

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: B38945/2022

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
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In the matter between:

KAGISO ANNETTE MAPHALLE

Applicant

and

SOUTH AFRICAN POLICE SERVICE

First respondent

THE NATIONAL COMMISSIONER OF POLICE

Second respondent

THE GAUTENG PROVINCIAL COMMISSIONER OF
POLICE

Third respondent

THE STATION COMMANDER, SUNNYSIDE POLICE
STATION

Fourth respondent

THE INVESTIGATING OFFICER, SUNNYSIDE
POLICE STATION: SGT SINUGU

Fifth respondent

THE HEAD: CRIMINAL RECORD AND CRIME
SCENE MANAGEMENT

Sixth respondent

DIRECTOR OF PUBLIC PROSECUTION, GAUTENG DIVISION: PRETORIA	Seventh respondent
CHIEF PROSECUTOR: PRETORIA MAGISTRATES COURT	Eight respondent
SENIOR PROSECUTOR: EZEKIEL MOLAUTSI, PRETORIA MAGISTRATE COURT	Ninth respondent
MINISTER OF POLICE	Tenth respondent

JUDGMENT

van der Westhuizen, J

- [1] The applicant approached this court on an urgent basis for certain relief relating to her finger prints being taken in respect of an investigation relating to alleged fraud committed by her.
- [2] The relief included a declaration that the applicant was not awaiting trial, various compelling orders that related to the destruction or removal of the applicant's fingerprints, the removal of the "awaiting trial" status, and other related directions in respect of the foregoing.
- [3] The respondents opposed the applications on the premises of non-urgency and on the merits of the application.
- [4] Although the arguments on behalf of the parties were primarily directed at the issue of urgency, the parties referred to the merits of the application as that formed the basis of the argument on the issue of urgency and whether the applicant would be afforded substantial redress if the matter is not heard in the urgent court.
- [5] It was submitted on behalf of the respondents that the matter related to a very narrow issue, namely whether the applicant was, or was not, awaiting trial under criminal case number 183/12/2021 where it was

alleged that the applicant committed fraud by submitting alleged fraudulent Covid-19 positive results to her employer, The National Heritage Council.

- [6] After the applicant's arrest on 11 January 2022, the applicant was released on bail, presumably the so-called police bail and warned to appear in court on 14 January 2022. On that day the prosecutor indicated that the matter would not be enrolled as further investigations were pending or had to be undertaken. Apparently the applicant was refunded her bail money. The reason for that was not explained.
- [7] The status of the matter remained as further investigations were under way. By 14 April 2022 the applicant was acutely aware that her police clearance certificate report indicated her status as "awaiting trial". The applicant did nothing to "correct" that inscription.
- [8] Only after an interview for prospective employment did the applicant attempt to engage with the South African Police Services (SAPS) and the National Prosecuting Agency (NPA). Details of when that occurred were lacking.
- [9] It was submitted on behalf of the applicant that in respect of the issue of urgency, the date of 14 April 2022 is not decisive. The period between April 2022 and October 2022 should rather be considered. It was submitted that the urgency was not self-created. The sublime submission was that the applicant's endeavours to engage with the relevant authorities should be crucially considered. When that approach is followed, the circumstances look bleak for the applicant as will appear below.
- [10] Before engaging on an investigation of urgency, the preliminary points raised by the defendants require stating. Those were: a premature application for the relief sought in this application; incompetent/improper relief sought in this application; lack of

compliance with the requirements for a declaratory; lack of compliance with the requirements for a final interdict; and lack of urgency.

[11] Considering the issue of urgency, it is to be noted that all that the applicant did since April 2022 were attempts to obtain the relief now sought by pressuring the investigation officer and the senior public prosecutor. Throughout that period, i.e. April 2022 and October 2022, the investigating officer kept the applicant and her attorneys in the loop relating to the progress of the investigation. The senior prosecutor further advised the applicant and her attorneys of the delays and the reasons therefor. Despite the foregoing, the applicant did not attempt at an early stage to obtain the required relief if she was unsatisfied with the feedback that she received. This application only saw the dawn of day when she was advised during early October 2022 that it was eminent for a decision to be made whether to prosecute or not. The issue of urgency was clearly self-created.

[12] On the issue of a premature application, counsel for the respondents submitted that the purpose of the taking of finger prints or body prints or photographic images were limited to: purposes related to the detection of a crime; the investigation of an offence; the identification of missing persons; the identification of unidentified human remains; or the conducting of a prosecution.¹

[13] Counsel for the respondents further submitted, with reference to the provisions of section 151 of the Criminal Law (Forensics Procedure) Amendment Act,² that an arrestee's index and removal of an arrestee's forensic DNA profile was dependent upon whether or not a decision was made not to prosecute a person or where the person was acquitted at his or her trial, provided that there was no other outstanding criminal investigation against that person. The said section provides directives in respect of the procedures to be followed in that regard.

¹ Section 15A(4), the South African Police Service Act, 68 of 1995

² Act 37 of 2013

- [14] In the present instance, neither of the two requirements were complied with. On 6 July 2022, the applicant's attorneys were informed that the investigation officer was conducting investigations that included an application in terms of section 205³ for a subpoena to access the records relating to the applicant's Covid-19 test results. This information was echoed to the applicant and her attorneys by the senior prosecutor.
- [15] On 5 October 2022 the applicant and her attorneys were informed that the senior prosecutor was awaiting a section 212⁴ statement. On 14 October 2022 the 212 statement was obtained and filed in the docket. The docket was sent to court and received by the prosecutor on 18 October 2022. This application was launched shortly thereafter.
- [16] The respondents further submit that the relief sought in this application was incompetent/improper in that the applicant has failed to meet the requirements of section 151⁵ relating to the deletion of the applicant's arrestee index and the arrestee's forensic DNA profile, namely that she has either been acquitted or not prosecuted.⁶ The applicant's apparent reference to the provisions of section 36B(6)(a)(iii) of the CPA is misplaced. The applicant's case does not fall in any of the categories of that section as recorded earlier. That section supports the case of the respondents.
- [17] Albeit that this court is empowered in terms of the provisions of section 21 of the Superior Courts Act, 10 of 2013, to grant declaratory orders, the applicant has failed to comply with the requirements relating to declaratory orders. The applicant has not proved an existing right to

³ Criminal Procedure Act (CPA), 51 of 1977

⁴ *ibid*

⁵ Act 37 of 2013

⁶ See *Mahlangu et al v Minister of Defence and Military Veterans et al* [2019] JOL 45940 (GP) at para [13]

have her arrestee's index and arrestee's forensic DNA profile deleted, for all the foregoing.⁷

[18] The relief sought by the applicant is final in effect and thus the requirements for a final interdict were to be met. It was restated in *Kopano Procurement & Services (Pty) Ltd v Standard Bank of South Africa*⁸ that there are three requirements that are to be met before a final interdict may be granted. These are: a clear right (a right clearly established); an injury actually committed or reasonably apprehended; and the absence of any satisfactorily remedy available to the applicant. All three of the aforementioned requirements are to be proven.

[19] As recorded above, the applicant has failed to prove a clear right. None of the requirements for a deletion of the arrestee's index and forensic NDA profile have been shown, nor proven. The applicant has an alternative remedy. The applicant could have approach the court for a *mandamus* to compel the prosecutor or the NPA to decide whether to prosecute or not. That has not been done, nor was it foreshadowed in this application. An action for damages is also available to the applicant.

[20] The applicant's apparent reliance upon *Thint Holdings (Southern Africa) (Pty) Ltd et al v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions*⁹ is misplaced. In the present matter the prosecutor was yet to decide whether to prosecute or not. The mere non-enrolment was insufficient. The prosecutor indicated clearly throughout the period since January 2022 that investigations were pending, which the applicant did not deny.

⁷ See in general *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* (237/2004) [2005] ZASCA 50 para [18]

⁸ 2021 JDR 1939 (FB) at para [24]

⁹ (CCT 90/07, CCT 92/07) [2008] ZASCA

[21] It follows from the foregoing that this application was ill conceived and clearly not urgent. It stands to be dismissed for all the aforementioned reasons.

I grant the following order:

1. The application is dismissed;
2. The applicant is to pay the costs.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

Heard on: 01 November 2022

On behalf of Applicant: L Moela
Instructed by: Sithi and Thabela Attorneys

On behalf of Respondent: M Mavhungu
Instructed by: The State Attorney

Judgment Handed down: 17 November 2022