NOT REPORTABLE

CASE NO.: A 145/12

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CHRISTIAAN FILLEMON **APPLICANT**

and

THE MAGISTRATE OF OSHAKATI **FIRST RESPONDENT**

THE STATION COMMANDER:

ONDANGWA POLICE STATION **SECOND RESPONDENT**

THE PROSECUTOR GENERAL **THIRD RESPONDENT**

CORAM: KAUTA, AJ

HEARD ON: 20th JULY 2012

DELIVERED ON: 27TH JULY 2012

JUDGMENT

KAUTA, AJ: [1] The Applicant approached this court on an urgent basis seeking an interim relief pending a review. The terms sought in the interim relief are:

(a) Condoning the non-compliance with the Rules of the Court and hearing the application for an interim relief set out in Part A of this application below on an urgent basis as envisaged in terms of Rule 6(12) of the Rules of the High Court including condoning non-compliance with time limits and mode of service;

(b) Issuing a rule nisi ordering the second respondent to return and restore possession of the applicant's vehicle with registration number N77999W forthwith pending the finalization of the review application; and

(c) Directing that the order granted under paragraph (b) above operate as an interim interdict with immediate effect;

(d) Directing the second and third respondents to pay the applicant's costs (if they oppose);

(e) Granting the applicant such further and/or alternative relief as this court may deem fit.

[2] The following facts are common cause: the Applicant is the owner of a Land Cruiser 2012 motor vehicle with registration number N77999W. After serving a period of time in custody the Applicant was released on the 11th of June 2012 after his arrest on the 26th of May 2012. On the 19th of June 2012 the Applicant's vehicle was seized in terms of warrant issued by the First Respondent. The next day the legal practitioners of record of the Applicant wrote a letter to the First Respondent and took issue with the validity of the

warrant issued by him. The First and Second Respondents elected to oppose this matter but the Third Respondent opposes the interim relief.

[3] In opposition of this matter the Third Respondent filed answering papers and an urgent counter application. The stance of the Third Respondent to the interim relief is firstly that there was no basis set out by the Applicant for the invalidity of the search warrant in the letter to the First Respondent and that in any event there was no lawful basis for the First Respondent to provide the Applicant with the statement under oath on which the warrant was issued. This argument by the Third Respondent is opportunistic, self-serving and surprising, bearing in mind that there is no opposition to this matter by the Third Respondent. In any event the Applicant set out various grounds in the application why in his opinion the warrant is invalid.

THE ISSUE DEFINED

[4] The issue calling for decision in this case is whether the search warrant issued on the 19th of June 2012 by First Respondent is *prima facie* invalid. This is so, because the Applicant is seeking interdictory relief.

[5] The consideration at this time in respect of interdictory relief has been set out in *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 688D-E. This approach is based on the views expressed by Clayden J in *Webster v Mitchell* 1948 (1) SA 1186 (W). With reference to what was said in the case of *Webster v Mitchell* Ogilvie Thompson J (as he then was) said the following in Gool's case (at 688D-E):

'(I)n Webster v Mitchell (supra) the headnote of which reads as follows:

"In an application for a temporary interdict applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is prima facie

established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by respondent should then be considered, and if serious doubt is thrown upon the case of applicant he could not succeed."

With the greatest respect, I am of opinion that the criterion prescribed in this statement for the first branch of the inquiry thus outlined is somewhat too favourably expressed towards the applicant for an interdict. In my view the criterion on an applicant's own averred or admitted facts is: should (not could) the applicant on those facts obtains final relief at the trial. Subject to that qualification, I respectfully agree that the approach outlined in Webster v Mitchell (supra) is the correct approach for ordinary interdict applications.'

[6] I am in full agreement with the legal position advanced above. In support of his contention that the seizure warrant was invalid Mr Namandje on behalf of the Applicant advanced various grounds. One such ground was that the common law intelligibility principle requires that the offence be specified in a warrant issued in terms of Section 21 of the Criminal Procedure Act 51 of 1977. It is common cause that the seizure warrant issued in this matter did not specify the offence. Mr Small on behalf of the Third Respondent argued feebly that Sections 20 and 21 of the CPA contains no requirement that the offence must be specified in the seizure warrant. He further argued that the intelligibility principle is not part of our common law.

[7] In the judgment of *Minister of Safety and Security v Gary van der Merwe and others* 2011 (5) SA 61 (CC) at para 43-57 the majority of that court had this to say on this issue:

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

The core issue is whether the warrant would be reasonably capable of that clear understanding even if the offence were not mentioned in it. Put differently, does the intelligibility principle require the specification of the offence in the section 21 warrant for its validity?

Innes CJ appears to have been the first to allude to the specification of the crime in the warrant as an integral part of the common law intelligibility requirement. He did so by declaring a warrant invalid and setting it aside as a result of, amongst others, its failure to state the offence. As indicated above, this principle was subsequently reversed by the majority in Pullen.

In reasoning its way to that reversal, the majority articulated the ideal role of the offence-specification requirement in facilitating the intelligibility of a warrant. The minority's endorsement of the principle that the specification of the offence in the warrant is a requirement for its validity is also significant. This is relevant to the determination of the main issue and also sheds light on the soundness of the dictum in Thint. What was merely desirable or advisable at the time has since been accepted as law in Thint.

As Langa CJ observed, the most relevant requirement in relation to the principle of intelligibility is that a warrant must convey intelligibly, to both the searcher and the searched person, the ambit of the search it authorizes. Intelligibility also requires that a warrant be reasonably intelligible in the sense that it is reasonably capable of being understood by a reasonably well-informed person

who understands the relevant empowering legislation and the nature of the offences under investigation.

Thint laid down the offence-specification requirement for the intelligibility of the NPA Act warrant. It did so in the following terms:

"A section 29 warrant should state at least the following, in a manner that is reasonably intelligible without recourse to external sources of information: the statutory provision in terms whereof it is issued; to whom it is addressed; the powers it confers upon the addressee; the suspected offences that are under investigation; the premises to be searched; and the classes of items that are reasonably suspected to be on or in that premises. It may therefore be said that the warrant should itself define the scope of the investigation and authorized search in a reasonably intelligible manner." (Emphasis added.)

In contending that Thint did not govern the CPA, the Minister referred to the observation by Langa CJ that the intelligibility principle lacks precision and that it had to be given content to determine what it requires specifically in relation to warrants issued under section 29 of the NPA Act.

Thint imposed the offence-specification requirement as an integral part of the intelligibility principle in relation to the NPA Act. The question is whether that requirement applies also to the CPA. I find that it does.

I can see no material difference between these pieces of legislation to explain why these aspects of the intelligibility principle cannot apply with equal force to warrants issued in terms of the CPA. Under either Act, a searched person ought to enjoy the same constitutional protection in relation to search and seizure warrants and both Acts are open to a construction that permits this to be done. As Nugent JA correctly pointed out:

"[T]he requirement that the offence must be specified was laid down unequivocally and without qualification in Thint in the context of the intelligibility of the warrant, and in that respect I see no material distinction between a warrant that is issued under that statute and a warrant that is issued under the Criminal Procedure Act."

The intelligibility requirement has its roots in the rule of law which is a founding value of our Constitution. Some of the essential attributes of the rule of law are comprehensibility, accountability and predictability in the exercise of all power, including the power to issue warrants. It is essential therefore that the warrant be crafted in a way that enables the person on the receiving end of the exercise of this authority to know why her rights have to be interfered with in the manner authorized by the warrant. A warrant can thus not be reasonably intelligible if the empowering legislation and the offence are not stated in it.

It is also consistent with both common sense and logic that the searched person's knowledge of the purpose or the reason for the search would enhance intelligibility and that its omission would reduce it. It follows that the baseline requirement for intelligibility in relation to a CPA warrant is that the offence must be mentioned.

The principle of intelligibility requires that, even in the case of a CPA warrant, "the person whose premises are being invaded should know the reason why". As Tindall J correctly observed, "the arguments in favour of the desirability of such a practice are obvious." Thint is authority for the proposition that the common law intelligibility principle requires warrants issued in terms of section 21 of the CPA to specify the offence.

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

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

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

(a) the person issuing the warrant must have authority and jurisdiction; the person authorizing the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts; the terms of the warrant must be neither vague nor overbroad; a warrant must be reasonably intelligible to both the searcher and the searched person; the court must always consider the validity of the warrants with a jealous regard for the searched person's constitutional rights; and the terms of the warrant must be construed with reasonable strictness.

Based on the elements of the intelligibility requirement and the approach to adopt in considering the validity of the warrants the Minister's contentions must fail, for none of the Cape Town warrants mentioned the offence. This conclusion obviates the need to address the question of vagueness or overbreadth."

[8] When this judgment was pointed out to Mr Small he could take the matter no further. Our common law and South Africa is the same, *cadit quaestio*. I am persuaded by the exposition of the law in paragraph 7 above and hold that the intelligibility principle applies to warrants issued in terms of Sections 20 and 21 of CPA in Namibia. As the warrant issued in this matter did not specify the offence, it is invalid for that reason alone.

[9] The declaration that the warrant is invalid operates retrospectively and any search and seizure carried out in terms of such warrant is invalid *ex tunc*. And restoration of an article seized thereunder is permissible even if it means the article must be restored to a person who will hold it illegally.

See *Svetlov Ivancmec Ivanov v North West Gambling Board and others, an unreported judgment of the Supreme Court of Appeal of* South Africa*, heard on 14 May 2012 and delivered on 31 May 2012*.

[10] This is however, not the end of this matter despite the fact that there's no substantial challenge to the balance of the Applicant's application. I shall now turn to deal with the urgent counter application of the Third Respondent. The Applicant *in limine* raised objection that the counter application was not urgent. In support of this contention Mr Namandje argued enthusiastically that the counter application was brought simply out of Third Respondent's fear of Applicant's application succeeding.

[11] The Third Respondent gives no reasons why the counter application was not launched timeously before these proceedings. There's no explanation for the delay from the Applicant's arrest to the 13th of July 2012, when the counter application was served on the applicant. This is a delay of more than a month and a half. In support of the submission that the application is urgent, Mr Small argued that the Applicant will dissipate or damaged the *merx*. In answer to the latter the Applicant encouraged this court, in the event that he is successful, to make an order that the Applicant should not alienate, dispose, hypothecate or in any manner damage the Land Cruiser.

[12] In *Salt and Another v Smith* 1990, NR 87 at 88C this court clarified the application of Rule 6(12) in the following words:

"This Rule entails two requirements, namely the circumstances relating to urgency which have to be explicitly set out and, secondly, the reasons why the applicant in this matter could not be afforded substantial redress at a hearing in due course."

[13] Further, in *Salt and Another v Smith*, supra, this court referred to the oft quoted dictum of Coetzee J in *Luna Meubelvervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137F that:

"Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down."

[14] In *MWEB Namibia (Pty) Ltd v Telecom Namibia Ltd & 4 Others*, unreported case number (P) A 91/2007, delivered on 31 July 2007, (HC) Muller J stated at pages 2 and 3 that Rule 6 of the High Court Rules applies to all applications and the requirements of Rule 6(12) must be complied with and strictly dealt with in the founding affidavit, and further, that the fact that irreparable damages may be suffered is not enough to make out a case of urgency, although it may be a ground for an interdict.

[15] The absence of an explanation by the Third Respondent relating to the time delay is fatal. For the reasons set out above I am not satisfied that the Third Respondent has made out a case for urgency. As a result, I make the following order:

1. That the Applicant's non-compliance with the Rules of this Court relating to time periods, service and form, is condoned and the matter is heard as one of urgency in terms of Rule 6(12)(a).

2. A rule nisi is hereby issued directing the Second Respondent to return and restore possession of the Applicant's vehicle with registration number N77999W forthwith to the Applicant pending the finalization of the review application.

3. The Applicant is ordered to ensure that he does not alienate, dispose, hypothecate or damage the Land Cruiser motor vehicle with registration N77999W pending the finalization of the review application. To this end, the Applicant is ordered to insure the Land Cruiser 2012, if he has not done so already, to the value of N$402 000.00 and provide proof to the Second Respondent, at the time the delivery of the vehicle is given to him.

4. The Third Respondent is ordered to pay the Applicant's costs of Part A of this application.

5. The Third Respondent's counter application is struck of the roll with costs.

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KAUTA AJ

COUNSEL ON BEHALF OF THE APPLICANT: **MR. SISA NAMANDJE**

INSTRUCTED BY: **SISA NAMANDJE & CO INC**

COUNSEL ON BEHALF OF THE RESPONDENT: **ADV.DF. SMALL**

INSTRUCTED BY: **GOVERNMENT ATTORNEYS**