REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT (TRIAL-WITHIN-A-TRIAL)

Case no: CC 11/2010

In the matter between:

THE STATE

v

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

Neutral citation: *S v Lameck* (CC 11/2010) [2018] NAHCMD 214 (16 July 2018)

Coram: LIEBENBERG, J.
Heard: **19 – 20 June 2018.**
Delivered: **16 July 2018**

Flynote: Criminal Procedure – Trial-within-a-trial – Admissibility – Declaration commissioned by official of the Anti-Corruption Commission – Whether official who commissioned declaration in support of search warrants was a commissioner of oaths – Council of Ministers in terms of AG No.128 of

1982 designated holder of any office specified therein as a commissioner of oaths – Anti-Corruption Commission is such statutory body as specified – Regulation has not been repealed – Declaration duly commissioned satisfying the requirements of a sworn statement.

Criminal Procedure – Trial-within-a-trial – Admissibility – Search warrants addressed to all authorised officers – Section 22(5)*(b)* of the Anti-Corruption Act requires search warrant to be addressed to a specified authorised officer – Search warrants inadmissible.

Summary: The state wanted to have six warrants issued by a magistrate in terms of s 22(4) of the Anti-Corruption Act 8 of 2003 admitted into evidence. The defence opposed and filed a notice to object, *inter alia*, the declaration used in support of the application for the issuing of search warrants did not satisfy the requirements of a sworn declaration on the basis that the person who commissioned the declaration was not a commissioner of oaths at the time. The other ground was that the search warrants were addressed to all authorised officers, and not to a specified authorised officer.

Held, that the right to privacy is guaranteed under Article 13 of the Constitution and it demands a strict interpretation of the search and seizure provisions in the Act.

Held, further that, the specific appointment of investigating officers of the Anti-Corruption Commission as justices of the peace by the Minister in 2012, should be read supplementary to AG. 128 and not be interpreted to mean that such officers had only been designated as commissioners of oaths since 2012.

Held, further that, s 22(5)*(b)* of the Act requires that a search warrant must specifically authorise an authorised officer mentioned in the warrant to conduct the entry and search. By its ordinary meaning an authorised officer must be identified and mentioned in the warrant to conduct the entry and search, not any or all officers.

ORDER

The affidavit deposed to by Mr Becker (Exhibit 'S-1') is ruled admissible, while the six search warrants (Exhibits 'S-2 to 7') are set aside and ruled inadmissible as evidence.

JUDGMENT

(Trial-within-a-trial)

LIEBENBERG J:

[1] This is a trial-within-a-trial in which the state seeks leave to have six search warrants issued by a magistrate in terms of s 22(4) of the Anti-Corruption Act, 2003[1] admitted into evidence.

[2] The defence filed a notice of objection in relation to any evidence that the state wishes to tender that may have been obtained through searches conducted at different premises on the strength of the said warrants. It was submitted that from the six grounds of objection identified it was evident that the search warrants fell short of satisfying the requirements set out in the Act, rendering it unlawful and thus null and void.

[3] It was decided by agreement that the impugned search warrants would provisionally be handed in for consideration of issues to be determined by court *ex facie* the documents, together with facts being common cause. This

[1] Act 8 of 2003 (hereinafter 'the Act').

essentially disposed of the need to lead further evidence in support of the state's application.

[4] The following facts are not in dispute and therefore common cause: On the 29th of June and again on the 1st of July 2009 Mr Nelius Becker, the Chief of Investigation and Prosecution at the Anti-Corruption Commission, applied on the strength of a declaration, deposed to by himself dated 24 June 2009, with a Windhoek magistrate for search warrants issued in terms of s 22(4) of the Act. This was done on the basis of reasonable grounds for believing that a corrupt practice has taken place and that anything (evidence) connected thereto is on the premises. These search warrants related to six different premises, all of which situated in the district of Windhoek. The search warrants were issued on the mentioned dates directing 'ALL AUTHORISED OFFICERS' to search the premises identified and any person found in or upon the said premises, and to seize the mentioned goods/articles/documents described in the warrant. This related to computers and any documentation and/or correspondence pertaining to transactions and contact between Teko Trading, Nuctech Company Limited, Nuctech Hong Kong and the Ministry of Finance of Namibia. Mr Becker's declaration was commissioned, as reflected at the end thereof, by William Lloyd, Commissioner of Oath (ex officio) from the Anti-Corruption Commission.

[5] During oral submissions Mr Namandje identified mainly three issues on which the admissibility of the search warrants could be decided and these are:

(a) In terms of s 22(3) of the Act the application for a warrant must be supported by an affidavit or a solemn declaration by the person making the statement, a requirement which Becker's affidavit does not satisfy as it was not commissioned by a Commissioner of Oaths as contemplated in terms of the Justices of the Peace and Commissioners Oaths Act 16 of 1963, read with Regulation 1258 dated 21 July 1972.[2]

(b) In terms of s 22(5)*(b)* the warrant must specifically 'authorise an authorised officer mentioned in the warrant to conduct the entry and

[2] Government Gazette No 3619 dd 21 July 1972.

search of the premises' while the instant warrants do not authorise any specific officer as required by the Act.

(c) That the warrants on themselves do not satisfy the common law requirement of intelligibility in that they ought to have specified a particular offence or corrupt practice as defined in Chapter 4 of the Act instead of merely stating that a corrupt practice has taken place and is being investigated.

[6] Article 13 of the Namibian Constitution is a prohibitive provision dealing with the fundamental rights to privacy and reads:

'(1) No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.

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

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

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

[7] Legislation where the privacy of a person may be interfered with can be found under Chapter 2 of the Criminal Procedure Act, 1977[3] providing for search and seizure warrants, and under the Anti-Corruption Act, 2003. In view of the search warrants under consideration having been obtained under the latter, there would be no need to discuss and consider the common law requirements to be satisfied in respect of a search warrant issued in terms of the CPA.

[3] Act 51 of 1977 (hereinafter 'the CPA').

[8] In terms of s 21 of the Anti-Corruption Act an authorised officer may conduct any investigation which the Commission is empowered to undertake in terms thereof and in respect of search and seizure, the process is regulated as provided for in s 22. The relevant part of the section reads:

'**Authority to enter and search under warrant**

(1) 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.

(2) Subject to section 23, premises may be entered in terms of subsection (1) only by virtue of a warrant issued by a judge of the High Court or by a magistrate in whose area of jurisdiction the building or premises are situated.

(3) A warrant referred to in subsection (2) must be applied for by the Director-General, the Deputy Director-General or any other authorised officer and must be supported by an affidavit or a solemn declaration by the person making the application, or any other person having knowledge of the facts, …

(5) A warrant to enter and search premises may be issued on any day and must specifically-

(a) identify the premises that may be entered and searched; and

(b) authorise an authorised officer mentioned in the warrant to conduct the entry and search of the premises.

(6) …'

(Emphasis provided)

[9] Whereas the right to privacy is guaranteed under Article 13 of the Constitution it deserves a very high level of protection and demands a strict interpretation of the search and seizure provisions in the Act. Those provisions may, for obvious reasons, result in a serious encroachment on the rights of those persons subjected to them. Hence, the courts will construe search and seizure warrants strictly and furthermore carefully scrutinize anything done in pursuance thereof. What this means is that the courts is obliged to employ a strict interpretation of the provisions relating to search and seizure warrants.

[10] The first issue for consideration is whether the declaration of Mr Becker in support of the application made to the magistrate for search warrants were duly supported by an affidavit deposed to by him on the 24th of June 2009.

[11] It is common cause that the same declaration was relied on in respect of the six warrants applied for and issued by the magistrate. The person who signed the declaration as commissioner of oaths (William Lloyd) did not state his designation or the office held by him as required by regulation 4(2). From the address appearing under his signature it could be inferred that he is attached to the Anti-Corruption Commission, though his designation not being stated. The defence however did not take issue as to whether Mr Lloyd was a member of the Commission or filled a post in the Commission. For purposes of this ruling I will therefore accept that he was an employee of the Commission at the time of commissioning.

[12] The objection raised against the validity of the affidavit concerns the commissioning thereof. It was submitted that the person who purported to have commissioned the deponent's declaration (Lloyd) was not a commissioner of oaths as contemplated in terms of the Justices of the Peace and Commissioners of Oaths Act, 1963,[4] read with Regulation 1258 dated 21 July 1972. This is because investigating officers of the Anti-Corruption Commission only having been appointed *ex officio* as justices of the peace on 15 February 2012, as per Government Notice No.33 of 2012, well after the date on which the deponent's declaration was commissioned (24 June 2009).

[13] Section 6 of the Justices of the Peace and Commissioners of Oaths Act provides for the designation of the holder of any office as a commissioner of oaths by notice in the Gazette by the Minister of Justice, while the regulations merely govern the process of administering of an oath or affirmation.

[4] Act 16 of 1963.

[14] The state countered the argument by referring to AG. 128 of 1982[5] where the then Council of Ministers designated the holder of any office specified therein as a commissioner of oaths for the specified area. Paragraph 29 deals with statutory bodies and includes any board, council, committee, commission or other body established by or under any law, of which a member of such body and any post constituting part of the establishment of such body, is designated as a commissioner of oaths for the then territory of South West Africa. It was submitted that the designation of commissioners of oaths by the Council of Ministers under AG. 128 of 1982 not having been repealed, is still applicable law.

[15] In reply, Mr Namandje submitted that designation is not done by regulations but by notice as provided for in the Act. Regulations cannot be relied on to override a statute and where in conflict, the regulation will be *ultra vires*. It must however be borne in mind that AG. 128 is not as such a regulation, but rather in the nature of an executive instrument issued by the then Council of Ministers and written into law, thus enforceable until repealed.

[16] I have not been presented with any proof that AG. 128 of 1982 had been repealed in any form or manner, neither have I been able to find legislation to that effect. Government Notice No. 33 of 2012 did not repeal AG. 128 and in the absence of any repealing provision, the court in terms of Article 140 of the Namibian Constitution must still recognise it as the present law and therefore finds application. There is further no conflict between AG. 128 and the designations made by the Minister by notice in the Government Gazette. The specific appointment of investigating officers of the Anti-Corruption Commission as justices of the peace by the Minister in 2012, should therefore be read supplementary to AG. 128 and not be interpreted to mean that such officers had only been designated as commissioners of oaths since 2012.

[5] Government Gazette No.4672 dated 01 September 1982.

[17] For the aforesaid reasons I am not convinced that Mr Becker's declaration did not satisfy the requirements of a sworn statement, duly commissioned. The objection raised in this regard is therefore without merit.

[18] The next issue turns on the search warrants not authorising a specific officer identified in the warrants to conduct the entry and search the premises.

[19] Section 22(5)*(b)* of the Act in peremptory terms states that a search warrant must specifically authorise an authorised officer mentioned in the warrant to conduct the entry and search. Whereas the section makes plain that a specified officer must be authorised, the issue of interpretation of the statutory requirement does not arise. By its ordinary meaning an authorised officer must be identified and mentioned in the warrant to conduct the entry and search, not any or all officers. Absent the requirement, the only question to answer is whether it renders the warrant null and void.

[20] Mr Lisulo conceded that on the available precedents it would appear that the courts have adopted the view that the search warrant must be addressed to a specific officer and, failing which, the warrant is liable to be set aside. However, he also argued that it was not fatal, suggesting that it is legal and enforceable. The court recognising counsel's conflicting submissions invited him to elaborate. Counsel was however unable to further develop the argument envisaged and left the matter in the court's discretion.

[21] The court in *Simataa v Magistrate of Windhoek*[6] was called upon to decide the same issue and succinctly disposed thereof by referring to the statutory requirement of an authorised officer to be mentioned in the warrant which, in itself, was sufficient reason to set aside the warrants under consideration. Not only is the court's finding consistent with the law, it had neither been challenged on appeal. These findings clearly nullify any suggestion that failure to authorise an identified officer in the search warrant, is not fatal. All search warrants in the present instance are drawn in the same

[6] 2012(2) NR 658 (HC).

form and fall foul of the same defect of being addressed to ‘All authorised officers’. Inevitably they fall to be set aside.

[22] Having upheld the objection raised by the defence rendering the search warrants inadmissible, there is no need to decide the further requirement of intelligibility equally objected to by the defence.

[23] In the result, the affidavit deposed to by Mr Becker (Exhibit ‘S-1’) is ruled admissible, while the six search warrants (Exhibits ‘S-2 to 7’) are set aside and ruled inadmissible as evidence.

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JC LIEBENBERG
JUDGE

APPEARANCES:

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