



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

CASE NO: 122735/2023

In the matter between:

JOSEPH MALULEKE

Applicant

and

DELETE WHICHEVER IS NOT
APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES:
NO
(3) REVISED

JOSEPH

MALULEKE

**THE MAGISTRATE N.O.
THE MAGISTRATES COMMISSION
DIRECTOR OF PUBLIC PROSECUTIONS**
Respondent

First Respondent
Second Respondent
Third Respondent
Fourth

In re:

JOSEPH MALULEKE

Applicant

and

**THE MAGISTRATE N.O.
THE MAGISTRATES COMMISSION
DIRECTOR OF PUBLIC PROSECUTIONS
MINISTER OF POLICE
NATIONAL COMMISSIONER OF POLICE**
Respondent
OFFICE OF NATIONAL HEAD: DPCI
Respondent

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth
Sixth

CAPTAIN MPHOFA PATRICIA MAGETSE
Respondent

Seventh

JUDGMENT

NGALWANA AJ

[1] This application, styled "*Application to anticipate the court order*", seeks an order reconsidering the order of Dlamini J dated 24 November 2023, and substituting it with an order dismissing the First Respondent's urgent application with costs on attorney and client scale, including the costs of counsel.

[2] Dlamini J had on the said date granted an order interdicting the Second Respondent, and/or any magistrate, from continuing with an examination of the First Respondent then scheduled for 27 November 2023 as contemplated in a subpoena issued in terms of section 205 of the Criminal Procedure Act, 1977, and from performing any act incidental to such subpoena, pending review and setting aside of the subpoena.

[3] The application before Dlamini J had been launched on an urgent basis on 21 November 2023, calling on the respondents in that case to file answering papers by 16h00 on 23 November 2023. The notice of motion informed the respondents that the application would be heard at 14h00 on 24 November 2023 after the First Respondent had filed his replying affidavit by 09h00 on that day.

[4] No answering papers were filed, and the matter served before Dlamini J in the morning session on 24 November 2023 and the Learned Judge granted the relief sought. The applicants complain that the First Respondent stole a march on them by moving the application in the morning when the notice of motion said it would be moved in the afternoon on that day. The First Respondent's retort to this is that the senior Judge's office had at 12h15 on 23 November 2023 posted on CaseLines a note to the parties' legal representatives which read as follows:

"Your matter will be heard tomorrow at 11h00.

Kindly ensure that you file your Compliance Affidavit, Draft Court Order and all outstanding affidavits to be exchanged by latest tomorrow morning at 09h00.

Also file your Practice Notes and Short Heads of Arguments for the Court."

[5] The application before me is said to "*anticipate*" the order of Dlamini J, reconsider and set it aside. It was launched on 26 November 2023, directed the respondents to file answering papers by 18h00 on the same day, and informed them that the applicants would file their replying papers by 08h00 on the day of the intended hearing on 27 November 2023. There is no prayer that the matter be heard as one of urgency, or that the rules pertaining to service periods be relaxed.

[6] In the supporting affidavit, it is submitted that the application is brought in terms of rule 6(8) of the uniform rules. Still, nothing is said about urgency under the rubric "*nature of this application*".

That discussion appears later in the supporting affidavit under “urgency” where the first respondent says, in relevant parts,

“42. I am advised that rule 6(8) entitles any person against whom an order was granted *ex parte* to anticipate the return day upon delivery of not less than twenty-four hours’ notice.

43. I am further advised that notwithstanding the remedy afforded in terms of rule 6(8), urgent applications are not free for taking and thus a person approaching the court on urgent basis is required to demonstrate the urgency for her matter to be entertained under truncated time periods in terms of rule 6(12) read with the Practice Directive of this Court”.

[7] The grounds for urgency advanced appear to be that the order of Dlamini J, in the absence of the applicants, “*is very detrimental to the administration of justice because it restrains [investigators of serious crime] from continuing with their work pending the review application...*”. The applicants allege that “*[i]nvestigations of serious crimes such as the one allegedly committed by Mr Nsele [the First Respondent’s client] are, by their very nature, a priority and thus urgent for good administration of justice. The longer the investigation reaches its finality, the more likelihood of evidence being extinguished. This is more so, especially if the subject of investigation has become aware of it*”.

[8] This is a novel approach to the reconsideration of orders. Firstly, the order of Dlamini J was not obtained *ex parte*. The First Respondent invited the applicants to file answering papers. That they did not do so did not turn the nature of that application into an *ex parte* application. So, rule 6(8) would seem to be the wrong horse for the applicants to have saddled in this race for the reversal of Dlamini J’s order. Secondly, there was no rule *nisi* for the applicants

to *anticipate*". An interim interdict was granted pending determination of the First Respondent's review of the impugned subpoena. Third, what the applicants will have this court do is sit as an urgent court of appeal or review, in circumstances where urgency is not even sought in the notice of motion. An urgent court cannot, to my mind, validly set aside an order of another urgent court on the grounds advanced in this case. Fourth, the usual approach in the circumstances raised by the applicants is to approach the same Judge who made the order for a reconsideration of his order under rule 42. Counsel for the applicants expressly disavowed that approach when that lifeline was thrown her way. Fifth, in any event, even if urgency were sought in the notice of motion, the fact that the crime being investigated is regarded by the applicants as "*priority*" or "*serious*" does not, without more, render the application urgent. More is required. The applicants advance no plausible facts that tend to show that the information or evidence sought from the First Respondent (to which he claims legal privilege as being communication as an attorney with his client) is in imminent danger of dissipation. Sixth, in the absence of facts tending to show that the information sought is in imminent danger of dissipation, I am not satisfied that the applicants cannot obtain substantial redress in due course. If they should successfully resist the review application, then they can pursue the information. If they should not succeed in resisting the review, then they were not entitled to the information in the first place.

[9] In the result, this application founders for lack of urgency and for procedural misstep. It is not necessary to deal with the merits of it. Those can be pursued in the review application.

[10] There is no reason why costs should not follow the cause.

Order

In the result, I make the following order:

1. The application is struck off the roll for lack of urgency.
2. The applicants are to pay the costs of this application on a party and party scale.

V NGALWANA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 01 December 2023.

Date of hearing: 28 November 2023

Date of judgment: 01 December 2023

Appearances:

Attorneys for the Applicants:

Counsel for the Applicants:

0757)

State Attorney, Pretoria

M Rantho (082 453

Attorneys for First Respondent:
Counsel for First Respondent:
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