IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

SIGNATURE DATE: 26 June 2023

Case No. 031864/2022

In the matter between:

MAXWELL MAVUDZI Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS,
GAUTENG DIVISION: JOHANNESBURG Respondent

JUDGMENT

WILSON J:

1 The applicant, Mr. Mavudzi, applies to rescind the dismissal of a point *in limine* he first raised in a bail application three years ago. The substance of the point was that his arrest, on multiple charges of money laundering, fraud and racketeering, was unlawful because there was no information under oath before the Magistrate who issued the arrest warrant that could have

given rise to a reasonable suspicion that Mr. Mavudzi had committed an offence. The contention was that the warrant was applied for on 17 March 2015 on the strength of allegations made in complainant statements that were only made on 10 April 2015. It was argued that the applicant for the warrant, a Mr. Majola, could not reasonably have suspected that Mr. Mavudzi was guilty of an offence at the time he applied for the warrant.

2 Du Plessis AJ, who heard the bail application, rejected that submission. He did so the basis that, at the time Mr. Majola applied for the warrant, he had in his possession complainant statements that predated the warrant, and which were sufficient to justify the arrest. Those statements were commissioned in 2014. This was confirmed in an affidavit from the investigating officer in Mr. Mavudzi's case, which was handed up to Du Plessis AJ, and referred to as "Exhibit B" in his ruling dismissing the point *in limine*.

3 Having dismissed the point *in limine* Du Plessis AJ went on to refuse bail. Mr. Mavudzi's attempts to appeal that decision were unsuccessful. Undeterred, Mr. Mavudzi issued a fresh application to have his arrest declared null and void on more or less the same basis as he had argued in his point *in limine* before Du Plessis AJ. That application came before Gilbert AJ who, unsurprisingly, dismissed it because the issue of the lawfulness of Mr. Mavudzi's arrest is *res judicata*.

4 In his judgment, Gilbert AJ remarked that Mr. Mavudzi had made serious allegations of fraud against Mr. Majola. The substance of those allegations is that Mr. Majola had falsely assured Du Plessis AJ that the warrant of arrest was applied for on the basis of the affidavit from the investigating officer,

Exhibit B. However, that affidavit turns out to have been deposed to after the warrant was applied for. It follows, Mr. Mavudzi argues, that the investigating officer's affidavit could not have formed part of the material upon which the warrant was applied for, or the basis on which Mr. Majola formed the reasonable suspicion he was required to have entertained before the application could properly have been lodged. Mr. Majola's apparent assertion that Exhibit B formed part of the material upon which he applied for the warrant was the respect in which Mr. Majola is said to have misled Du Plessis AJ.

5 Mr. Majola did not depose to an affidavit before Gilbert AJ. This does not surprise me, as the mainstay of the DPP's opposition to that application was that the issues raised were *res judicata*. There would have been little point in feeding the erroneous assertion that there were new facts to adjudicate by attempting to join issue with more of Mr. Mavudzi's allegations than was strictly necessary. However, Gilbert AJ was less than impressed with Mr. Majola's failure to explain the discrepancy Mr. Mavudzi identified. Gilbert AJ found "for the purposes" of the proceedings before him that Mr. Mavudzi had "established the misrepresentations upon which he relies" (*Mavudzi v Director Public Prosecutions Gauteng Local Division* [2021] ZAGPJHC 418 (23 September 2021) ("the Gilbert AJ judgment"), paragraph 53).

6 Gilbert AJ went on to suggest that, although Mr. Mavudzi's allegations of fraudulent misrepresentation could not be entertained in the proceedings before him, they might found an application to rescind and set aside Du Plessis AJ's judgment on the basis that it was obtained by fraud (see the

Gilbert AJ judgment, paragraph 62). Critically, however, Gilbert AJ did not make a finding that Mr. Majola had intentionally misled Du Plessis AJ or that Du Plessis AJ's judgment had been fraudulently obtained. Gilbert AJ's observation that "there may be an innocent explanation" for the discrepancy Mr. Mavudzi relied upon is wholly inconsistent with either conclusion (see the Gilbert AJ judgment paragraph 51).

7 Nonetheless, it is fair to say that Gilbert AJ's judgment excited a fresh sense of grievance. Mr. Mavudzi applied to have Mr. Majola struck from the roll of advocates on the basis that he had intentionally misled Du Plessis AJ. That application failed because Mr. Mavudzi relied on nothing more than the Gilbert AJ judgment to support it. Predictably, Sutherland DJP (with whom Molahlehi J agreed) found that Gilbert AJ's conclusions were not sufficient to support a factual finding that Mr. Majola had misled Du Plessis AJ (see *Mavudzi v Majola* 2022 (6) SA 420 (GJ), paragraph 27).

8 That brings me – finally – to the application before me, in which it is contended, substantially on the basis of Gilbert AJ's tentative findings, that the ruling of Du Plessis AJ was obtained by fraud, and that it should be rescinded on that basis. As should be abundantly clear by now, however, Mr. Mavudzi has established neither that there was a fraud nor that Du Plessis AJ made his ruling as a result of it.

9 In the first place, fraud has not been established. Gilbert AJ did not find that it was. He accepted that "there may be an innocent explanation" for the discrepancy Mr. Mavudzi identified. In the absence of any facts other than the judgment of Gilbert AJ, which itself allows for the possibility of an

"innocent explanation", fraud cannot be inferred. In any event, the respondent, the DPP, denies that there is anything to explain. The DPP says that Mr. Majola applied for the warrant on the basis of the 2014 complainant statements, which were enough in themselves to justify Mr. Mavudzi's arrest. The DPP denies that Mr. Majola assured Du Plessis AJ that Exhibit B formed part of the material upon which the warrant was applied for. The DPP argues that Mr. Majola had no need to do this, because the 2014 complainant statements were enough in themselves to underpin a reasonable suspicion that Mr. Mavudzi had committed an offence.

10 Indeed, having myself read Du Plessis AJ's ruing closely, I think that the most natural interpretation of it is that Du Plessis AJ in fact knew that Exhibit B was not part of the material upon which the warrant was applied for. He seems rather to refer to Exhibit B as a useful summary of the evidence upon which Mr. Majola actually relied when he formed the suspicion necessary to sustain the warrant application.

11 Moreover, whether or not Du Plessis AJ thought that Exhibit B was part of the material upon which Mr. Majola decided to apply for the warrant, Exhibit B was plainly not the only material upon which Du Plessis AJ relied to conclude that the arrest warrant was lawfully obtained. Du Plessis AJ also refers to and relies upon the 2014 complainant statements, which obviously predate the application for a warrant by many months. Indeed, in an application brought for similar relief on the same facts by one of Mr. Muvudzi's co-accused, Fisher J said that the proposition that Exhibit B was the only information before the Magistrate was "concocted" (see the

judgment of Fisher J in *Dube v Director of Public Prosecutions, Gauteng* (case no. 42296/2020 in this court), paragraph 38). I agree, but whether or not it was concocted, the proposition was plainly wrong.

12 Mr. Mavudzi argues that the 2014 complainant statements do not implicate him, but that proposition must be taken to have been examined and rejected by Du Plessis AJ in his judgment dismissing the bail application. Even if I were inclined to revisit the issue of whether the 2014 complaint statements were enough to ground the application for an arrest warrant (I am not so inclined), I would be precluded from doing so for the same reason that Gilbert AJ refused to revisit the lawfulness of Mr. Mavudzi's arrest: the issue is *res judicata*.

13 It follows that the application cannot succeed. Mr. Georgiades, who appeared for the DPP, pressed two points *in limine*. The first was that I lack jurisdiction to entertain the recission application, because the proceedings before Du Plessis AJ are comprehensively regulated by the bail provisions of the Criminal Procedure Act 51 of 1977, which does not allow for the recission of bail judgments. It is, however, trite that the nature of a legal proceeding is determined by its subject matter, not its form (*Sita v Olivier* 1967 (2) SA 442 (A), 449B-E). While it is true that the ruling Mr. Mavudzi seeks to rescind was made in the context of a bail application, the subject matter of the point *in limine* Mr. Mavudzi pursued was the lawfulness of his arrest. The dismissal of the point *in limine* was a civil ruling that was capable, in principle, of being rescinded.

14 Mr. Georgiades next contended that the recission application is *res judicata*. However, I do not think that the question of whether the fraudulent misrepresentation Mr. Mavudzi alleges led to the judgment sought to be rescinded has been determined before in proceedings between these parties. The judgment of Fisher J in *Dube* did address that question, but Mr. Mavudzi was not a party to that application.

15 Moreover, I do not think that it is wise to decide this application on procedural grounds if that can be avoided. Mr. Mavudzi and his co-accused have shown themselves to be enthusiastic litigators. To decide the matter on procedural grounds would be to invite Mr. Mavudzi to repackage his pre-occupation with the lawfulness of his arrest, and to encourage him to pursue the issue again in another forum. I wish to do nothing to encourage that outcome.

16 To emphasise: it has not been demonstrated that Mr. Majola intentionally misled Du Plessis AJ. But even if it had, the alleged misrepresentation made no difference to Du Plessis AJ's decision to dismiss Mr. Mavudzi's point *in limine*.

17 Mr. Mavudzi has been incarcerated for several years. He is litigating an issue closely associated with pending criminal proceedings. He is doing so without the benefit of legal representation. His aim is to be set free. In these circumstances, a costs order against him would be wholly inappropriate, even though his arguments are manifestly lacking in merit.

18 For all these reasons, the application is dismissed, with each party paying their own costs.

S D J WILSON
Judge of the High Court

This judgment was prepared by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 26 June 2023.

HEARD ON:	2 June 2023
DECIDED ON:	26 June 2023
For the Applicant:	In person
For the Respondent:	C Georgiades SC Instructed by the State Attorney