

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: HC-MD-CIV-MOT-EXP-2016/00275

THE NAMIBIAN COMPETITION COMMISSION

APPLICANT

and

PUMA ENERGY (NAMIBIA) (PTY) LTD

RESPONDENT

Neutral citation: *The Namibian Competition Commission v Puma Energy (Namibia) (Pty) Ltd* (HC-MD-CIV-MOT-EXP-2016/00275) [2018] NAHCMD 356 (8 November 2018)

Coram: GEIER J

Heard: 06 September 2018

Delivered: 08 November 2018

Flynote: A warrant in terms of Section 34 of the Competition Act 2 of 2003 had been granted on application made *ex parte* and *in camera* by a Judge of the High Court during September 2016 to the Namibian Competition Commission. The search authorized by the warrant occurred from 15 to 17 September 2016. On 10 October 2016 the respondent filed its anticipation notice and its notice of counter-application.

Court holding that the respondent, Puma Energy Namibia Pty Ltd, in this instance was entitled as a matter of law, to a reconsideration of the order authorizing the warrant, which regardless of its form, was provisional in nature and subject to reconsideration where the court was tasked to consider the matter 'afresh' on the return date — that is on the merits — in the light of all the information which has by then been placed before the court — 'as if the order was first being applied for'.

Court holding that in such circumstances and once the court was appraised of the true facts, through the filing of an answer, the court may set aside the former order. This so it was held further was not interference with the discretion that the previous court had exercised, but an exercise of the reconsidering courts powers, in the light of further information placed before it.

Summary: The Namibian Competition Commission had applied for- and was granted a warrant to enter and search the premises of Puma Energy Namibia Pty Ltd for purposes of establish whether or not Puma was engaged in prohibitive practices as a result of a complaint received. The High Court authorized the applied for search and issued an appropriate warrant for such purpose in terms of Section 34 of the Competition Act 2 of 2003. The warrant was granted by order granted *ex parte* and *in camera*.

After holding that Puma was entitled to a reconsideration of the order as if the order was first being applied for the court upheld a point *in limine* to the effect that the acting secretary of the commission was not authorized to apply for the warrant in question, which finding then meant that the warrant fell to be set aside on that basis.

ORDER

1. The warrant issued by the Honourable Mr Justice Angula, on 14 September 2016, is hereby set aside with costs.
2. Such costs are to include the costs of three instructed- and one instructing counsel.

3. All bags containing hard copy documents, seized from Puma by the Commission, during the period 15 to 17 September 2016, together with all electronic devices as well as all Puma's electronic data seized and/or copied from Puma electronic devices and server by the Commission, as kept by the Registrar for safekeeping in terms of the Court's Order of 14 September 2016, are to be returned to Puma within 2 days of this order.

JUDGMENT

GEIER J:

[1] The Namibian Competition Commission was established by the Competition Act 2 of 2003¹ to '*safeguard and promote competition in the Namibian market*'² in order to:

- '(a) promote the efficiency, adaptability and development of the Namibian economy;
- (b) provide consumers with competitive prices and product choices;
- (c) promote employment and advance the social and economic welfare of Namibians;
- (d) expand opportunities for Namibian participation in world markets while recognizing the role of foreign competition in Namibia;
- (e) ensure that small undertakings have an equitable opportunity to participate in the Namibian economy; and
- (f) promote a greater spread of ownership, in particular to increase ownership stakes of historically disadvantaged persons.'³

[2] The Commission's functions are set out in section 16.

¹ See: Section 4.

² See Preamble.

³ Section 2 of the Act. See also *Namibian Competition Commission and Another v Wal-Mart Stores Incorporated* 2011 NASC 11 para 24.

[3] In order to achieve the purposes of the Act and to enable it to carry out its functions and duties effectively, the Commission is also tasked with the responsibility to investigate contraventions of the Act and for this purpose it is granted powers of investigation.⁴

[4] More particularly the Commission's powers in relation to investigations into 'prohibitive practices'⁵ are set out in Part IV of the Act.

[5] The statute also provides for the opportunity to enter and search premises pursuant to a warrant, which is to be issued by a Judge of the High Court.

[6] The Commission then utilized these provisions during September 2016 after it had received a complaint during March 2016 from the Aircraft Owners and Pilots Association of Namibia, alleging that Puma Energy (Namibia) Pty Ltd was abusing its dominance by charging excessive prices for aviation fuel supply at the Eros and Ondangwa airports, in contravention of section 26 of the Competition Act.⁶

[7] The Commission initiated an investigation into the complaint,⁷ and then applied, *ex parte*, for a search and seizure warrant in respect of Puma, in terms of section 34 of the Act.

[8] The warrant was granted by the Court on 14 September 2016 - on different terms to those originally sought – and - after the Learned Judge had carefully examined the application and had required further safeguards to be included in the order.⁸

⁴ See Section 16(f).

⁵ As set out in Parts I and II of the Act.

⁶ Section 26 of the Act provides that: "(1) 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 a part of Namibia, is prohibited. (2) Without prejudice to the generality of subsection (1), abuse of a dominant position includes—(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting or restricting production, market outlets or market access, investment, technical development or technological progress; (c) applying dissimilar conditions to equivalent transactions with other trading parties; and (d) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject-matter of the contracts."

⁷ Bundle 1, Item 10 Page 42 Founding Affidavit – Puma's Counter-Application Annexure DD3.

⁸ Bundle 1, Item 10 Page 29 Court order 14 September 2016 annexed to Puma's Counter-Application as DD1.

[9] The search and seizure operation was conducted on 15 to 17 September 2016.

[10] On 10 October 2016 Puma instituted the present proceedings through which it seeks a re-hearing of the *ex parte* and *in camera* application and pursuant to such a re-hearing to seek the dismissal of the order granted to the Commission on an *ex parte* basis.⁹ Puma also counter-applied for an order declaring the warrant unlawful and for it to be set aside.

[11] These applications were opposed by the Commission.

Further relevant background facts

[12] Counsel for the Commission summarized these in their heads of arguments as follows:

'The Commission initiated an investigation into Puma's conduct, which is presently ongoing. Its preliminary enquiries revealed that Puma is the only party that is authorised to dispense aviation fuel at Ondangwa airport and, until recently, was also the sole dispenser of aviation fuel at Eros airport.¹⁰ Puma's prices are recorded as being higher than suppliers at other outlier airports (who must pay more in costs for transporting the fuel).¹¹ The damages that are alleged to have been borne by competing operators are in excess of \$20 500 000.¹²

The application for a warrant

On 14 September 2016, the Commission determined to apply to the High Court for a warrant to conduct a search and seizure in terms of section 34 of the Competition Act.¹³ The application was supported by a founding affidavit deposed to by Mr Ndalikokule, an employee of the Commission who at the time was acting as its Secretary, in which he stated amongst others that he was duly authorised to bring the proceedings.¹⁴

⁹ Bundle 1 Item 8 Page 1 -3.

¹⁰ Bundle 1, Item 2 Page 8 Founding Affidavit *Ex Parte* Application para 31.2.

¹¹ Bundle 1, Item 2 Page 8 Founding Affidavit *Ex Parte* Application para 31.4.

¹² Bundle 2 Item 16 Page 9 Class Complaint, Competition Commission's Answering Affidavit Annexure VND7 para 27.

¹³ Bundle 1 Item 1 Page 1 -2 Notice of Motion *Ex Parte* Application.

¹⁴ Bundle 1 Item 2 Page 1 Founding Affidavit *Ex Parte* Application para 1.1 and 1.2.

The founding affidavit set out that, for the Competition Commission impartially to conduct the investigation, it requires Puma's documentary proof relating to the following particularised information:¹⁵

- a) pricing strategies and policies;
- b) demands studies;
- c) company value/supply chain cost of production/sourcing per litre that form part of the pricing;
- d) cost per item at each level of the value/supply chain;
- e) supply and distribution contracts;
- f) invoices for sourcing as well as all costs incurred at each level of the value/supply chain;
- g) financial statements; and
- h) meeting minutes.

The founding affidavit recorded that the Commission believed it required to conduct a search and seizure because:

- a) Puma and its employees are unlikely to volunteer information to assist with the investigation – particularly since they are believed to have actively (but surreptitiously) engaged in prohibited conduct over an extended period of six years. The Commission intends to proceed there by interviewing and interrogating them after it has obtained documents and information;¹⁶
- b) a subpoena would not adequately safeguard the Commission's investigation because the documents and information sought are liable to easy manipulation and disposal such that, absent a warrant, the investigation would be compromised;¹⁷ and

¹⁵ Bundle 1, Item 2 Page 5 Founding Affidavit *Ex Parte* Application para 16; see also Bundle 1 Item 3 Page 6 Founding Affidavit *Ex Parte* Application Annexure "A".

¹⁶ Bundle1 Item 2 Page 7 Founding Affidavit *Ex Parte* Application paras 25-26.

¹⁷ Bundle 1 Item 2 Page 5 and 6 Founding Affidavit *Ex Parte* Application para 17, 23.

c) the evidence sought is not readily available from another source because it is contained in internal company documents that are not distributed to suppliers or customers.

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The grant and execution of the warrant

The High Court granted the Commission's application for a warrant on 14 September 2016.¹⁹ As required by section 34(4) of the Act, the warrant identified the premises to be searched, the times at which the search could take place, and the inspectors authorised to conduct the search. Significantly, the court order did not simply mirror the warrant sought. It imposed additional limitations and safeguards on the search, including by:

- a) expressly directing that the warrant and proof of the inspectors' authority had to be provided to the owner or person in control at the search premises;
- b) providing for electronic data seized to be filed with the Registrar for safe-keeping, in the absence of a tripartite agreement being concluded to govern the search of such data; and
- c) permitting the Commission to run an audit trail if the search took place over more than one day, to ensure that the evidence had not been tampered with.

The search took place on 15 to 17 September 2016.²⁰ It was conducted by the Commission, with the assistance of an expert forensic information technology service provider, Century Technical Solutions (Pty) Ltd (Century) as well as representatives of the South African Competition Commission.²¹

Puma did not object to the search and willingly acceded to it. Significantly:

It is common cause that Puma was presented with the warrant, the relevant Form 4 Notice of Investigation and a tripartite agreement.²² It was also provided with a copy of the founding affidavit in support of the application for its warrant.²³

¹⁸ Bundle 1 Item 2 Page 5 and 7 Founding Affidavit *Ex Parte* Application para 18, 24.

¹⁹ Bundle 1 Item 10 Page 29 Court order 14 September 2016 annexed to Puma's Counter-Application as DD1.

²⁰ Bundle 1 Item 10 Page 3 Founding Affidavit – Puma's Counter-Application para 5.

²¹ Bundle 1 Item 10 Page 5 Founding Affidavit – Puma's Counter-Application para 14.

²² Bundle 1 Item 10 Page 5 – 6 Founding Affidavit – Puma's Counter-Application para 15.

²³ Bundle 2 Item 17 Page 1 – 2 Melissa Hanmer Confirmatory Affidavit; Bundle 2 Item 16 Page 101 Copy of the front page of the Competition Commission's Founding Affidavit bearing the signature of a Puma employee attached to Answering Affidavit as "VND8".

Puma was legally represented during the search. Indeed, its legal representatives, Engling Stritter and Partners, agreed to an extension of the hours for execution of the warrant,²⁴ and consented to Century's taking forensic mirror images of the seized information into its possession.²⁵ In doing so, they did not impugn the lawfulness of the search at all.

Puma initially refused the Commission access to its server, and insisted it would only allow access when its information technologist had arrived from South Africa.²⁶ The Commission was eventually granted access to the server at 15h20 – a full seven hours after the execution of the warrant begun.²⁷

Puma thus had a proper opportunity to consider and take advice on its position in relation to the search. Having done so, it elected to acquiesce in the search.

Various materials were collected during the search, including hard copy documents, electronic devices and forensic mirror images of Puma's server.²⁸ This evidence has been sealed in bags, which remain unopened to date.

The Commission has presented Puma with a draft tripartite agreement to be concluded between it, Century and Puma. The agreement aims to protect Puma and any privilege claims it may have.²⁹ It envisages that Century will conduct key-word searches and similar processes on the mirror images taken of the seized servers and hard drives, to identify data relevant to the investigation. A harddrive of relevant data will then be provided to Puma to identify and exclude privileged documents, before it is provided to the Commission. To date, Puma has refused to sign the tripartite agreement despite an undertaking that they will request certain amendments thereto which they have not done to date.³⁰

It is instructive to note that when the High Court granted the order of the 14th September 2016, amongst others, it ordered that in the event Puma 'does not agree to enter into a tripartite agreement, the Commission must file the electronic data seized with the Registrar

²⁴ Bundle 1 Item 10 Page 9 Founding Affidavit – Puma's Counter-Application para 27; Bundle 1 Item 10 Page 53 Letter from Engling, Stritter and Partners annexed to Puma's Founding Affidavit as "DD5".

²⁵ Bundle 1 Item 10 Page 9 Founding Affidavit – Puma's Counter-Application para 28; Bundle 1 Item 10 Page 55 Letter from Engling, Stritter and Partners annexed to Puma's Founding Affidavit as "DD6".

²⁶ Bundle 2 Item 14 Page 4 Answering affidavit – Puma's Counter-Application para 12.

²⁷ Bundle 2 Item 14 Page 34 Letter from Dr Weder, Kauta and Hoveka Inc attached to the Competition Commission's Answering Affidavit as "VND3".

²⁸ Bundle 1 Item 10 Page 3 Founding Affidavit – Puma's Counter-Application para 5.

²⁹ Bundle 1 Item 10 Page 48 Draft Agreement attached to Puma's Counter-Application as Annexure DD4.

³⁰ Bundle 1 Item 10 Page 56 Founding Affidavit – Puma Counter Application para 2.

of the High Court for safe keeping, pending further direction from the Court.’ On the 16 September 2016, Puma agreed that Century take in its possession the evidence before the tripartite agreement is signed as it was considering making certain amendments.³¹

The present proceedings

It is against this backdrop that, on 10 October 2016, Puma launched proceedings to challenge the warrant, by way of an anticipation notice³² paired with a counter-application.³³ Both the anticipation notice and the counter-application proceed from the premise that the application for a warrant is still open for opposition and determination.’

[13] Counsel for Puma, in their heads of argument, and in their summation of the relevant background facts placed a different emphasis on some of the above-sketched facts, which nevertheless, and in essence, are however common cause. For the sake of completeness I extract and list those aspects which in my view also have relevance. They are that:

‘a) Puma was not advised of the fact that the Commission had initiated the investigation, and in the months that followed (since 23 March 2016) no requests were made to Puma for it to make submissions to the Commission or to provide it with any documents or information. There are no available facts to reveal what, if anything, the Commission did in pursuit of its investigation in the six-month period between March and September 2016. On the Commission's version, it appears to have done little more than to engage in a '*cursory analysis*' of information submitted to it by the complainant.³⁴

b) On 7 September 2016, the Commission launched an application for the issue of a search and seizure warrant in terms of section 34 of the Competition Act,³⁵ *ex parte* and *in camera*.³⁶

c) The Founding Affidavit in respect of this application was deposed to by Vitalis Ndalikokule ('**Ndalikokule**'),³⁷ the acting Secretary to the Commission³⁸ who relied on a

³¹ Bundle 1 Item 6 Page 1 Court Order para 4, Bundle 1 Item 10 Page 56 Founding Affidavit – Puma's Counter application annexure 'DD6'.

³² Bundle 1 Item 8 Page 1 -3 Puma's Anticipation Notice.

³³ Bundle 1 Item 9 Page 1 -4 Puma's Counter-Application.

³⁴ Commission FA para 22 Bundle 2 p 6.

³⁵ Commission Notice Bundle 1 pp 1 - 2; Puma affidavit para 11 Bundle 10 p 4.

³⁶ Commission FA para 7 Bundle 2 p 3 and para 12 Bundle 2 p 4.

³⁷ Commission FA Bundle 2 p 2; Puma affidavit para 11 Bundle 10 p 4.

³⁸ Commission FA para 1.1 Bundle 2 p 2.

delegation of authority.³⁹ The delegation relied on was a delegation of the '*powers to investigate in terms of section 16(1)(f) and section 33 read with Rule 4 of the Competition Act & Rules ... to the Office of the Secretary to the Commission*' of 1 August 2012.⁴⁰

d) The application was moved on 14 September 2016. It was issued on the same day,⁴¹ but not before the court expressed concern about Puma's privacy and confidentiality.⁴² For this reason, the court varied the order sought in two respects:

aa) it limited the time of execution of the warrant, coupled with limitations on Puma's access to the server during the period of execution of the warrant;⁴³ and

bb) added an order that protected the confidentiality of Puma's information.⁴⁴

e) The order does not include a return day, nor did it make express provision for opposition by Puma.

f) The search purportedly authorised by the warrant took place at Puma's premises from 15 to 17 September 2016 ('the Dawn Raid').⁴⁵

g) In the course of 15 September 2016, Puma was presented with the warrant, to which was annexed the notice of investigation, and a proposed tripartite agreement.⁴⁶ At the time, Puma was not served with copies of the notice of motion and founding affidavit in the warrant application.⁴⁷

h) On 16 September 2016, a representative of Puma at the Eros Airport was handed a copy of the founding affidavit in the warrant application.⁴⁸ No copy of the application papers was handed to the Puma representatives at the Puma head offices at any stage during the Dawn Raid.

i) During the course of the Dawn Raid, a number of hardcopy documents were seized, as were various electronic devices. In addition, forensic mirror images were created of these

³⁹ Commission FA para 1.2 Bundle 2 p 2.

⁴⁰ Annexure VD1 Bundle 3 p 1.

⁴¹ Puma affidavit para 4 Bundle 10 p 3 and para 12 Bundle 10 p 5.

⁴² Commission AA para 7 Bundle 17 p 3.

⁴³ Commission AA para 8 Bundle 17 p 3.

⁴⁴ Commission AA para 9 Bundle 17 p 3.

⁴⁵ Puma affidavit para 5 Bundle 10 p 3 and paras 23 - 30 Bundle 10 pp 8 - 9.

⁴⁶ Puma affidavit para 15 Bundle 10 p 5.

⁴⁷ Puma affidavit para 16 Bundle 10 p 6.

⁴⁸ Commission AA para 59 Bundle 14 p 16; Annexure VND8 Bundle 16 p 101.

electronic devices and of Puma's server.⁴⁹ This, after access to the server was authorised by Puma employees who flew in from South Africa for the purpose.⁵⁰

j) On 21 September 2016, the Commission advised Puma's legal practitioners that it sought to unseal the evidence bags containing hard copy documents seized during the Dawn Raid in the period between 26 and 29 September 2016 and requested their presence at the unsealing.⁵¹

k) On 22 September 2016, Puma's legal practitioners asked the Commission's legal practitioners for a copy of the affidavit that accompanied the application for the warrant. It was provided on the same day.⁵²

l) On 26 September 2016, Puma's legal practitioners advised that Puma intended launching a challenge and accordingly they requested that the unsealing of the evidence bags be postponed.⁵³ The Commission agreed on the following day, subject to a condition that Puma indicate the date by which it intended to launch its application.⁵⁴ In response, it was undertaken to file the application by 10 October 2016.⁵⁵

m) On 10 October 2016 Puma filed its anticipation notice,⁵⁶ as well as its notice of counter-application,⁵⁷ together with its affidavit in support of both notices.⁵⁸

[14] It is then against this background that the parties presented their respective cases.

The Argument for Puma

[15] Counsel for Puma aligned their written submissions with the Commission's arguments which commenced with the disagreement with the Commission's submission that Puma cannot competently invoke the process that it has (that is, by way of an anticipation notice and a counter-application), because –

⁴⁹ Puma affidavit para 5 Bundle 10 p 3 and para 31 Bundle 10 p 10.

⁵⁰ Puma affidavit para 23 Bundle 10 p 8.

⁵¹ Puma affidavit para 32 Bundle 10 p 10.

⁵² Annexure RA4 Bundle 20 p 17.

⁵³ Puma affidavit para 33 Bundle 10 pp 10 - 11.

⁵⁴ Puma affidavit para 34 Bundle 10 p 11.

⁵⁵ Puma affidavit para 35 Bundle 10 p 11.

⁵⁶ Anticipation notice Bundle 8 pp 1 - 3.

⁵⁷ Notice of counter-application Bundle 9 pp 1 - 4.

⁵⁸ Puma affidavit para 6 Bundle 10 p 3.

- a) the search was conducted with Puma's acquiescence, and its approach constitutes an impermissible prevarication in the conduct of litigation;⁵⁹
- b) the search is complete and the warrant has been discharged;⁶⁰ and
- c) the relief sought in the anticipation notice and the notice of counter-application are mutually exclusive.⁶¹

[16] Here it was firstly denied that Puma had impermissibly prevaricated and that Puma's cooperation in allowing the Commission to carry out the Dawn Raid in terms of the warrant did not amount to acquiescence to, and/or an election to accept, the validity of the warrant.⁶² Puma allowed the warrant to be executed on the understanding that it reserved its right to challenge the validity thereof at a later stage.⁶³ This it was entitled to do, not least to ensure that, pending an approach to court to have the warrant set aside, it was not acting in contempt. This approach was permissible as a matter of law and necessary as a matter of practicality.

[17] It was pointed out that it was common cause that Puma did not have access to the application papers on the basis of which the warrant had been granted, prior to the execution of the warrant. Accordingly, Puma 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. It would have been unlawful for Puma to resist or interfere with the execution of a warrant. It would have been impractical (and questionable as a matter of law) for Puma to institute urgent application proceedings or otherwise delay the Commission in its execution of the warrant, when Puma had yet to assess the merits of the decision to grant the order.⁶⁴ But that did not preclude it from challenging the warrant once it had the opportunity to consider the contents of the application for the warrant.

⁵⁹ Commission heads paras 32 - 34 pp 15 - 16.

⁶⁰ Commission heads para 35 pp 16 - 19.

⁶¹ Commission heads para 36 p 19.

⁶² Puma RA para 14 p 6.

⁶³ Puma RA para 15 Bundle 19 p 6.

⁶⁴ Puma RA para 16 Bundle 19 p 6.

[18] It was further argued that it makes no difference that the warrant has been 'discharged'. This submission was founded on the persuasive power of a South African Supreme Court of Appeal judgment, the *Pretoria Portland Cement Company Ltd. v Competition Commission* 2003 (2) SA 385 (SCA) judgment, in which the SCA had considered a similar case in which the South African Competition Commission had sought and was granted a warrant in terms of section 34 of the South African Competition Act.⁶⁵ in circumstances more fully described in the judgment of the SCA.⁶⁶

The order, which was the subject matter of the appeal had in common with the order issued in the present instance that it included no return date, and that it made no provision for opposition.⁶⁷ The search was conducted and documents were seized.⁶⁸ Thereafter, an order was obtained to secure the seized documentation and preventing access thereto by the SA Commission pending the launch of an application to challenge the issue of the warrant.⁶⁹ Pretoria Portland Cement (PPC) launched a self-standing application,⁷⁰ The SCA held that:

1.1. where an *ex parte* order is granted, it may be corrected by another single judge through the ordinary processes of court;⁷¹

1.2. in a rehearing of a matter in which an *ex parte* order has been made, grounds that in other circumstances may be raised as review grounds, may equally be raised in the rehearing, but that does not make the proceeding a review;⁷²

1.3. any person who shows a direct and substantial interest in proceedings concerned with an order that was granted *ex parte*, and whose affidavit indicates that his opposition might contribute something to a just decision of the case, should not be deprived of an opportunity of being heard;⁷³

⁶⁵ See SA Competition Act s 46 - s 49.

⁶⁶ *Pretoria Portland Cement Company Ltd. v Competition Commission* 2003 (2) SA 385 (SCA).

⁶⁷ PPC judgment para 2.

⁶⁸ PPC judgment para 2.

⁶⁹ PPC judgment para 3.

⁷⁰ PPC judgment para 3.

⁷¹ PPC judgment para 36.

⁷² PPC judgment para 36.

⁷³ PPC judgment para 44, citing *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 347 – 348A.

1.4. an order granted *ex parte* is by its nature provisional, irrespective of the form which it takes, and once it is contested and the matter reconsidered by a court, the party that launched the *ex parte* proceedings is in no better position in other respects than it was at the time this occurred⁷⁴ (a position that was endorsed by the Supreme Court of Namibia in the matter of *Prosecutor-General v Uuyuni*⁷⁵);

1.5. the fundamental principle of *audi alteram partem* dictates that a party's right to a hearing cannot be lost merely because a judge hearing an application omitted to provide for a return day or to expressly draw to his attention the respondent's right to resist relief obtained against him without his knowledge;⁷⁶

1.6. the form that the opposition takes (whether as answer to the application launched or as a fresh application), matters not since law is concerned with substance.⁷⁷

[19] Counsel for PUMA then argued that the overriding principle applicable here is that, where 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*'.⁷⁸ It matters not that no return date was provided for: in *Samco Import & Export v Magistrate of Fenian*⁷⁹ ('*Samco*') the High Court of Namibia held that the test whether an order is final or interlocutory was the nature of the application to the court, and not the order which the court made in respect of such application.⁸⁰ An order is not final if it is alterable by the court whose order it is.⁸¹ In the present case it was submitted that the order is alterable.

[20] It was submitted further that it makes no difference that the order has been given effect to, for the consequences of the order are capable of being undone through a return of the documents seized in the course of the search and seizure operation. Counsel here emphasised that the bags remain sealed and that the tri-

⁷⁴ PPC judgment para 45, citing *Ghomeshi-Bozorg v Yousefi* 1998 (1) SA 692 (W) at 696D-E.

⁷⁵ *Prosecutor-General v Uuyuni* 2015 (3) NR 886 (SC) at para 33.

⁷⁶ PPC judgment para 46.

⁷⁷ PPC judgment para 48.

⁷⁸ *Thint CC* para 9, referring to *PPC SCA* paras 2 and 44 - 48.

⁷⁹ *Samco Import & Export v Magistrate of Fenian* [2009] NAHC 9.

⁸⁰ At para 9.

⁸¹ *Phillips and others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA), cited with approval in *Samco Import & Export v Magistrate of Fenian* [2009] NAHC 9 at para 10.

partite agreement had not been signed. The Commission could thus not demand of Puma to make allegations in support for the claim that the order that had been granted was provisional, as it seeks to do.⁸² The order is provisional as a matter of law. It ought to have included a return date, but the fact that it did not, did not deprive Puma of the opportunity to challenge it. Puma could not (and does not) rely on rule 72(7), because no return date was set. This does not alter the nature of the application before court.

[21] It was also denied that the relief sought was mutually exclusive as in the anticipation notice, Puma was seeking the dismissal of the *ex parte* application and the return of the documents seized by the Commission.⁸³ In the counter-application, Puma 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.⁸⁴ The two sets of relief are not mutually exclusive - the relief sought is effectively cast in two different forms, to ensure that legal technicalities do not stand in the way of Puma obtaining relief, as if the *ex parte* application were to be dismissed, it would follow axiomatically that the documents seized in consequence of the order must be returned. Puma was in any event exercising its right to challenge the grant of the order in consequence of the *ex parte* application, in respect of which Puma was fully entitled to proceed as it did in opposing the *ex parte* application by way of anticipation proceedings, but if the court would disagree, then Puma would make application for relief as foreshadowed in the notice of counter-application.

[22] Counsel reiterated that, as the SCA had made it plain in the PPC judgment, that it was not the form in which the application was brought that was important and that it was the substantive nature of the relief sought that must be taken into account.

[23] In regard to the Commission's contention that, in granting the warrant, the court had exercised a discretion that should not be lightly interfered with,⁸⁵ it was argued that the contended for review test was no bar to the grant of the relief sought by PUMA as the court can only issue the warrant if the statutory test has been met. If the test has not been met, the court has no discretion to do so. Moreover, the

⁸² Commission AA para 19 Bundle 14 p 6.

⁸³ Anticipation notice prayers 1 and 2 Bundle 8 p 2.

⁸⁴ Notice of counter-application prayers 1 - 3 Bundle 9 p 2.

⁸⁵ Commission heads para 39 p 19.

order granted in an *ex parte* application is provisional and subject to reconsideration. Once the court is apprised of the true facts, through the filing of an answer, the court may set aside the former order.⁸⁶ This is not interference with the discretion of the court, but an exercise of the courts powers, in light of further information placed before it.

[24] A further challenge to the grant of the order was mounted on Mr Ndalikolule's absence of authority to apply for the grant of the warrant. Mr Ndalikolule, the deponent to the founding affidavit, was the acting Secretary to the Commission, who enjoys delegated powers of investigation in terms of section 16(1)(f) and section 33 of the Competition Act, read with Rule 4 of the Commission Rules.⁸⁷ The delegated power does not include an express delegation to exercise powers, or to make application, in terms of section 34 for the issue of a warrant. It is Puma's position that the Secretary is not empowered to institute legal proceedings on behalf of the Commission, relating to its investigations, and to obtain a search warrant.⁸⁸ As the Commission was arguing that, despite there being no express reference in the delegation to section 34, those powers could be exercised by the Secretary on the basis that those powers are incidental to the general investigative powers under section 16(1)(f) delegated to him.⁸⁹ It was thus noted that the position so adopted accepts implicitly (and correctly) that there was no express delegation of authority to the Secretary to exercise the powers conferred upon the Commission under section 34. It was pointed out that the Commission's stance does not take account of the content of the delegation that couples the delegation of the general investigative powers under section 16(1)(f) with a specific delegation of the powers under section 33, and section 33 only. The extraordinary powers of investigation under section 34 are not delegated. There was thus no basis for considering that the delegation was or could be implied, particularly since the rationale for the delegation (said to be *nemo iudex in sua causa*) does not apply in relation to the section 34 powers. In such circumstances, the warrant falls to be set aside.

⁸⁶ *Standard Bank of Namibia v Potgieter and Another* 2000 NR 120 (HC) at 125F, approving *Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) ('Hyundai judgment') para 73. The Hyundai judgment, in turn, cited *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 para 21 and *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E - 349B.

⁸⁷ Commission FA paras 1.1 - 1.2 Bundle 2 p 1, read with annexure VD1 Bundle 3 p 1.

⁸⁸ Puma RA para 44 Bundle 19 pp 13 - 14.

⁸⁹ Commission heads paras 51 - 53 pp 22 - 23.

[25] Considerable argument was also focused on the jurisdictional requirement set by Section 34(3) of the Competition Act which requires that a judge may only issue a warrant once satisfied that this ‘was necessary’ for purposes of a Commission investigation, and which requirement, so it was argued, had not been met.

The Commission’s Argument

[26] On an *in limine* basis - and on three grounds - it was contended that Puma cannot competently invoke the processes that it has⁹⁰:

a) Firstly, and as Puma elected to acquiesce in the search, rather than to interdict or object to it the result was that the search has been conducted and, after having participated willingly in the search, Puma cannot belatedly seek to anticipate it or to bring a counter-application against the grant of the warrant. By doing so, it impermissibly prevaricates in its conduct of litigation.⁹¹ As South African courts have found:

*“The principle of the right of election is a fundamental one in our law. . . . When exercising an election, the law does not allow a party to blow hot and cold. A right of election, once exercised, is irrevocable particularly when the volte face is prejudicial or is unfair to another.”*⁹²

Puma made the election to permit the search, on legal advice and on notice of the grounds and basis for the search. Having done so, it waived its right to anticipate or oppose its initial grant. That was so because an “*election generally involves a waiver: one right is waived by choosing to exercise another right which is inconsistent with the former.*”⁹³ Put differently, Puma elected to allow the warrant to be executed; it cannot now resile from its choice.

⁹⁰ We note that the Commission has, in the case management process, consented to be treated as the applicant in these proceedings, merely for convenience and to avoid unnecessary interlocutory skirmishes. As its answering affidavit shows, it has never conceded that its application remains pending or that Puma is properly regarded as a respondent in this matter.

⁹¹ *Kahua and Others v Minister of Regional And Local Government, Housing And Rural Development and Another* [2014] NAHCMD 1 para 18.

⁹² *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC) para 54, citing *Chamber of Mines v NUM* 1987 (1) SA 668 (AD) at 681D-G with approval.

⁹³ *Feinstein v Niggli and Another* 1981 (2) SA 684 (A) at 698 E-H, quoted with approval in *Mbekele v Standard Bank Namibia Ltd Vehicle and Asset Finance ((P). I 698.2009)* [2011] NAHC 18 para 22

b) Secondly, and in any event, the result of Puma's conduct was that the search has been completed and the warrant has been discharged. The application for a warrant is no longer pending. Puma consequently cannot anticipate it or bring a counter-application to it.

'Rule 72(7) provides that "[a]ny person against whom an order is granted *ex parte* may anticipate the return day on delivery of not less than 24 hours' notice." But it applies only in respect of a provisional order or at the very least before the order is executed and given full effect. It is also required to be invoked rapidly on "very short notice".⁹⁴ Referring to rule 72(7)'s predecessor, Hoff J in the Namibian High Court noted that the rule is intended to aid a litigant who is taken by surprise by an *ex parte* order, and cannot be used in the context of extensions (of return days) or to circumvent having to properly set matters down.⁹⁵

Puma has not met either of these requirements. The order granting the warrant has been fulfilled, and it has waited almost a month after its grant and execution to file its anticipation notice. As a result, the Rule 72(7) procedure is no longer available to it.

Hefer JA, in the context of executing a warrant in terms of Income Tax legislation, opined:

'It is obvious that documents discovered as a result of a search may, in many cases, reveal the existence of other documents or articles for which further searches have to be made; and it is not easily conceivable that the Legislature would in such cases require a fresh authorisation for each further search. Be that as it may, the question whether several consecutive searches are authorised by any particular authorisation must be answered by reference to the terms of the authorisation itself. An authorisation under s 74(3), after all, confers a mandate and the duration of the mandate depends, in the absence of any statutory direction, upon the terms of the authorisation itself'⁹⁶

When the Court granted its order of 14 September 2016 it specifically ordered that the warrant must be executed in accordance with section 34(6) of the Act between the hours of 07h00 and 18h00.⁹⁷

Section 34(6) of the Act provides that:

⁹⁴ *Standard Bank of Namibia Ltd v Atlantic Meat Market (Pty) Ltd* [2014] NASC 14 para 25.

⁹⁵ *Neves and Another v Andre Neethling t/a Andre Neethling Consultancy and Others* [2012] NAHC 135 para 5, quoting with approval from *Peacock Television Co (Pty) Ltd v Transkei Development Corporation* 1998 (2) SA 259 (Tk) at 262 G-H.

⁹⁶ *Rudolph and Another v Commissioner for Inland Revenue and Others* 1997 (4) SA 391 (SCA) at 398 C – E.

⁹⁷ Bundle 1 Item 6 Page 1 Court Order para 3.

‘A warrant may be executed on any day between 7:00 and 18:00 unless a different time that is reasonable in the circumstances is authorised and specified in the warrant by the judge granting the warrant.’

The terms of the Court Order were clear that the warrant was to be executed consecutively until it is discharged.⁹⁸ It is common cause between the parties that the warrant was executed on 15 September 2016 and was discharged on 17 September 2016.⁹⁹ The warrant issued by the Court in this matter therefore was discharged by execution on 17 September 2016 in terms of section 34(5)(a) of the Act.

Its counter-application in terms of Rule 69 is similarly flawed. Counter applications can only be brought when there is a pending application for relief. Once the order granted pursuant to the application is granted and indeed thereafter discharged, the application has been finalised and no counter-application can competently be brought.

c) Thirdly, the relief sought in the anticipation notice and the counter-application are mutually exclusive. The anticipation notice seeks to restore the status quo ante. The counter-application, by contrast, proceeds on the basis that a warrant has been granted, and seeks to challenge its outcome. These are two fundamentally inconsistent methods of proceeding. Puma cannot seek them in parallel to one another.’

[27] Counsel for the Commission accordingly submitted that Puma had invoked defective processes. Properly understood, these proceedings, in their view, were actually in the nature of a review. Puma was seeking to set aside a warrant that has been granted and executed. Indeed, Puma’s legal practitioners appear, implicitly, to recognise as much, so the argument ran further. Their correspondence in anticipation of these proceedings notified the Commission that a review would be brought.¹⁰⁰ That should have implications on the manner in which this matter must be approached and determined.

[28] On this score it was further submitted that in granting the warrant, the High Court had exercised a discretion that this Court should not lightly interfere with. Here

⁹⁸ Bundle 1 Item 6 Page 1 Court Order para 3, Bundle 1 Item 10 Page 55 - 56 Founding Affidavit – Puma’s Counter application annexure ‘DD6.’

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¹⁰⁰ Bundle 1 Item 11 Page 90 Letter from Engling, Stritter and Partners annexed to Puma’s Founding Affidavit as “DD9” para 2.

it was trite that the power to interfere in the exercise of a discretion by a court a quo is “*strictly circumscribed*”.¹⁰¹ The case law permits of a later court to intervene only “*if the court has exercised the discretionary power capriciously, was moved by a wrong principle of law or an incorrect appreciation of the facts, had not brought its unbiased judgment to bear on the issue, or had not acted for substantial reasons.*”¹⁰² (own emphasis.)

[29] It was thus argued that Puma could only succeed in setting aside the warrant if it can show that its grant was “*clearly wrong or if there were irregularities and/or misdirections justifying the setting aside of the findings and conclusions*”.¹⁰³ None of these grounds for interference pertain here. Far from rubber-stamping the application, the Judge who had granted the warrant had applied his mind and had ultimately imposed additional restrictions on the conduct of the search and the terms of the warrant. In doing so, he acted entirely appropriately. It could thus not be said that no reasonable court would not have authorised the warrant.

[30] In response to the *in limine* objection in regard to Mr Ndalikokule’s authority to apply for the grant of the warrant raised by Puma the Commissions stance was that such objection should not be sustained.

[31] This stance was based on the argument that Mr Ndalikokule was appointed the acting Secretary of the Competition Commission from 1 July 2016.¹⁰⁴ Section 13 of the Act provides that the Secretary is responsible for ensuring the Commission’s efficient administration and for its organisation, control and management. For as long as he holds the position, Mr Ndalikokule was entitled to act as the Commission’s representative. In addition, in terms of section 12 of the Act and by way of a resolution, the Commission delegated to the Secretary its investigatory powers under sections 16 and 33 of the Act, read with Rule 4.¹⁰⁵ Section 16(1)(f) of the Act mandates the Commission to investigate contraventions of the Act. Section

¹⁰¹ *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* [2012] NASC 21 para 106.

¹⁰² *Ferris and Another v Firstrand Bank Limited and Another* [2013] ZACC 46; 2014 (3) BCLR 321 (CC); 2014 (3) SA 39 (CC) para 28.

¹⁰³ *Ekanjjo NO v Van Der Berg* [2008] NASC 20; 2008 (2) NR 548 (SC) para 19. See also *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* [2012] NASC 15 para 58.

¹⁰⁴ Bundle 2 Item 14 Page 40 Letter from Competition Commission, attached to Answering Affidavit as “VND5”.

¹⁰⁵ Bundle 1 Item 3 Page 1 Founding Affidavit *Ex Parte* Application Annexure VD1.

33 further empowers the Commission to commence an investigation into any conduct or proposed conduct which is alleged to constitute, or may constitute an infringement of either Part I or Part II of the Act. As Secretary, Mr Ndalikokule is entitled to exercise any powers reasonably incidental or ancillary to those powers.

[32] These submissions were further based on the High Court's affirmation that-

'It is settled law that whatever is reasonably incidental to the proper carrying out of an authorized power, is considered as impliedly authorized. (Johannesburg Consolidated Investment Co. Ltd v Marshalls Township Syndicate Ltd., 1917 AD 662 at p. 666; Randfontein Estates G. M. Co. Ltd v Randfontein Town Council, 1943 AD 475 at p. 495). It is clear, however, that only such powers will be implied as are reasonably ancillary to the main purpose.

A power would be regarded as reasonably ancillary to the main power conferred if the true object which the Legislature had in mind in conferring that power, would be defeated if the ancillary power is not implied (Johannesburg Municipality v Davies and Another, 1925 AD 395 at p. 403 or if the power conferred cannot in practice be carried out in a reasonable manner unless the ancillary power is implied (City of Cape Town v Claremont Union College, 1934 AD 414 at pp. 420, 421).¹⁰⁶

[33] It was thus argued that search and seizure powers are incidental to and implied by, the investigatory powers contained in sections 16 and 33 and that this became clear from the following:

a) Section 34 appears in the chapter and part of the Act headed "*Investigation into Prohibited Practices*". It recognises that search and seizure powers are constituent in – and one instantiation of – broader investigative powers.

b) Section 34(1) expressly links the search powers to the purpose of assisting the Commission in investigating whether an entity has engaged in prohibited conduct. A power (and duty) to investigate suspected prohibited conduct thus naturally extends to, and includes, the power to apply for a search and seizure

¹⁰⁶ *Trustco Group International (Pty) Ltd v Katzao* [2011] NAHC 350 para 11. See also, in the context of agency relationships, *Worku v Equity Aviation (Pty) Ltd* [2009] NASC 10 para 27: "It is equally trite that the authority of the agent is generally construed in such a way as to include not only the powers expressly conferred upon him or her, but also such powers as are necessarily incidental or ancillary to the performance of his mandate".

warrant.

[34] The ability to apply for a search and seizure warrant was thus incidental to and implied by the power and function of the Commission to investigate alleged breaches of the Act. As such, Mr Ndalikokule was authorised to apply for the warrant. Accordingly there was no merit in the contention by Puma that the resolution did not authorise Mr Ndalikokule to institute legal proceedings on behalf of the Commission. It was irrelevant whether Mr Ndalikokule had been authorised to depose to the founding affidavit. It is trite law that the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to an affidavit. 'It is the institution of the proceedings and the prosecution thereof which must be authorised'.¹⁰⁷

[35] Extensive argument was also made on the need for the warrant and whether or not the Commission had shown that the warrant was reasonably necessary to the investigation. I will revert to this below.

[36] If one then turns to the arguments and points raised by the parties it does not take much to realize that it not only seems logic but also convenient that the resolution of the various issues should commence with the factual determination of whether or not the search executed by the Commission during September 2016 has been completed and whether or not the warrant obtained was discharged.

Has the search been completed and the warrant been discharged?

[37] In order to resolve these questions the first point of departure surely must be the determination of what a search and the execution of a warrant would entail in order to then be able to conclude, after an examination of the facts, whether or not the envisaged search-processes have been concluded and the warrant has been discharged.

[38] From the provisions of Section 34 the following elements can be extracted:

¹⁰⁷ *Ganes and Another v Telecom Namibia Limited* 2004 (3) SA 615 (SCA) at 624 para 19 approved in *Otjizondou Mining (Pty) Ltd V Purity Manganese (Pty) Ltd* 2011 (1) NR 298 (HC) at 311 and 312 para 49 and 54.

- a) The person/s authorized to execute the warrant may firstly enter upon and search the premises; Upon first entering any premises under a warrant the person authorised by the warrant must provide to the owner or person in control of the premises proof of- (i) his or her authority to enter the premises by handing a copy of the warrant to that person; and (ii) his or her identity; or if none of the persons mentioned is present, by then affixing a copy of the warrant to the premises in a prominent and visible place;
- b) The person/s authorized to execute the warrant may then 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 may have a bearing on the investigation;
- c) The person/s authorized to execute the warrant may examine any document or article found on the premises that has a bearing on the investigation;
- d) The person/s authorized to execute the warrant may 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 a document or article; or
 - (iv) any other person who may have the information;
- e) The person/s authorized to execute the warrant may take extracts from, or make copies of, any book or document found on the premises that has a bearing on the investigation;
- f) The person/s authorized to execute the warrant may 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 that may be available on that computer system;
 - (ii) reproduce any record from that data; and
 - (iii) seize any output from that computer for examination and copying; and
- g) The person/s authorized to execute the warrant may attach and, if necessary, remove from the premises for examination and safekeeping anything that has a bearing on the investigation;
- h) If the person/s authorized to execute the warrant remove/s anything from any premises he/she must-
- (a) issue a receipt for that thing to the owner of, or person in control of, the premises; and
 - (b) return that thing as soon as practicable after achieving the purpose for which it was removed.

[39] From the common cause facts between the parties it appears that the following did occur:

- a) The physical search, authorised by the warrant, took place at Puma's premises from 15 to 17 September 2016. It was conducted by the Commission, with the assistance of an expert forensic information technology service provider, Century Technical Solutions (Pty) Ltd (Century) as well as representatives of the South African Competition Commission;
- b) In the course of 15 September 2016, Puma was presented with the warrant, to which was annexed the notice of investigation, and a proposed tripartite agreement;
- c) During the course of the search, a number of hardcopy documents were

seized, as were various electronic devices;

d) In addition, forensic mirror images were created of these electronic devices and of Puma's server. This, after access to the server was authorised by Puma employees who flew in from South Africa for the purpose;

e) On 21 September 2016, the Commission advised Puma's legal practitioners that it wanted to unseal the evidence bags containing hard copy documents seized during the search and requested their presence at the unsealing in the period between 26 and 29 September 2016;

f) On 26 September 2016, Puma's legal practitioners advised the Commission that Puma intended launching a challenge and accordingly they requested that the unsealing of the evidence be postponed. The Commission agreed on the following day, subject to a condition that Puma indicate the date by which it intended to launch its application;

g) Various materials and data was collected during the search, including hard copy documents and forensic mirror images made of the data contained on the electronic devices seized and those made from Puma's server.¹⁰⁸ This evidence has been sealed in bags or is in the Registrar's safe-keeping and which remain unopened/unaccessed to date;

h) The Commission also presented Puma with a draft tripartite agreement to be concluded between it, Century and Puma. The agreement was aimed at protecting Puma and any privilege claims it may have. It envisages that Century will conduct key-word searches and similar processes on the mirror images taken of the seized servers and hard drives, to identify data relevant to the investigation. A hard drive of relevant data will then be provided to Puma to identify and exclude privileged documents, before it is provided to the Commission. To date, Puma has refused to sign the tripartite agreement despite an undertaking that they will request certain amendments thereto which they have not done to date;

i) When the High Court granted the order of the 14th September 2016, amongst

¹⁰⁸ Bundle 1 Item 10 Page 3 Founding Affidavit – Puma's Counter-Application para 5.

others, it ordered that in the event Puma '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.' To date this data remains unaccessed in the Registrar's safe-keeping

[40] If one then considers the above facts it appears that the search remains incomplete as:

a) The hardcopies of all documents seized during the search remain sealed in bags, which bags, to date, have remained unopened. No search has as yet been conducted to determine whether or not any of the hardcopies seized during the search have any relevance to the pending investigation; and

b) The electronic data seized/copied during the search from electronic devices and Puma's server remains filed with the Registrar for safekeeping. This data has also not yet been accessed and or been subjected to any scrutiny such as the envisaged key-word-searches in order to determine whether any of its contents/data is relevant to the investigation.

[41] Surely any search and seizure operation can only be regarded as complete once an evaluation of the material seized has also occurred from which its relevance and further use can be determined. Also the object of such a search will only have been achieved if its outcome determines or assists 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 contained in the Competition Act. Before all this has not occurred no search can be regarded as complete in my view. It must therefore be concluded that the submission made on behalf of the Commission to the effect that the search has been completed cannot be upheld.

[42] Counsel for the Commission however submit further that the warrant has been discharged. In this regard it seems that this submission stands on firmer ground. Section 34 (5) states : 'A warrant continues in force for a period of 30 days from the date it is issued but lapses if- (a) the purpose for which it was granted

is satisfied; or (b) it is cancelled by the judge by whom it was issued or by any other judge of the Court.

[43] Here it is firstly clear that the warrant has not lapsed because it was cancelled. Sub-section (b) is thus not applicable. I have already found that the purpose, for which the warrant was granted in this instance, was not satisfied. So the warrant has also not lapsed in terms of sub-section (a). But as the warrant clearly only had force for a period of 30 days, which period has elapsed, it must in any event be regarded as having lapsed *ex lege*. So, regardless of whether or not the warrant must by now be regarded as having lapsed, or discharged by time, if regard is had to the provisions of section 34(5), counsel for the Commission utilized this consequence, *mutatis mutandis*, to bolster their argument that, as the warrant was thus no longer pending, there was nothing to anticipate or to counter or to reconsider.

[44] Counsel for Puma contended on the other hand that this aspect is immaterial as their client is entitled to a re-consideration.

Should there be a reconsideration

[45] Here Counsel for Puma have relied on the overriding principle applicable that, where an application for a warrant is brought *ex parte* and in chambers, it is '*by its nature provisional and subject to reconsideration*'. It matters not that no return date was provided.

[46] For this proposition they rely on the *PPC* judgment¹⁰⁹ as approved in Namibia in *Prosecutor-General v Lameck* 2010 (1) NR 156 (HC) at [4] as confirmed in a number of subsequent Namibian decisions. See for instance: *Prosecutor-General v Uuyuni* 2014 (1) NR 105 (HC) at [69] to [70], *Shalli v Attorney-General* 2013 (3) NR 613 (HC) at [35] to [37], *Uuyuni, Prosecutor-General v* 2015 (3) NR 886 (SC) at [33] and *Atlantic Ocean Management Group (Pty) Ltd v Prosecutor-General* 2017 (4) NR 939 (HC) at [30] to [33].

¹⁰⁹ *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) at 404B.

[47] The principle is thus firmly established, namely that the court, on the approved test as originally formulated by Nugent J in the South African judgment of *Gomeshi-Bozorg v Yousefi*,¹¹⁰ is essentially tasked to consider the matter 'afresh' on the return date — that is on the merits — in the light of all the information which has by then been placed before the court — 'as if the order was first being applied for'.¹¹¹

[48] With reference to these leading authorities the submissions made on behalf of Puma:

- a) that It matters not that no return date was provided for; and
- b) that the order made by Angula DJP is provisional as a matter of law; and
- c) that it makes no difference that the order has been given effect to, for the consequences of the order are capable of being undone through a return of the documents seized in the course of the search and seizure operation :the bags remain sealed and the tri-partite agreement was not signed; and
- d) that the fact that the order made by Angula DJP ought to have included a return date, does not deprive Puma of the opportunity to challenge it; and
- e) that this was not a challenge which was reliant on rule 72(7);

will thus have to be upheld.

[49] I also agree that the relief seeking the dismissal of the order granted as a result of the *ex parte* application is not mutually exclusive with the relief sought through the counter-application. If Puma should succeed in undoing the *ex parte* order which granted the warrant in the first place it would indeed follow 'axiomatically' that documents and materials that were seized, would have to be returned. Similar relief would flow from the declaration sought in the counter-application, should it succeed.

¹¹⁰ 1998 (1) SA 692 (W) as approved in *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) at 404B.

¹¹¹ *Gomeshi-Bozorg v Yousefi* op cit at 696.

[50] Finally it should be said that I find myself also in agreement with Puma's argument that the principle that the discretion which the court exercised, when it granted the warrant, is something that cannot be interfered with lightly, finds no application in this instance, as the order, granting the warrant, was granted in *in camera* and on an *ex parte* basis, which makes the grant provisional and subject to a reconsideration. Once the court is appraised of the true facts, through the filing of an answer, the court may set aside the former order. This is not interference with the discretion of the court, but an exercise of the courts powers, in the light of further information placed before it.

[51] Accordingly I find further that the proceedings which Puma has brought, where competently brought.

[52] Inherent in this finding is, at the same time, the rejection of the argument that Puma has impermissibly prevaricated and/or waived its rights in that it seemingly elected to acquiesce in the search rather than to interdict or object to it. In this regard it is obviously to be taken into account firstly that a party is not likely deemed to have waived its rights. No decision by Puma to abandon its rights was ever communicated to the Commission expressly or impliedly. On the contrary it was expressly contended that Puma's cooperation in allowing the Commission to carry out the Dawn Raid in terms of the warrant did not amount to acquiescence, and/or an election to accept, the validity of the warrant.¹¹² Puma explained its initial inactivity by explaining that it allowed the warrant to be executed on the understanding that it reserved its rights to challenge the validity thereof at a later stage.¹¹³ This it was entitled to do initially, not least to ensure that, pending an approach to court to have the warrant set aside, it was not acting in contempt. I agree that this was a permissible approach as a matter of law and necessary as a matter of practicality. What is of further cardinal relevance is that Puma did not immediately have access to the application papers and thus did not immediately know on which basis the warrant had been applied for and granted, prior to the execution of the warrant. Accordingly, Puma did not have the opportunity, prior to the execution of the warrant, to form an educated opinion as to the correctness of the decision to grant the

¹¹² Puma RA para 14 p 6.

¹¹³ Puma RA para 15 Bundle 19 p 6.

warrant and therefore it was not immediately in the position to decide whether or not to challenge it. It is also clear that it would have been unlawful for Puma to resist or interfere with the execution of a warrant, seemingly issued on a lawful basis by a Judge of the High Court. I also agree that it would have been impractical (and questionable as a matter of law) for Puma to institute urgent application proceedings or otherwise delay the Commission in its execution of the warrant, when Puma had yet to assess the merits of the decision to grant the order.¹¹⁴ But that did not preclude it from challenging the warrant once it had had the opportunity to properly consider the contents of the application for the warrant. I take into account further that Puma first obtained knowledge of the warrant on 15 September 2016 - on the occasion of the so-called 'dawn raid' – and - that by 26 September 2016 – that is a mere 11 days later – and after having reserved Puma's rights - Puma's legal practitioners advised that they would launch a challenge thereto. The election to challenge the warrant was in my view and in the circumstances also not delayed unreasonably. Importantly also Puma's legal representatives requested the Commission to postpone the opening of the bags containing hardcopies and the analysis of the copied electronic data pending the outcome of the intended legal challenge.

[53] Having then disposed of the various preliminary issues considered above I believe that the time for a reconsideration of the order granting the warrant, as made on 14 September 2016, has arrived.

The re-consideration

[54] Also here a preliminary point came into play, namely Puma's point relating to the absence of the Commission's acting secretary's authority to make application in terms of Section 34 for the issue of a warrant. As the question of authority is clearly one of those fundamental legal technical objections that require an *in limine* determination this point requires resolution before any re-consideration of the merits proper can even get off the ground.

[55] It will be recalled that – once faced with this objection - the Commission was immediately constrained to argue that the Commission's acting secretary's authority

¹¹⁴ Puma RA para 16 Bundle 19 p 6.

– that is Mr Ndalikolule’s authority - was to be implied only as the ability of the Commission’s acting secretary’s authority apply for the warrant was merely incidental to and to be implied from the power and function of the Commission to investigate alleged breaches of the Act. The Commission thus argued with reference to the investigatory powers contained in sections 16 and 33 that search and seizure powers were incidental to- and to be implied from such powers. In addition reliance was placed on the provisions of section 34 which appears in the Chapter and Part of the Act headed ‘Investigation into Prohibited Practices’ which so recognizes that search and seizure powers are constituent in – and are one instantiation of the Commissions broader investigative powers. It was further argued in defence to the point of authority that the power and duty to investigate suspected prohibited conduct would naturally extend to and include the power to apply for a warrant. In this regard the provisions of section 34(1) were supportive of this as the section expressly linked the search powers to the purpose of assisting the Commission in its investigations.

[56] Puma’s essential counter-argument pointed out that the Commission’s stance did not take into account that the content of the delegation couples the delegation of the general investigative powers under section 16(1)(f) with a specific delegation of the powers under section 33, and section 33 only. The extraordinary powers of investigation under section 34 were not delegated. There was thus no basis for considering that the delegation could be implied, particularly since the rationale for the delegation (said to be *nemo iudex in sua causa*) does not apply in relation to the section 34 powers.

Puma’s additional submissions on the point of authority

[57] Here it should be mentioned that the Commission’s counsel complained during the hearing of this matter that the thrust of Puma’s argument on this score had shifted. At the conclusion of the hearing – and in order to cure any possible prejudice that might have accrued - the court thus directed the parties, by way of its Order of 6 September 2018, to file additional written submissions on this point. Only Puma availed itself of this opportunity.

[58] Puma’s additional/amplified submissions, which I quote verbatim, ran as follows

‘NO PROPER DELEGATION OF AUTHORITY

2. In applying for the warrant, the deponent relied on a delegation of authority¹¹⁵ attached to the founding affidavit.¹¹⁶

3. The delegation relied on was a delegation only of the powers of investigation under section 16(1)(f) and section 33 of the Competition Act 2 of 2003 (‘the Competition Act’), read with Rule 4 of the Rules in terms of the Competition Act 2 of 2003 (‘the Commission Rules’):

3.1. section 16(1)(f) records as one of the functions of the Namibian Competition Commission (‘the Commission’), the responsibility to investigate contraventions of the Competition Act;

3.2. section 33 deals with the circumstances in which the Commission is entitled to employ its investigative powers;

3.3. rule 4 provides for the assignment by the Commission of functions of the Commission to members of staff of the Commission.

4. The powers in sections 16(1)(f) and 33 are powers of the Commission.

5. The application for the warrant that forms the subject-matter of this litigation was made in terms of section 34, a section in respect of which no delegation was recorded. In response to the respondent pointing this out, the Commission has sought to argue that the delegation is implied. However, this submission ignores the fact that section 34 is not concerned with a power vested in the Commission.

5.1. Section 34 empowers an ‘*inspector*’, *ie* a person designated or appointed in terms of section 14(1) of the Competition Act, to take the actions set out in section 34(1), if a judge issues a warrant for ‘*an inspector to exercise those powers*’. As section 34(4)(b) shows, it is an inspector that is granted the authority, not the Commission. The Competition Act is unambiguous in vesting the power to apply for a warrant in the inspector.

5.2. The choice of the legislature makes sense.

¹¹⁵ FA para 1.2 Item 2 p 1.

¹¹⁶ Annexure VD1 Item 3 p 1.

5.3. We submit that the inspector is the party that is authorised under the statute to make application for the issue of the warrant, since the inspector is the person most familiar with the state of the investigation and thus in a position to make out a case to a judge that:

5.3.1. the search and seizure will ultimately assist the Commission to ascertain whether a contravention has taken place, as contemplated in section 34(1) of the Competition Act;

5.3.2. the exercise of the invasive powers is necessary for the determination of that question, as required by section 34(3) of the Competition Act.

5.4. Moreover, section 34 deals with a situation where the exercise of certain investigative actions by an inspector is made subject to judicial oversight and, ultimately, the terms of any warrant issued by this Court. Search and seizure that follows upon a warrant issued in consequence of a section 34 application does not constitute the exercise of powers vested in the Commission, but the exercise of a power vested in an investigator who was authorised to exercise such power.

6. What is patently clear is that section 34 does not vest any power in the Commission. In this regard it is different from section 16(1)(f) and section 33, which expressly confer certain investigative powers on the Commission, as discussed above. Section 34 is also distinguishable, for example, from section 35(1), where the power to receive evidence is given to the Commission, as opposed to an inspector. The ancillary powers described in section 35 are similarly assigned to the Commission, and not to inspectors. It is different also from section 36, which directs the Commission to give notice of the outcome of its investigations, and not an inspector. The same distinguishing factor is to be found in section 37 (under which the Commission may receive oral representations), section 38 (institution of proceedings by the Commission), section 39 (power of the Commission to make application for interim relief to the High Court), section 40 (power of the Commission to enter into a consent agreement) and the like.

6.1. What is evident from a consideration of the various sections, is that the legislature made a choice. A careful distinction was drawn between the various powers vested in the Commission and the power to apply for a warrant, vested in an investigator.

6.2. In statutory interpretation, words should be given their ordinary and grammatical meaning,¹¹⁷ unless it would lead to 'absurdity or a result which is unjust, unreasonable or inconsistent with other provisions, or repugnant to the general object, tenor or policy of the statute'.¹¹⁸ Furthermore, intelligibility of language requires consistency.¹¹⁹ Where there is a manifest change in phraseology or terminology, it may be assumed that this imports a change in the intention on the part of the legislature.¹²⁰

6.3. Legislation confers powers on named officers ('the Secretary' or 'an inspector') or bodies ('the Commission'). Specific offices or institutions are intended and they have to be identified by reference to the definitions or descriptions in the empowering legislation. 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:¹²¹

'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. In a sense unlawful delegation is an abdication of power, which cannot be tolerated in a constitutional state.¹²²

6.4. If someone else purports to exercise the power, that act is *ultra vires* and invalid.¹²³ This is so because the recipient of the power is chosen for a purpose.

¹¹⁷ GE Devenish *Interpretation of Statutes* Juta 1992 at p 26. *Minister of Justice v Magistrates' Commission and Another* 2012 (2) NR 743 (SC) at paragraph 27.

¹¹⁸ *Volschenk v Volschenk* 1946 TPD 486 at 488. *Minister of Justice v Magistrates' Commission and Another* 2012 (2) NR 743 (SC) at paragraph 27.

¹¹⁹ *Minister of Interior v Machadodorp Investments (Pty) Ltd and another* 1957 (2) SA 395 (A); *Durban City Council v Shell and BP Southern Africa Petroleum Refineries (Pty) Ltd* 1971 (4) SA 446 (A) at 457.

¹²⁰ *Marine & Trade Insurance Co Ltd v Workmen's Compensation Commissioner* 1972 (1) SA 535 (N) at 539. *Republican Party of Namibia and Another v Electoral Commission of Namibia and Others* 2010 (1) NR 73 (HC) at 98C.

¹²¹ Baxter *Administrative Law* Juta 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) at para 35. See also *Shidiack v Union Government* 1912 AD 642 at 648. *Social Security Commission and Another v Coetzee* 2016 (2) NR 388 (SC) at paragraph 25 to 28. *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment and Tourism* 2010 (1) NR 1 (SC) at 13D.

¹²² Devenish, Govender and Hulme: *Administrative Law and Justice in South Africa* (2001) at para 5 p 69, emphasis supplied. *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC) at paragraph 23.

¹²³ *Sigaba v Minister of Defence and Police* 1980 (3) SA 535 (Tk) at 541. *Skeleton Coast Safaris v Namibia Tender Board and Others* 1993 NR 288 (HC) at 299J – 300A. *Mbambus v Motor Vehicle Accident Fund* 2011 (1) NR 238 (HC) at 246C – 246F.

Should he allow that power to be exercised by someone who was not chosen, he will have abdicated his power and will not have complied with the legislation.¹²⁴

7. Not only is the statute clear in its distinction between the powers vested in the Commission, and the power to apply for a warrant that is vested in the investigator; the language used in the delegation was also carefully chosen, we submit for the same reason. The delegation was expressly confined to a delegation of powers vested in the Commission. The delegation did not purport to delegate any powers under section 34, precisely because the Commission must have appreciated that those powers were vested in investigators, and therefore not capable of delegation by the Commission.

8. Since section 34 confers no power upon the Commission, there can be no inference that the delegation of powers conferred under section 16(1)(f) and section 33 axiomatically includes a delegation of section 34 powers. On the contrary, we submit that -

8.1. the delegation relied on by the Commission was not a delegation of powers conferred under section 34;

8.2. no delegation can be inferred in circumstances where the Commission enjoys no power to delegate under section 34; and

8.3. the purported delegation of powers conferred in terms of section 34 was unlawful, to the extent that reliance was placed on such implied delegation, given that the Commission enjoyed no power to delegate.

9. For this reason alone, the warrant issued by the honourable Mr Justice Angula falls to be set aside.'

[59] The additional written argument is meticulous and it is compellingly made. It is indeed common cause that the warrant, forming the subject matter of this case, was applied for in terms of Section 34. It is also so that this is a section in respect of which no delegation was recorded. On examination it appears that Section 34 expressly empowers an '*inspector*', ie a person designated or appointed in terms of section 14(1) of the Competition Act, to take the actions set out in section 34(1) and if a judge issues a warrant for '*an inspector to exercise those powers*'. In terms of section 34(4)(b) it is indeed an inspector that is granted this authority by the Court,

¹²⁴ *Baxter Administrative Law* Juta 1984 at p 434. *Anhui Foreign Economic Construction (Group) Corp Ltd v Minister of Works and Transport and Others* 2016 (4) NR 1087 (HC) at paragraph 49.

not the Commission. I agree that the Competition Act is unambiguous in vesting the power to apply for a warrant in an inspector.

[60] Also the supportive arguments mustered on behalf of PUMA make sense, as:

a) it is the inspector that is the party that is authorized, under the statute, to make application for the issue of the warrant, since it is the inspector that is the person most familiar with the state of the investigation and he or she is thus most likely to be in the best position to make out a case to a judge;

b) it is also so that Section 34 deals with a situation where the exercise of the investigative actions by an inspector are made subject to judicial oversight and, ultimately, the terms of any warrant issued by this Court;

c) the search and seizure that follows upon a warrant issued in consequence of a section 34 application does not constitute the exercise of powers vested in the Commission by the warrant, but the exercise of a power vested in an investigator who is authorized by court order to exercise the powers granted in the warrant in question;

d) this position is to be distinguished from the position created by section 16(1)(f) and section 33, which sections expressly confer certain investigative powers on the Commission;

e) section 34 is also distinguishable, for example, from section 35(1), where the power to receive evidence is given to the Commission, as opposed to an inspector;

f) the ancillary powers described in section 35 are similarly assigned to the Commission, and not to inspectors;

g) it is different also from section 36, which directs the Commission to give notice of the outcome of its investigations, and not an inspector;

h) the same distinguishing factors are to be found in section 37 (under which the Commission may receive oral representations), section 38 (institution of proceedings

by the Commission), section 39 (power of the Commission to make application for interim relief to the High Court) and section 40 (power of the Commission to enter into a consent agreement) and the like.

[61] I agree with the submission that it is evident from the consideration of the various sections listed above, that the legislature has made a choice and that it appears from those sections 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 investigator.

[62] Puma's submissions are further underscored by the various relied upon and applicable canons of statutory interpretation, which all militate towards a literal interpretation of the sections in question, resulting in a position where it can by no stretch of the imagination be said that the contended for interpretation would result in an absurdity or an unjust result or even one that would be inconsistent with the other provisions of the Competition Act.

[63] The above analysis and comparison of the various sections has also in my view shown – through the phraseology utilized - that the legislature intended to draw a distinction between the powers of the Commission and those afforded to an investigator in pursuance of a judicially authorised warrant.

[64] In addition the supportive argument is also particularly well made, namely that:

' ... legislation (*often*) confers powers on named officers (*'the Secretary'* or *'an inspector'*) or bodies (*'the Commission'*). Specific offices or institutions are intended and they have to be identified by reference to the definitions or descriptions in the empowering legislation. 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:

'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. In a sense unlawful delegation is an abdication of power, which cannot be tolerated in a constitutional state.¹²⁵

If someone else purports to exercise the power, that act is *ultra vires* and invalid.¹²⁶ This is so because the recipient of the power is chosen for a purpose. Should he allow that power to be exercised by someone who was not chosen, he will have abdicated his power and will not have complied with the legislation.¹²⁷

[65] It must follow further from the above that if any powers could be delegated by the Commission it could only be those powers which the Competition Act confers on the Commission. As the section 34 power was a power that was not conferred by the statute on the Commission the Commission could not delegate any such powers to its Acting Secretary, Mr Ndalikolule. Factually the delegation in question was also expressly confined to a delegation of powers vested in the Commission. That delegation did not even purport to delegate any powers under section 34 vested in investigators, which in any event were not being capable of delegation by the Commission.

[66] It follows that in such circumstances there can be no inference that the delegation of powers conferred under section 16(1)(f) and section 33 axiomatically includes a delegation of section 34 powers or that such delegation can be implied in circumstances where the Commission enjoyed no powers which it could delegate. The Commission's argument on this score must therefore fail.

[67] For these reasons it is then found that Mr Ndalikolule was not authorized expressly or impliedly to apply for the warrant in question, which means that the warrant issued by the Honourable Mr Justice Angula, on 14 September 2016, falls to be set aside on that ground.

[68] This finding then also obviates the need to deal with the remaining issues and

¹²⁵ Devenish, Govender and Hulme: *Administrative Law and Justice in South Africa* (2001) at para 5 p 69, emphasis supplied. *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC) at paragraph 23.

¹²⁶ *Sigaba v Minister of Defence and Police* 1980 (3) SA 535 (Tk) at 541. *Skeleton Coast Safaris v Namibia Tender Board and Others* 19 the Commission could not delgate93 NR 288 (HC) at 299J – 300A. *Mbambus v Motor Vehicle Accident Fund* 2011 (1) NR 238 (HC) at 246C – 246F.

¹²⁷ *Baxter Administrative Law* Juta 1984 at p 434. *Anhui Foreign Economic Construction (Group) Corp Ltd v Minister of Works and Transport and Others* 2016 (4) NR 1087 (HC) at paragraph 49.

arguments raised by the parties. At the same time the need to determine the counter-application similarly falls away.

[69] I also see no reason why, in the circumstances of this case, the general rule, relating to the award of costs, should not be followed.

[70] Accordingly, and in the result, the following orders are made:

1. The warrant issued by the Honourable Mr Justice Angula, on 14 September 2016, is hereby set aside with costs.
2. Such costs are to include the costs of three instructed- and one instructing counsel.
3. All bags containing hard copy documents, seized from Puma, by the Commission, during the period 15 to 17 September 2016, together with all electronic devices as well as all Puma's electronic data seized and/or copied from Puma electronic devices and server by the Commission, as kept by the Registrar for safekeeping in terms of the Court's Order of 14 September 2016, are to be returned to Puma within 2 days of this order.

H GEIER
Judge

APPEARANCES

APPLICANT: R A Bhana (with him I Goodman)
instructed by Dr Weder, Kauta & Hoveka Inc.,
Windhoek

RESPONDENT: W Trengrove (with him M Engelbrecht and B De
Jager)
instructed by Engling, Stritter & Partners,
Windhoek