

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

**JUDGMENT**

Case no: A 186/2013

In the matter between:

**CROSS-BORDER VEHICLE TRADE CC**

**APPLICANT**

and

**THE MAGISTRATE FOR WALVIS BAY**

**1<sup>ST</sup> RESPONDENT**

**HEAD OF THE SPECIAL BRANCH OF THE**

**NAMIBIAN POLICE, WINDHOEK**

**2<sup>ND</sup> RESPONDENT**

**HEAD OF THE COMMISSION FOR CUSTOMS**

**AND EXCISE**

**3<sup>RD</sup> RESPONDENT**

**Neutral citation:** *Cross-Border Vehicle Trade CC v The Magistrate for Walvis Bay*  
(A 186/2013) [2013] NAHCMD 169 (19 June 2013)

**Coram:** MILLER AJ

**Heard:** 13 June 2013

**Delivered:** 19 June 2013

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**ORDER**

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I accordingly grant the relief claimed in Paragraphs (a), (b), (c) and (d) of Part A of the Notice of Motion. The second respondent is ordered to pay the applicant's costs.

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**JUDGMENT**

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MILLER AJ :

[1] On the 31<sup>st</sup> of May 2013 Chief Inspector Reinhard !Haoseb, of the Namibian Police received information that a certain cargo container bearing the number PCIU 7341120, had been cleared from the Walvis Bay in circumstances which may have been fraudulent, and that the applicant may have been involved. The applicant's business objectives are to conduct bonded warehouse business, forwarding and clearing business and transportation.

[2] The applicant conducts business from premises prescribed as M.3.1 Naras Investments Business Centre, Walvis Bay.

[3] As a consequence of the information received, the first respondent was approached, whereupon the first respondent, acting in terms of Section 21 of Act 51 of 1977 issued a search warrant.

[4] The salient features of that document are:

- 1) It is issued to Chief Inspector R. !Haoseb.
- 2) It states that from a complaint made under oath there are reasonable grounds for suspecting that at premises situated at corner of 3<sup>rd</sup> Street East and 14<sup>th</sup> Road, M.3.1 Industrial Area, Walvis, there is something.

2.1. in respect of which an offence has been committed.

2.2. in respect of which there are reasonable grounds for believing that it will afford evidence as to the commission of an offence.

2.3. in respect of which there are reasonable grounds for believing that it was used for the purpose of or in connection with the commission.

2.4. The “something” referred to is identified as “documents, files, financial registers/books, registers, laptops, computers and central processing unit (CPU), server and other devices which may have been used to create/frame false documents.

2.5. It directs Chief Inspector !Haobeb, to search the identified premises during daytime, and any person found there and to seize the said documents, files, financial registers/books, registers, laptops, computers – central processing unit (CPU), server and other devices which may have been used to create/frame false documents.

[5] Armed with this warrant the applicant’s premises were on 7 June 2013 searched by the police and they removed what is described as the main PC hard drive and the server to which the applicant says three computers were connected. The second respondent denies that the server was seized. Also seized were two printers and a scanner.

[6] It was this chain of events which prompted the applicant to seek the following relief:

**PART A**

- (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 and third respondents to forthwith return and restore possession to the applicant of all the seized documents inter alia all computer hardware, computer servers, Samsung printer, HP printer, HP scanner, all documents, files, stamps, custom clearance documents and all other items seized on

7 June 2013 including any copy or reproduction from such items, pending the finalization of the review application under Part B; 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.'

[7] Mr. Namandje appears for the applicant and Mr. Chibwana appeared for the respondents.

[8] Mr. Chibwana fairly and rightly so did not oppose the issue of urgency. I say rightly so, because it was not placed in issue that as a consequence of the events, the applicant's clearing business which generates some 70% to 80% of the revenue came to and remains at a standstill.

[9] Mr. Chibwana submitted, however that the applicant is not entitled to any of the interim relief claimed in Part A. He submits that until such time as the search warrant is set aside, it remains valid and must be given effect to.

[10] In response Mr. Namandje drew my attention to an unreported judgment in this Court in *Fillemon v The Magistrate of Oshakati and others*, Case No. A145/2012 delivered on 27 July 2013.

[11] In that matter, Kauta AJ, granted similar relief to that which the applicant now seeks in relation to a vehicle which was seized on the strength of a warrant.

[12] That decision is binding upon me unless I am persuaded that it is clearly wrong. I am not so persuaded. In fact I agree with it.

[13] The legal principles which guide me on the invalidity of the warrant in question, even on a prima facie basis were set out fully in *Minister of Safety and*

***Security v Gary van der Merwe and others*** 2011 (5) SA 61 (CC) in the following way:

“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." This 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.’

[14] That judgment was adopted by Kauta AJ in the Fillemon case and I respectfully agree with it.

[15] It is immediately apparent that the warrant in question fails to meet the intelligibility requirement. It does not even begin to specify the alleged offence which triggered the investigation, nor does it seek to identify the offenders.

[16] That in itself renders the warrant prima facie invalid to say the least.

[17] In addition the warrant is vague in the extreme and decidedly overbroad.

[18] Even if I were to assume that in all probability some investigation was being conducted in relation to the container I referred to, the warrant is not stated to be directed at and confined to that.

[19] Instead the warrant authorizes a search and seizure on a wide and almost unlimited scale for things which “may have been used to create/frame false documents”.

[20] It smacks rather of a witch-hunt to my way of thinking. Searches and seizures impose upon constitutional rights and freedoms. While they are permitted in certain circumstances, they must not be authorized or conducted in a manner which is arbitrary and unreasonable.

[21] It follows as a further consequence that the warrant in question is not valid on that basis as well.

[22] I accordingly grant the relief claimed in Paragraphs (a), (b), (c) and (d) of Part A of the Notice of Motion. The second respondent is ordered to pay the applicant’s costs.



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P J MILLER  
Judge

APPEARANCES

APPLICANT: S NAMANDJE  
Of Sisa Namandje & Company Incorporated

FIRST, SECOND, THIRD  
RESPONDENTS: T CHIBWANA  
Of Government Attorneys

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