



REPORTABLE

CASE NO: SA 67/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NAMIBIAN COMPETITION COMMISSION

Appellant

and

PUMA ENERGY NAMIBIA (PTY) LTD

Respondent

Coram: SHIVUTE CJ, DAMASEB DCJ and SMUTS JA

Heard: 6 July 2020

Delivered: 8 September 2020

Summary: The High Court set aside, with costs, an *ex parte* order granted in terms of section 34(1), (2) and (3) of the Competition Act 2 of 2003 (the Act) in favour of the Competition Commission (the Commission) against the respondent (Puma Namibia) by a different judge of that court. The *ex parte* order was set aside on the ground that an employee of the Commission who applied for it in chambers was incompetent to seek such an order as in terms of s 34(3) of the Act only an 'inspector' appointed in terms of s 14 of the Act was competent to apply for such an order.

On appeal to the Supreme Court, the Commission argued that the High Court misdirected itself in finding as it did, as on a 'purposive' interpretation of the Act, the Commission's power of investigation of suspected abuse of a dominant position contrary to s 26 of the Act, included a power to seek a search and seizure warrant and that the Commission therefore lawfully delegated that power to its secretary.

Held that the High Court correctly concluded that the power to seek search and seizure could only lawfully be applied for by an inspector appointed in terms of s 14 of the Act, because (a) at common law a power can only be exercised by a functionary in whom it is vested and (b) 'purposively' interpreting the relevant provisions to imply such a power in the Commission's main power of investigation of prohibited conduct under Parts I and II of the Act will disturb a 'fundamental feature' of the Act and undermine clear legislative intent. Appeal therefore dismissed, with costs.

APPEAL JUDGMENT

DAMASEB DCJ (SHIVUTE CJ and SMUTS JA concurring):

Introduction

[1] The central issue in this appeal concerns who has the power under the Competition Act 2 of 2003 (the Act) to seek a warrant of search and seizure from a judge of the High Court, in furtherance of the Competition Commission's (the Commission) power to investigate suspected abuse of a dominant position under Part II of Chapter 3 (Abuse of Dominant Position) of the Act.

[2] Section 26(1) of the Act prohibits 'Any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market in Namibia, or part of Namibia. . .'. In terms of subsec (2) of s 26, abuse of a dominant position includes:

- '(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) . . .
- (c) applying dissimilar conditions to equivalent transactions with other trading parties . . .'

[3] Section 33(1) of the Act authorises the Commission either on its own initiative or upon receipt of information or complaint from any person to start an investigation into any conduct or proposed conduct which is alleged to constitute abuse of a dominant position. In furtherance of the Commission's power of investigation under s 33(1), s 34(1), (2) and (3) of the Act authorises 'an inspector'¹ to enter and search premises of suspect undertakings but only with a warrant granted by a judge.

[4] In September 2016, a search and seizure warrant was executed by officials of the Commission on two premises (the premises) of the respondent (Puma Namibia) on the authority of an order granted *ex parte* by a judge of the High Court (the *ex parte* order).

[5] According to Puma Namibia, the *ex parte* order was invalidly obtained by an official of the Commission who was not legally competent to do so. The assertion is that only an inspector appointed in terms of s 14 could apply for a search and seizure warrant under the Act.

¹ In terms of s 14(1) of the Act, the Commission may 'designate' any of its employees or appoint 'any other suitable person' to be an inspector for the purposes of the Act.

[6] It is common cause that the warrant was obtained by the acting secretary to the Commission (the acting secretary). According to the Commission, he was lawfully delegated to seek the warrant and that, at all events, the Commission had the power to seek such an order.

[7] The power of search and seizure is contained in s 34 of the Act. The outcome of the appeal turns on the proper interpretation of that provision. The relevant part of the section reads as follows:

'Entry and search of premises

34 (1) For the purpose of assisting the Commission to ascertain or establish whether any undertaking has engaged in or is engaging or is about to engage in conduct that constitutes or may constitute an infringement of the Part I or the Part II prohibition, an inspector may –

- (a) enter upon and search any premises;
- (b) search any person on the premises if there are reasonable grounds for believing that the person has personal possession of any document or article that has a bearing on the investigation;
- (c) examine any document or article found on the premises that has a bearing on the investigation;
- (d) request any information about any document or article from –
 - (i) the owner of the premises;
 - (ii) the person in control of the premises;
 - (iii) any person who has control of the document or article; or
 - (iv) any other person who may have the information;

- (e) take extracts from, or make copies of, any book or document found on the premises that has a bearing on the investigation;
- (f) use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to –
 - (i) search any data contained in or available to that computer system;
 - (ii) reproduce any record from that data; and
 - (iii) seize any output from that computer for examination and copying; and
- (g) attach and, if necessary, remove from the premises for examination and safekeeping anything that has a bearing on the investigation.

(2) Subject to subsection (8), an inspector may not enter upon and search any premises unless the inspector obtains a warrant authorising such entry and search in accordance with subsection (3).

(3) If a judge of the Court is satisfied, upon application made on oath or affirmation, that there is reasonable ground for believing that it is necessary, in order to ascertain or establish whether any person has engaged in or is engaging or is about to engage in conduct that constitutes or may constitute an infringement of the Part I or the Part II prohibition, for an inspector to exercise the powers conferred by subsection (1), the judge may grant a warrant authorising an inspector to exercise those powers in relation to any premises specified in the warrant.' (Emphasis supplied.)

Factual background

[8] It is common cause that in the supply of aviation fuel, Puma Namibia is in a dominant position as contemplated in Part II of the Act. The Commission received a complaint during March 2016 from the Aircraft Owners and Pilots Association of Namibia alleging that Puma Namibia was abusing its dominant position by charging

excessive prices for aviation fuel at the Eros and Ondangwa airports, in contravention of s 26 of the Act.

[9] The essence of the complaint was that the prices for aviation fuel charged by Puma Namibia are above the prices charged by other suppliers of the same product and appear to be unreasonable considering the input factors such as transportation cost. In addition, the prices charged by Puma Namibia allegedly bear no reasonable relation to the economic value of the product.

[10] The Commission initiated an investigation into the complaint and, through the acting secretary, applied *ex parte* for a search and seizure warrant in respect of Puma Namibia, purportedly in terms of s 34 of the Act. The application was supported by a founding affidavit deposed to by the acting secretary, Mr Vitalis Ndalikokule.

[11] In relevant part, the acting secretary alleged that he was:

'Duly authorized, in terms of a delegation of authority of the [Commission] . . . As such I am able to depose to this affidavit, and to bring this application for a warrant in terms of section 34 of the Competition Act . . . on behalf of the [Commission].'

[12] It is common cause that the acting secretary was not 'designated' as an inspector as contemplated in s 14 of the Act.

[13] The 'delegation of authority' which was executed in August 2012 reads in part as follows:

'The powers to investigate in terms of section 16(1)(f) and section 33 read with Rule 4 of the Competition Act and Rules be delegated to the Office of the Secretary to the Commission and that the adjudicative role continue to vest in the Board of Commissioners.'

[14] Rule 4 of the rules² (rule 4) made pursuant to the Act authorises the Commission to 'in writing assign any function of the Commission to a member of the staff of the Commission, either generally or in connection with a particular matter.' The underlying premise is that by this 'delegation' the acting secretary was delegated to apply for a search and seizure warrant.

[15] An explanatory background to the 'delegation' states that the delegation was necessary to separate the Commission's 'investigative' power under s 16³ from the adjudicative power under s 33 as the fusion of the two 'violates the common law principle of . . . 'no man can be judge in his own cause'.

[16] As will become clearer during the course of this judgment, the approach adopted by the Commission in the present case is that the 'delegation' has the effect that the power to seek a search and seizure warrant forms part of the 'investigative' function vested in the Commission and that the acting secretary was duly authorised thereby to apply for such a warrant.

[17] On application by the acting secretary, the High Court granted the *ex parte* order on 14 September 2016 and officials of the Commission conducted a search

² GN 41 in GG 4004 of 3 March 2008.

³ In terms of s 16 (1) of the Act, the Commission 'is responsible for the administration and enforcement of this Act', and it has, amongst others, 'to be responsible for investigating contraventions of this Act by undertakings . . . '.

and seizure operation at the premises on 15 to 17 September 2016 with the assistance of Century Technical Solutions (Pty) Ltd (Century) who is described in Mr Ndalikokule's affidavit as its Digital & IT Forensic Specialists. Century's role was to collect the identified electronic devices, to do forensic copying of electronic evidence, extract relevant evidence and to index the data and to avail it to the Commission in a searchable format.

[18] Puma Namibia allowed the search and seizure to proceed and various items of evidence were collected during the search, including hard copy documents, electronic devices and forensic mirror images of its server.

[19] The items of evidence were seized by Century on behalf of the Commission, sealed in bags in the presence of officials of Puma Namibia and, in compliance with the terms of the *ex parte* order, surrendered to the registrar of the High Court in whose custody they remain unopened to date. The Commission thus has no idea as to the content of the evidence.

[20] As was foreshadowed in the affidavit that served before the judge and incorporated in the *ex parte* order, the Commission presented Puma Namibia with a draft tripartite agreement to be concluded between it, Puma and Century. The purpose of the tripartite agreement was to give Puma Namibia 'an opportunity to protect and claim privilege, on such information which invariably might be seized during the execution of the warrant'. When presented with the draft tripartite agreement, Puma Namibia advised that it would propose amendments to it before it could be signed but after all never signed it.

[21] In the *ex parte* order the High Court had ordered that in the event Puma Namibia 'does not agree to enter into a tripartite agreement, the Commission must file the electronic data seized with the Registrar of the High Court for safe keeping, pending further direction from the Court'. That was done and as already indicated, the Commission has no access to the items of evidence.

Events post execution of *ex parte* order

[22] On 10 October 2016, Puma Namibia instituted proceedings in the High Court to challenge the Commission's *ex parte* application which resulted in the *ex parte* order. The challenge was two-pronged. The first is an 'anticipation notice' seeking the following relief:

- (a) dismissal of the *ex parte* application and *ex parte* order;
- (b) that the Commission deliver to Puma Namibia all items of evidence seized pursuant to the *ex parte* order;
- (c) Costs of instructing and instructed counsel.

[23] The second is a 'notice of counter-application' seeking an order that:

- (a) the warrant obtained by the Commission be declared unlawful and set aside;
- (b) that the execution of the warrant be declared unlawful and set aside;

- (c) an order ordering the Commission to deliver to Puma Namibia all the seized evidential material pursuant to the search and seizure warrant;
- (d) costs.

[24] The relief sought in the alternative under the two notices is supported by a single affidavit deposed to by Mr Dominic Dhanah who is the Managing Director of Puma Namibia. He advanced several grounds for the relief under the two notices. First, that the acting secretary lacked the authority to apply for a search and seizure warrant. Second, that it was entirely unnecessary for the Commission to obtain such a warrant. Third, the founding affidavit in support of the warrant did not justify it being granted. Fourth, the Commission failed to serve on Puma Namibia the application which served before the High Court when it granted the order and, fifth, the Commission exceeded the terms of the warrant in the manner of its execution and thus violate Puma Namibia and its employees' right to privacy and dignity.

[25] Notwithstanding the manner in which they are formulated, the common denominator between the two notices is the claim that (a) the search and seizure process was invalid and must be set aside and (b) that the evidential material seized be returned to Puma. If there was no legal basis for the search and seizure warrant being granted, that relief is inevitable.

[26] The Commission opposed the application and in opposition to Puma Namibia's application, maintained that:

- (a) the search was conducted with Puma Namibia's acquiescence;
- (b) the search has been completed and the warrant 'discharged' and that the High Court was no longer competent to revisit it;
- (c) the relief in terms of the anticipation notice and that under the counter-application are mutually exclusive.

[27] Puma Namibia retorted that it had an obligation to comply with the *ex parte* order so as not to be in contempt. It allowed the warrant to be executed on the understanding that it reserved the right to challenge its validity at a later stage. Puma Namibia did not have the opportunity, prior to the execution of the warrant, to form an opinion as to the correctness of the decision to grant the warrant and therefore whether or not to challenge it.

[28] It was contended that where, as here, an application for a warrant is brought *ex parte* and in chambers, it is 'by its nature provisional and subject to reconsideration after all the parties who have an interest have been heard'. It matters not that no return date was provided for the order. An order is not final if, as in the present case, it is alterable by the court whose order it is.

[29] Puma Namibia also denied that the relief under the two sets of relief were mutually exclusive as in the anticipation notice it was seeking the dismissal of the *ex parte* application and the return of the documents seized by the Commission. In the counter-application, it was seeking an order that the warrant and its execution be

declared unlawful and that it be set aside, and for the seized documents to be returned.

[30] The matter was then heard by a different judge than the one who granted the *ex parte* order.

The High Court

[31] The High Court rejected all of the Commission's technical objections to the procedure adopted by Puma Namibia. It found no merit in the assertion that the *ex parte* order could not be revisited because it had already been executed and complied with. It maintained that the search remains incomplete because the items of evidence seized during the search remain sealed and un-opened in the custody of the registrar.

[32] The court *a quo* reasoned that the legislature has made a considered distinction between the various powers vested in the Commission and the power to apply for a warrant which is vested in an inspector. In the court's view, the Act is unambiguous in vesting the power to apply for a search and seizure warrant in an inspector. The legislature reserved the power of investigation under s 16 to the Commission but assigned the power to apply for search and seizure to an inspector which under the Act is an office separate and distinct from the Commission. According to the learned judge *a quo*, interpreting the provisions in that way does not produce an absurdity or cause an unjust result or one inconsistent with the other provisions of the Act. The High Court reasoned that the Commission could only validly delegate a power which the Act vests in it.

[33] The High Court held that the Commission could only delegate those powers which the Act confers on it. The search and seizure power under s 34 was not conferred on the Commission and it could therefore not delegate it to the acting secretary.

[34] The court further held that a plain reading of the 'delegation' in terms of rule 4 showed that the delegation to the acting secretary was expressly confined to a delegation of powers vested in the Commission. That delegation did not even purport to delegate any powers under s 34 to the acting secretary.

[35] The court therefore found that Mr Ndalikolule as acting secretary was not authorized expressly or impliedly to apply for the warrant in question and thus set aside the warrant issued on 14 September 2016.

[36] The High Court on 8 November 2018 made an order in favour of Puma Namibia, setting aside the search and seizure warrant, with costs, and directing that all the items of evidence seized pursuant to the *ex parte* order and now in the custody of the registrar be 'returned to Puma Namibia within 2 days of this order'.

[37] The present appeal lies against that order.

Grounds of appeal

[38] The essence of the Commission's complaint on appeal is that the High Court was wrong in setting aside the order granted *ex parte* on the basis that the acting

secretary lacked authority to apply for it. Specifically, the Commission challenges the High Court's judgment and order on the grounds that the court misdirected itself in finding that:

- (a) Section 34 of the Act vests the power to apply for a search warrant in an inspector, and not in the Commission;
- (b) The power to apply for a warrant in terms of section 34 is distinct from the general investigative powers conferred on the Commission by section 16(1)(f) and section 33 of the Act;
- (c) Because the power to apply for a warrant was not conferred on the Commission, the Commission could not lawfully delegate that power to the acting secretary; and
- (d) Factually, the delegation of powers to the acting secretary did not include a delegation of the section 34 power.

Discussion

Could the ex parte order be revisited?

[39] One of the grounds of appeal advanced by the Commission in its notice of appeal is that the *ex parte* order granted by the High Court had been complied with and executed and thus could no longer be revisited in subsequent proceedings in the manner Puma Namibia did. In other words, it was not competent for the judge who

granted relief to Puma Namibia to make such an order. That ground of appeal was abandoned during oral argument on appeal.

[40] It must now be accepted as settled that an *ex parte* order such as was sought, granted and executed in favour of the Commission is provisional in nature regardless of it being not subject to a return date. Being provisional in nature such an order is alterable by another judge of the High Court and can be revisited in subsequent proceedings (*Pretoria Portland Cement Company Ltd & another v Competition Commission & others* 2003 (2) SA 385 (SCA) at 404, approving *Ghomeshi-Bozorg v Yousefi* 1998 (1) SA 692 (W) at 696). The principles enunciated in those South African cases have been approved in Namibia.⁴ The Commission's concession was therefore properly made and nothing further needs to be said about the matter.

[41] I have shown earlier that Puma Namibia had impugned the *ex parte* order granted by the High Court on several grounds, including that the acting secretary lacked the authority to apply for such an order and that only an inspector appointed in terms of s 14 of the Act is in law authorised to apply for a search and seizure warrant. In light of the conclusion to which I come on that ground, I find it unnecessary to consider the remainder of the objections raised by Puma Namibia against the search and seizure process. In short, the outcome of the appeal turns on whether or not the application for search and seizure granted by the High Court was competent in law.

Parties' submissions on appeal

The Commission

⁴*Prosecutor-General v Uuyuni* 2015 (3) NR 886 (SC) para [33]; *Shalli v Attorney-General & another* 2013 (3) NR 613 (HC) paras [35]-[37].

[42] According to Mr Kauta for the Commission, the acting secretary was properly and lawfully delegated by the board resolution 'to execute powers of investigation on the Commission's behalf'; a delegation which, necessarily, included the authority to apply for a search and seizure warrant. According to counsel, the Commission's investigative power contained in Part IV, Chapter 3 of the Act is prosecutorial in nature. It was in order to separate the prosecutorial function from the adjudicative function that the Board passed the delegation resolution. The objective being 'to separate . . . these two roles and permit them to be discharged by different sections of the Commission'. The Commission retaining the adjudicative role whilst the investigative function was delegated to its secretary.

[43] According to Mr Kauta, the resolution clothed the acting secretary with 'broad investigative function' and authorised him 'to exercise any powers incidental' to its discharge. The search and seizure power in s 34 is, the argument goes, such an investigative function and that the power in s 34 is one which vests in the Commission. Mr Kauta submitted that if the provisions are given a 'purposive' interpretation the conclusion would be that the power of investigation vesting in the Commission necessarily includes the power to seek a warrant of search and seizure.

[44] According to counsel, an inspector is far removed from the investigation process as to be, without more and by himself or herself, possessed of the facts necessary to bring an application for search and seizure. Since the Commission initiates an investigation into prohibited conduct and in the process garners the necessary information, it is best placed to apply for a search and seizure warrant in order to complete the investigation.

[45] That approach is at the heart of the disagreement between Mr Kauta for the Commission and Mr Heathcote for Puma Namibia.

Puma Namibia

[46] Mr Heathcote for Puma Namibia supports the High Court's judgment and order in every respect.

[47] Counsel submitted that the entry, search and seizure power is an extraordinary and invasive means of gathering information. Unlike the other investigative powers of the Commission, it is subject to judicial 'consent' and therefore judicial oversight. Judicial approval is only to be given if the presiding judge is satisfied upon application made on oath or affirmation by an inspector as envisaged in s 34(2). The inspector may only seek such relief upon a 'reasonable ground' that it is 'necessary' for purposes of the investigation to exercise the power. There is no evidence on record that the acting secretary, being an employee of the Commission, was designated to be an inspector in terms of that provision.

[48] As I understood Mr Heathcote, restricting the search and seizure power to an inspector in whom s 34 vests the power is in harmony with Art 13(2) of Constitution which states that searches of the person or the homes of individuals shall only be justified if authorised by a competent judicial officer. Since it allows for invasion of privacy, the provision must therefore be given a restrictive interpretation in terms of who is permitted to exercise that invasive power. Given the need for judicial oversight ordained by s 34, the Commission's contention that it enjoys broad power

to delegate any function to the secretary is inconsistent with the legislative intent, viewed against Art 13(2).

[49] The delegation in terms of rule 4 invoked by the acting secretary is a delegation of the powers of investigation under s 16(1)(f) and s 33 of the Act. It cannot conceivably be implied in respect of s 34 powers which are subject to judicial oversight.

Disposition

[50] Mr Kauta has contended that if the relevant provisions of the Act are given a purposive interpretation, it will be concluded that (a) the Commission was competent to apply for a search and seizure warrant and (b) could delegate that power to its secretary.

Purposive interpretation and its limits

[51] At the heart of 'purposive interpretation' lies, as Lord Denning put it in *Notham v London Borough of Barnet*,⁵ the principle that the court must interpret a statute in a way that 'promotes the general legislative purpose underlying the provisions'.

[52] To understand the meaning of words in a statute, the court must understand the legislature's intent. To that end, the purpose of the statute, ie why it was enacted and how it came to be, is not just a relevant factor in deciding how to give effect to a statute's words, but is essential to determining its meaning.

⁵ [1978] 1 WLR 220 at 228C-D. See also *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 at 639H.

[53] The modern approach to statutory interpretation requires that the words of a statute be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.⁶ Thus, the court strives to construe statutory language in accordance with the object and intent of the legislation.

[54] But there are limits to purposive interpretation. Lord Scarman noted in *R v Barnett LBC*⁷ that judges may only adopt purposive interpretation if they 'can find in the statute read as a whole or in the material to which they are permitted by law to refer as aids to interpretation an expression of Parliament's purpose or policy'.

[55] The courts of the UK have also held that in purposively interpreting a statute, judges must respect the 'fundamental features' of the statute.⁸ On this approach, it is important to identify the particular statutory provision being interpreted and guard against interpretations that are devised to give effect to an abstract purpose in the statute. In addition, a purposive interpretation should not render any of the provisions in the statute redundant.⁹

[56] It must follow that the court must not through purposive interpretation contradict a provision in the statute which calls for interpretation, for doing so would be to usurp the legislative function. Purposive interpretation should not become the means by which courts undermine the sovereign will of Parliament.

⁶ See, for example, the Canadian case of *Re Rizzo & Rizzo Shoes Ltd* 1998 1 SCR 27.

⁷ [1983] 2 AC 309 at 348B.

⁸ *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10; [2002] 2 AC 291 at 313F-G para 40.

⁹ *R (Anderson) Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837 paras 30 and 50.

[57] With that in mind I will now consider the contentions on behalf of the Commission.

[58] The first obstacle facing the argument advanced on behalf of the Commission is an important canon of statutory interpretation which is premised on the imperative of enhancing legal certainty and the effective administration of justice.¹⁰

Parliament presumed to know the common law

[59] Parliament is presumed to legislate with full knowledge of the common law and when it enacts legislation, relevant common law principles, including that relating to interpretation of statutes, remain in force and operate in conjunction with a new statute in the absence of a clear indication to the contrary. As Du Plessis correctly writes:

‘Legislation must, in other words, be interpreted in the light of the common law, must as far as possible be reconciled with related precepts of the common law and must be read to be capable of co-existing with the common law in pari materia.’¹¹

[60] It has long been an established principle under the common law that when power is conferred upon an office or statutory body it is intended that the power should be exercised by that office or body and no one else.¹² Lord Bingham in his celebrated book *The Rule of Law* writes that an important aspect of the rule of law is

¹⁰ Du Plessis, L. *Interpretation of Statutes* (2002) at 177; Devenish *Interpretation of Statutes* 1996 at 159; *Van Heerden & others, NNO v Queen’s Hotel 65 (Pty) Ltd & others* 1973 (2) SA 14 (RA).

¹¹ Du Plessis *Interpretation of Statutes* at 160.

¹² Baxter, L *Administrative Law* (1984) at p 426 and p 434, cited with approval in *Molefe v Dihlabeng Local Municipality* [2003] ZAFSHC 35; [2003] ZAFSHC 9 (5 June 2003) para 35. See also *Shidiack v Union Government* 1912 AD 642 at 648. *Social Security Commission & another v Coetzee* 2016 (2) NR 388 (SC) para 25 to 28. *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment and Tourism* 2010 (1) NR 1 (SC) at 13D.

that public power must be exercised only by those in whom the authority to do so is reposed.¹³

[61] In *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others*¹⁴ this court held that power must be exercised in a lawful way in a constitutional state. This requires that it must be exercised by the authority upon whom it is conferred. Unauthorised delegation is administratively invalid because it constitutes a usurpation of parliamentary legislative authority.

[62] In other words, unlawful delegation or usurpation is an abdication of power, which cannot be tolerated in a constitutional state.

[63] The rationale of the common law's approach is that a repository of statutory power is chosen for a purpose. Should the repository allow that power to be exercised by someone not named in the relevant provision or should someone assume responsibility for its exercise, it will either be an abdication or usurpation that is not permissible and thus a breach of the statute.¹⁵

[64] The power of search and seizure is an invasive power and its ambit must be interpreted restrictively, both in terms of its extent and by whom it must be exercised. Those who are affected must have certainty about who exercises it and in what circumstances.

¹³ Bingham, T. *The Rule of Law* (2011) Penguin Books: London at p 60.

¹⁴ 2010 (2) NR 487 (SC) para 23. *Skeleton Coast Safaris v Namibia Tender Board & others* 1993 NR 288 (HC) at 299J – 300A.

¹⁵ *Anhui Foreign Economic Construction (Group) Corp Ltd v Minister of Works and Transport & others* 2016 (4) NR 1087 (HC) para 49; Baxter, L *Administrative Law* (1984) 1984 at p 434.

[65] There is undeniable force in Mr Heathcote's submission that search and seizure is an invasive power given to a specified functionary, subject to judicial oversight, and cannot therefore be susceptible of delegation under a general delegation provision which contains no similar safeguard. The legislature has clearly spelled out that an inspector and not the Commission or a delegate must entertain a 'reasonable ground' as to the existence of prohibited conduct.

[66] I am satisfied that holding that a functionary other than the one named in s 34 has the power to apply for a search and seizure warrant under s 34 is in conflict with the common law principle that power reserved under statute to a specific functionary or office holder may not be exercised by another.

Implied powers argument

[67] An important strand of the Commission's argument is that its power of investigation under s 16 and s 33 would be meaningless without an ancillary power to apply for search and seizure being implied to the investigation power.

[68] It is correct that where the legislature has granted a main power and its purpose would be defeated without an ancillary power being implied to give effect to it, the court will imply such ancillary power as is reasonably necessary to give effect to the main power.¹⁶

¹⁶ *Trustco Group International (Pty) Ltd v Katzao* [2011] NAHC 350 para 11, citing with approval: *Johannesburg Consolidated Investment Co. Ltd v Marshall's Township Syndicate Ltd.*, 1917 AD 662 at 666; *Randfontein Estates G M Co Ltd v Randfontein Town Council* 1943 AD 475 at 495; *Johannesburg Municipality v Davies and Another* 1925 AD 395 at 403 and *City of Cape Town v Claremont Union College* 1934 AD 414 at 420-421.

[69] Ancillary power is implied in a statute where it has not been expressly granted. That is not the case with the search and seizure power under the Act. The power exists and the only question is who must exercise it. The legislature has expressly vested the power in an inspector but the Commission maintains it too, not only an inspector, can exercise it. Doing so will go against a fundamental feature of the Act as will also become clearer below.

[70] It could well have been different had the legislature granted a general search and seizure power without identifying a specific functionary who must exercise it. In that case, it could plausibly be argued that whoever under the Act required the power of search and seizure in order to carry out a main power should enjoy such a power. It is significant that the legislature, in addition to making provision for a general pool of employees, created a special category of office of inspector and assigned to it the search and seizure power instead of and not in addition to a functionary belonging to the general pool of employees.

[71] Under the scheme created by the Act, the Commission is granted the power to investigate suspected abuse of a dominant position. That power is granted in s 33. The power of search and seizure is granted separately in s 34 and is described as a power to 'assist the Commission to ascertain or establish whether any undertaking has engaged in or is about to engage in' prohibited conduct.

[72] What the legislature has clearly done is to separate the investigation function (which is the main power) from the search and seizure process (which is the ancillary power) such that the one who calls the latter in aid is required to apply his or her

mind independently and only based on a reasonable ground of the existence of conduct that amounts to abuse of a dominant position. In that sense, an inspector is not an extension of the Commission in the execution of its function under ss 16 and 33.

[73] The Commission's power of investigation granted under s 33 bears a direct relationship to its 'functions, powers and duties' under s 16(1)(f) which, without including search and seizure, empowers the Commission 'to be responsible for investigating' prohibited conduct.

[74] It also bears mention that the invasive power of search and seizure is not a default procedure for the exercise of the Commission's investigation power. In that respect the Commission has at its disposal potent powers and tools for carrying on an investigation.

[75] When an investigation is contemplated, the Commission must in writing give notice of the proposed investigation to those affected by indicating the subject-matter of the investigation and invite them to make representations.¹⁷ It may for the purpose of the investigation 'by notice in writing' invite the affected undertaking (through its representative(s)) 'to furnish to the Commission by writing . . . any information pertaining to any matter specified in the notice which the Commission considers relevant to the investigation'.¹⁸

¹⁷ Section 33(3)(a) and (b).

¹⁸ Section 33(4)(a).

[76] The Commission may also by notice require the affected undertaking to produce 'any document or article, specified in the notice which relates to any matter which the Commission considers relevant to the investigation'.¹⁹

[77] Most importantly, the Commission may by notice require an affected undertaking's representative 'to appear before the Commission at a time and place specified in the notice to give evidence or to produce any document or article specified in the notice'.²⁰ When the latter power is invoked, s 35(2) empowers the Commission to receive evidence 'on oath or affirmation'.

[78] It is a criminal offence for anyone to refuse to take an oath or affirmation required by the Commission or to refuse to answer any question or to give evidence that is false or to fail to produce any document or thing in his or her possession or under his or her control lawfully required by the Commission to be produced to it.²¹

[79] These are very important and potentially effective powers which the legislature has specifically reserved to the Commission and punctiliously excluded the power of search and seizure contained in s 34. That separation of roles is a fundamental feature of the Act.

[80] As I have demonstrated earlier, an inspector plays a supporting role to the Commission in respect of its investigation power under s 33. He or she may very well form the view that a search and seizure warrant is not necessary based on information furnished by the Commission to seek such a warrant. That construction

¹⁹ Section 33(4)(b).

²⁰ Section 33(4)(c).

²¹ Section 61(i), (ii) and (iii).

is reinforced by the fact that the office of inspector is separate from the general pool of the Commission's employees appointed under s 13 of the Act. In terms of s 13(1), the Commission appoints a 'Secretary to the Commission' and 'other employees as it deems necessary to assist in the performance of the functions of the Commission.'

[81] By contrast, an inspector is a person who is 'designated' as such either from the pool of employees appointed in terms of s 13, or any other 'suitable person' appointed by the Commission. In other words, an inspector may be an outsider to the Commission, reinforcing the independent and supporting nature of the office.

[82] This carefully delineated separation of functions by the legislature between the Commission and an inspector in my view represents a 'fundamental feature' of the Act which it will be impermissible for the court to disturb through a 'purposive interpretation' as submitted by Mr Kauta on behalf of the Commission.

[83] As the High Court correctly found, that interpretation does not yield any absurdity nor does it frustrate the performance by the Commission of its power of investigation. On the contrary, it achieves a measure of fairness in that those affected by the exercise of the invasive power and the judge who after all grants it without the knowledge of and in the absence of the affected undertaking, have some assurance that an independent mind was brought to bear on the question whether a search and seizure was necessary in a particular case.

[84] The plea for a purposive interpretation so as to read into the Act a power for the Commission – when that power has been expressly vested in a named

functionary – will amount to this court usurping the legislative function which under the Constitution is the exclusive preserve of the elected branch. There is no ambiguity in the language employed by the legislature. The Act reserves certain powers and functions to the Commission and creates an office of inspector and assigns thereto specific powers which, in relation to the Commission, it does not.

[85] For all of the above reasons I come to the conclusion that the High Court came to the correct conclusion in finding that the search and seizure power under s 34 does not vest in the Commission and could not be delegated to the acting secretary.

[86] In light of the conclusion to which I come on the main issue of who may properly exercise the search and seizure power under s 34, it is unnecessary to deal with the subsidiary finding by the High Court that on a plain reading of the delegation by the Commission to its secretary, the s 34 power was not expressly delegated. It must be obvious that such a finding is predicated on a finding that the Commission was in law the proper repository of the power in question.

[87] It is accordingly ordered as follows:

- (a) The appeal is dismissed with costs, consequent upon the employment of one instructing legal practitioner and two instructed legal practitioners.

SHIVUTE CJ

SMUTS JA

APPEARANCES

Appellant:

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Respondent:

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