has a discretion as to the future course of the proceedings. If it does not consider the case such that the dispute of fact can properly be determined by calling viva voce evidence under Rule 9, the parties may be sent to trial in the ordinary way, either on the affidavits as constituting the pleadings, or with a direction that pleadings are to be filed. Or the application may even be dismissed with costs, particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the Court to apply Rule 9 to what is essentially the subject of an ordinary trial action.

The crucial question is always whether there is a real dispute of fact. That being so, and the applicant being entitled in the absence of such dispute to secure relief by means of affidavit evidence, it does not appear that a respondent is entitled to defeat the applicant merely by bare denials such as he might employ in the pleadings of a trial action, for the sole purpose of forcing his opponent in the witness box to undergo cross-examination. Nor is the respondent's mere allegation of the existence of the dispute of fact conclusive of such existence.'[19]

[27] With these principles in mind I now turn to the determination of whether or not a real dispute of facts exists in this matter.

[28] In this regard it will already have emerged that the resolution of the dispute as far as the first applicant's case was concerned, did not pose an obstacle to the resolution of that part of the case, mainly because of the respondents' misplaced reliance on the Covid regulations, ultimately a legal issue. This resolution thus narrows the enquiry.

Do the raised disputes between second applicant and the respondents constitute 'real disputes of fact'?

[29] The second applicant however seeks a declarator to the effect that his arrest and detention was unlawful. He also seeks compensation therefore in the amount of N$ 100 000.00.

[30] In support of this cause of action it appears from the founding papers that it is alleged that :

'a) as the first and second respondents' police officers where not there when the offence was committed they could not have arrested the second applicant on a Schedule 1 offence (in terms of the Criminal Procedure Act) without a warrant of arrest;

b) the arrest and detention of the second applicant was arbitrary and not reasonably necessary given the fact that there were no facts suggesting that the applicant will not turn up at court if he were to be given a summons, warning or notice;

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19 *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* at p1162H to 1163A.

c) there was no reasonable suspicion that the second applicant had committed any offence;

d) it was unconstitutional for the first and second respondents members to arrest and detain the second applicant on the allegations that he sold liquor to certain individuals while at the same time acting for and on behalf of an employer (first applicant) even if there was a reasonable suspicion which is denied;

e) the second applicant's arrest was arbitrary and inconsistent with both Articles 7 and 11 of the Namibian Constitution.'[20]

[31] These allegations elicited the following response:

' … The second applicant sold the liquor to the public during Stage 2; State of Emergency and in contravention of the Covid 19 Regulations prohibiting the sale of liquor. Secondly the second applicant's voluntary admission of selling alcohol to the boys who led us to the first applicant's business premises as well as the receipts lawfully obtained from the cashier machine found at the premises is evidence that the second applicant wilfully and deliberately disregarded the Covid 19 Regulations put in place at the time. I therefore deny the allegation that the liquor was not for sale as alleged by the first applicant and submit that the second applicant sold liquor during Stage 2 Covid 19 State of Emergency. I admit that the doors of the first applicant's premises where closed upon our arrival at the said premises. I however reiterate that access and entry was granted wilfully and without resistance from the second applicant and his female colleague, all employees of the first applicant, who occupied the said premises at the time and whom we had reasonable suspicion to believe could furnish us with information regarding the allegations regarding the selling of liquor during the State of Emergency period. Furthermore such entry was in compliance with section 26 of the Criminal Procedure Act. My colleagues and I knocked on the closed doors and we were granted access and entry freely there was therefore no violation of Article 13 of the Namibian Constitution as alleged by the first applicant.

Save to admit that my colleagues and I did not have a warrant of search and seizure, I reiterate that since my colleagues and I had a reasonable suspicion that liquor was sold at

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[20] Compare founding papers at paras 19 to 19.5.

the first applicant's business by her employee the second applicant during the Stage 2 Covid 19 State of Emergency a warrant was not required to execute the seizure. …

Save to admit that I arrested the second applicant without warrant I deny that such arrest and detention was unlawful, arbitrary and unreasonable as alleged by the applicants. I submit that there was probable and reasonable cause to arrest the second applicant and that such arrest was just, lawful and necessary. I reiterate that I lawfully arrested the second applicant without a warrant and that such arrest was executed within the confines of the law. I further submit that I was permitted in terms of section 40(h) of the Criminal Procedure Act to arrest the second applicant without a warrant as I had reasonable suspicion that he had committed an offence under the governing the supplying of intoxicating liquor. Regulation 7 of the Covid 19 regulations which provided for the prohibition relating to liquor is a law which governed the supply of intoxicating liquor during Stage 2 Covid 19 State of Emergency. I reiterate that the second applicant voluntarily admitted selling liquor during the State of Emergency … cash receipts obtained from the cash machine further proved my suspicions that liquor was sold by the second applicant …'.[21]

[32] After making further factual allegations relating to the circumstances of the second applicant's arrest and detention it was contended that the second applicant was, as is required by the Constitution, Article 11, brought before a court within 48 hours and that the arrest and detention was thus not in contravention of any constitutional provisions.[22]

[33] Contrary to this the second applicant maintained that he was detained in horrific conditions at the Okatope Police station for four days when it would have been reasonable to have brought him to court earlier. It was reiterated that he had been arrested without warrant when it was not necessary to have him arrested and that the requirements pertaining to such arrest in terms of the CPA and the common law had not been complied with.[23] These aspects – such as how the applicable 48 hour period would have to be calculated and allegations relating to the conditions at the Okatope Police station - where in turn denied.[24]

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21 Compare paras 11 to 12 of the answering affidavit.
22 Compare para 16 of the answering affidavit.
23 Compare para 22 of the founding affidavit.
24 Compare par 25 of the answering papers.

[34] In reply the following further aspects were denied in turn by the applicants:

a) that the relied upon section 26 of the CPA was not applicable;

b) that Article 13(a) and (b), as read with section 22 of the CPA was not complied with;

c) that the after hour search was not in compliance with the law and was in conflict with requirement that searches should be conducted during the day;

d) that the consent for entry to the premises could not be given by lowly-ranked employees;

e) the commission of any offence under the regulations was denied;

f) the fact that the 'boys' purchased liquor at the Omo Mini Market was denied;

g) that the second applicant could never admit selling liquor in his private capacity as he works for the business; an admission could thus not be made on behalf of the business;

h) that the second applicant could never have admitted to selling liquor to the 'boys', which admission would amount to a confession which did not comply with section 217(1)(a) and (b) of the CPA;

i) that in regard to the respondents reliance on section 40(h) of the CPA as read with the Covid regulations it was denied that any reasonable suspicion that the second applicant had committed an offence in his own right could be harboured as he acted for the business;

j) that the arresting office had to apply his mind whether an arrest was appropriate and necessary to ensure that the second applicant would appear in court and that the failure to consider this was fatal;

k) that the reliance on section 23(a) does not avail the respondents;

l) that the officers in question where always under an obligation to obtain a warrant;

m) that the second applicant actually sold liquor to the public and that he did not sell on that day or the day before;

n) just because a period of 48 hours was available to the respondents to take the second applicant to court did not mean that they could wait to the last minute to do so;

o) that there was no explanation why the second applicant was not taken to court on the Friday;

p) that no facts where placed before the court that proved on a balance of probabilities that the second applicant's arrest had been lawful.[25]'

[35] It is against this background that it will have to be determined whether the summed up disputes constitute 'real disputes of fact'.

[36] If regard is had to *Herbstein & Van Winsen 'The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa'* 5th Ed Vol 1 by Cilliers, Loots & Nel a real dispute of fact arises for instance in the following circumstances :

> 'a) when the respondent denies material allegations made on the applicant's behalf and produces evidence to the contrary;

b) the court should follow a so-called 'robust approach, usually in circumstances where the denials are 'hollow or bald' or when entertaining a version that is 'wholly fanciful and untenable';

c) when a respondent admits certain evidence but alleges other facts which the applicant disputes.'

[37] The above summary is not intended to be conclusive. It was merely intended to provide some guidance against which the determination of the *in limine* point should occur.

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[25] Compare generally para's 7, 10 and 13 of the replying affidavit.

[38] In the first instance and given these guidelines and on a simple consideration of the issues identified above it can surely be said generally that :

a) the respondents have denied the material allegations made by the applicants;

b) they have not just relied on bare denials;

c) the denials don't appear to be male fide or totally untenable;

d) the respondents have most certainly endeavored to produce positive evidence to the contrary;

e) the respondents admitted certain facts, which the applicants dispute, as appears particularly from the reply.

[39] It has appeared further that at the core of the second applicant's case is the contention that he was arbitrarily and unlawfully arrested, that it was not reasonably necessary to arrest him as there were no facts suggesting that the second applicant will not turn up at court if he were to be given a summons, warning or notice and that there was no reasonable suspicion that the second applicant had committed any offence. These notions were resisted.

[40] In addition it becomes immediately clear that certain core issues certainly cannot satisfactorily be determined simply on a robust approach or without the aid of oral evidence. These are for example :

a) whether the 'boys' actually purchased liquor at the Omo Mini Market, which was the trigger event, which was denied;

b) whether or not the second applicant actually sold liquor to the 'boys';

c) whether or not the second applicant actually sold liquor to the public;

d) whether or not the second applicant did not sell liquor on that day or the day before;

e) whether or not access to the *Omo Mini Market* was granted voluntarily;

f) whether the alleged consent for entry to the premises could not be given by lowly-ranked employees;

g) whether or not any reasonable suspicion that the second applicant had committed an offence in his own right could be harboured;

h) whether or not any reasonable suspicion that the second applicant had committed an offence in his own right could be harboured as he acted for the business;

i) whether or not the respondents reliance on section 40(h) of the CPA as read with the Covid regulations was misplaced;

j) whether or not the commission of any offence under the regulations had been committed, which was denied;

k) whether the second applicant admitted selling liquor in his private capacity as he works for the business; an admission could thus not be made on behalf of the business;

l) whether the second applicant admitted selling liquor as an accomplice or accessory;

m) whether or not the second applicant could ever have admitted to selling liquor to the ‘boys’,

n) whether or not this admission would amount to a confession which had to- but did not comply with sections 217(1)(a) and (b) of the CPA;

o) whether or not the second applicant was arbitrarily arrested and unduly detained;

p) whether or not it would have been reasonable to have brought him to court earlier, ie. on the Friday instead of the Monday;

q) whether or not the conditions at the Okatope police station where 'horrific'?;

r) what the impact the admission of guilt and payment of a fine of N$ 2000.00 by the second applicant on all this would be.

[41] From the above a clear picture emerges in my view, namely that, indeed, a material dispute of fact has arisen in this instance, which cannot properly be decided on affidavit. This finding in turn brings to the fore a number of possibilities.

The court's discretion

[42] In the first instance the question arises whether or not the court should, in terms of Rule 76(1), refer the matter to trial or, secondly, direct, that oral evidence be heard on specified issues with a view to resolving the disputes of fact which have arisen in this case, or thirdly, whether the court, in its discretion should dismiss the second applicant's application, should it find that when launching the application, the second applicant should have realised that a serious dispute of fact, incapable of resolution on the papers, was bound to develop.

[43] In regard to the first possible two scenarios it was noted that the first applicant in her replying affidavit half-heartedly threatened that *' … to the extent that there is a genuine dispute of facts an application will be made for the proceedings to be transformed into a trial*.'[26] The threatened application was however never brought. The threatened application was still not brought once it must have been realised that this possibility should be catered for as the *in limine* objection in this regard was persisted with, which must have become clear, at the latest, on a consideration of the heads of argument filed on behalf of the respondents. Also the heads of

[26] Compare par 5 of the replying affidavit.

argument filed on behalf of the applicants were silent in this regard. It must be deduced therefore that such an application was never seriously contemplated.

[44] What therefore comes to the fore is the consideration of the third possibility and with it whether or not the court, in its discretion, should dismiss the second applicant's application. In such scenario it becomes incumbent on the court to consider whether or not, when launching the application, the second applicant should have realised that a serious dispute of fact, incapable of resolution on the papers, was bound to develop.

[45] There are two aspects which are indicative of the conclusion that the second applicant should indeed have realised that this possibility was likely to occur :

a) the first aspect appears from the requisite notice that had to be given in terms of section 39 the Police Act. Such notice was duly given as is evidenced by annexure 'FA-KNN4'. The court was unfortunately not informed whether a response was received in this regard and if so what the tenor of the response was. Legal proceedings where however threatened and instituted thereafter from which it must at the very least be inferred that the respondents, after investigation, were not in agreement with the allegations made in the letter and that the threatened legal proceedings would be opposed. It needs to be taken into account in this regard that it has been held that the purpose of the section 39 notice is to afford the defendant sufficient opportunity to investigate the claim in order to react thereto appropriately.[27] This opportunity was given and did obviously not elicit a favourable response.

b) Secondly it appears from the founding papers that at a time[28] prior to the launching of the application[29] - the third respondent agreed to the release of the confiscated goods on condition that the second applicant pay an admission of guilt fine of N$ 2000.00, which promise was not kept despite the payment of the fine.

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[27] See for instance *Simon v Administrator-General,* SWA 1991 NR 151 (HC) (1992 (2) SA 347).

[28] During 16 to 20 June 2020.

[29] The application was launched during August 2020.

[46] Faced with such an opponent and given such non-committal stance the second applicant should have expected opposition and thus should have thought twice before resorting to motion proceedings. Material disputes where surely foreshadowed and should have been foreseen against this background. Given the above scenario the second applicant should thus have been aware and should thus have realised this when launching his application particularly also in circumstances in which he wished to enforce an illiquid claim and in respect of the attendant risks, he would surely have been warned by- and received appropriate advice from his legal practitioners.

[47] It is with these considerations in mind that I deem it proper to exercise my discretion against the second applicant in which circumstances I then find that it is also apposite to dismiss his claims with costs.

[48] In the result the following orders are made :

Ad the first applicant:

1. The seizure of the First Applicant's goods on 14 May 2020 is hereby declared unlawful.

2. The First, Second and Third Respondents are hereby directed to return the First Applicant's goods, as listed in Annexure FA-KNN1 within 30 (thirty) days of this Order.

3. The first applicant's claim for loss of profit is refused.

4. The First, Second and Third Respondents are to pay the First Applicant's costs of suit jointly and severally, the one paying the others to be absolved.

Ad the second applicant

5. The claims are dismissed with costs.

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H GEIER

JUDGE

APPEARANCES:

APPLICANTS:	S. Namandje Sisa Namandje & Co. Inc., Windhoek.
RESPONDENTS:	NOM Shikongo Office of the Government Attorney, Windhoek