IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: B9/2024

DATE: 02-04-2024

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
2024-04-16
DATE SIGNATURE

In the matter between

NOSIVIWE MAPISA-NQAKULA	Applicant
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE MINISTER OF POLICE	Second Respondent
BHEKI MANYATHI	Third Respondent
CHIEF INVESTIGATOR DYLAN PERUMAL	Fourth Respondent
SERGEANT SUNEEL BELLOCHUN	Fifth Respondent

J U D G M E N T

POTTERILL, J:

[1] The applicant, Ms Nosiviwe Mapisa-Nqakula has brought an urgent application seeking the following order:

> "Interdicting and restraining the respondents or their agents from arresting the Speaker, notwithstanding any warrant of arrest under the Criminal Procedure Act, 51 of 1977 (to which I shall refer as the CPA) pending the final outcome of this application on terms to be directed by this Court; alternatively the final outcome of the application served on the respondents at or about 06:30 on Friday, 22 March 2024."

This is referred to as the main application.

[2] Furthermore, that the Court is to exercise a discretion to take a judicial peek into the state's brief, including the docket to decide this application.

[3] This relief is sought against five respondents, not in this notice of motion, neither in the founding affidavit are the respondents cited in accordance with the Uniform Rules of Court. The Court is referred to the main application for the correct citation." I will remark that this deviation, due to urgency is not accepted practise. The respondents are cited as the National Director of Public

Prosecutions, to whom I shall refer as the NDPP. The second respondent is the Minister of Police [the Minister] and the third respondent is cited as Bheki Manyathi. The answering affidavit is made by Adv Manyathi setting out that he is the Deputy Director of Public Prosecutions and the lead prosecutor in this matter that the applicant is to be charged with. The fourth respondent is cited as Chief Investigator Dylan Perumal; and that seems to be correct in terms of his answering affidavit where it is stated that he is the chief investigator in the criminal matter pertaining to the applicant. The fifth respondent is Sgt Suneel Bellochun. Counsel for the respondents placed on record that counsel was appearing on behalf of all the respondents.

Background:

[4] The applicant, on Friday, 22 March 2024 at 06:30 in the morning, one court day before this application, before me was launched and served, served another urgent application, on the same respondents. This is the application referred to as: “the main application.” In the founding affidavit, the urgent application before me, it is set out that this urgent application is interim relief to anticipate the main application; “the pre-emptive strike” to the main

application. The relief in this application is the same relief sought in prayer 2 of the main application. It is further set out, in the founding affidavit, that the basis for the interdict sought herein is essentially the same relief sought, set out in the main application.

[5] The first issue the Court has to decide is urgency. The grounds for the accelerated or anticipated urgency application is set out as that the unlawful arrest is imminent and it intended to take the applicant and her attorney by surprise. The imminent arrest will harm the applicant's dignity, as a normal citizen, and under the Constitution of the Republic of South Africa: "Merely by virtue of her office and status as Speaker of Parliament." It is further averred that there has been constant and unrelenting attempts by the state to arrest, despite the necessary threshold to arrest her, let alone charge a statutory and constitutional authority. In this case one of the three most important functionaries appointed in terms of the Constitution of the Republic of South Africa.

[6] It is further set out that the state's case is underpinned by an underwhelming weak investigation and riddled with irregularities which could never justify the infringement and imperilment of the applicant's

constitutional rights; let alone the applicant's position as the Speaker of the Parliament.

[7] Furthermore the applicant is not a flight risk. The media reports leaked by the NPA is the NPA trying the applicant by means of the media.

[8] The respondents deny that the matter is urgent and submit that any urgency is self-created. There is an urgent application set down for 09 April 2024. One cannot anticipate that urgent application and set it down earlier.

[9] The applicant knew since 08 March 2024, when Mr Perumal contacted the applicant and asked who her attorney is, that her arrest was imminent. For a period of two weeks, since 08 March 2024, no arrest has been carried out. The urgent applications were brought while NDPP Manyathi was still engaging with the applicant to hand over the applicant at the police station for processing in preparation for the enrolment of the matter. It is common cause that even before this application before me was brought, it was indicated to the applicant that the respondents would not oppose bail. An arrest, on its own, cannot create urgency; especially when there is no apprehension of detention.

[10] The applicant, herself, concedes it was brought to her attention that resort to section 40 of the CPA would be the last resort. This fact is now, however, used as to create urgency despite it being a last resort.

[11] Furthermore, whether there is a weak case is speculative and the Court should not consider this as a ground for urgency. The media leaks by the NDPP are denied and also do not constitute grounds for urgency.

[12] There has been non-compliance with the practice directives as to service and the date it was enrolled. One cannot anticipate another urgent application.

Ruling on urgency:

[13] It is trite that an urgent application is not for the mere asking. Rule 6(12)(b) sets out:

> "In an urgent application an applicant must set forth explicitly the circumstances which averred rendered the matter urgent and the reasons why the applicant claims that the applicant would not be afforded redress at a hearing in due course."

The *locus classicus* of *Luna Meubelvervaardigers (Edms) Beperk v Makin and another t/a Makin's Furniture*

Manufacturers 1977 (4) SA 135 (W) bears repeating:

> "The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter must be set down."

[14] The Gauteng Practice, Pretoria Practice Manual, contained in Volume 3 of *Erasmus* sets out how urgent applications must be brought before Court. On page H2-137(6) it reads as follows:

> "The rules ensure an ordinary flow of applications through the court and their expeditious adjudication. Rule 6(12) allows an applicant who requires relief urgently to have his case decided without the delays necessitated by the ordinary procedure. However, the normal times will be abridged and a deviation from rule 6 will be permitted only when the matter is urgent.

> The degree of abridgement and deviation must be commensurate with the case and must be justified in the founding affidavit."

Page H2-139 under [4](2) the following is said:

> "The abridgement of times and the deviation from a rule must be justified. If the matter is not heard immediately the applicant will not be afforded substantial redress at a hearing in due course. These matters must be pertinently dealt with in the affidavits filed in support of the application."

[15] The Court has to decide whether the matter is so urgent that the times are justified and the urgency is not self-created, because:

> "Where the application lacks the requisite element or degree of urgency, the court can for that reason decline to exercise its power under Rule 6(12)(a). The matter is then not properly on the court's roll and it declines to hear it. The appropriate order is generally to strike the application from the roll."[1]

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[1] *Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd Commissioner for South African Revenue Services v Hawker Aviation Services Partnership and others* 2006 (4) SA 292 (SCA)

[16] The Constitutional Court in *AParty and Another v Minister for Home Affairs and Others; Moloko and Others v Minister for Home Affairs and Another* 2009 (3) SA 649 (CC) at paragraph [65] found that launching applications on such short notice and at the very latest date should be avoided as it places undue pressure on the parties and the Court.

In *Economic Freedom Fighters and Others v Chairperson of the Powers & Privileges Committee and Others* (23230/23) 2024 ZAWCHC 31 (8 February 2024) it was found that one day notice to the respondents with the Court:

> "To digest the contents thereof so that the matter could be heard and judgment handed down in the space of a day or two thereafter, was also wholly unreasonable."

[17] With this background the Court has to decide this urgency. In this matter the application was filed on a Saturday. The respondent was to oppose the matter by e-mail or extraordinary by means of WhatsApp on the Sunday by 16:00 on the same day; Saturday 23 March 2024 and to deliver any opposing affidavit by no later than 16:00 on Sunday 24 March 2024, with the matter set down for Monday 25 March 2024. The Court was expected to hear this matter on Monday at 10:00. The respondents'

answering affidavit was filed on Monday and the matter stood down till 15:00 for the applicant to decide whether it wanted to reply; for the Court to have time to read the answering affidavit in between the other 20 urgent applications this Court had on its roll. I managed to read the answering affidavit and entertained the matter at 15:00. The applicant had decided not to file a reply.

[18] It is patently clear that none of the practice directives of this Court was adhered to. The timeframes in terms of Rule 6(12) were unreasonable, not only to the respondents, but to the Court. It was thus argued that despite these shortcomings the urgency is so patent, as it stems from a threat to arrest the applicant, without a due and lawful process, and the whole premise of the applicant's case is:

1. The applicant's standing in society.
2. There is an unlawful prosecution.
3. The arrest will be unlawful.
4. The applicant's constitutional right to dignity and freedom of movement will be infringed.

[19] Arrest is a means to process a suspect and have an appearance before Court. The respondents set this out in their answering affidavit; but it is trite. The applicant, by means of her attorney, sets out in the main application, that

the NDPP does not even intend to oppose bail. This was already in the main application set out making it clear that detention was not in issue. In the answering affidavit, to this application, the NDPP confirms that it will not oppose bail. Arrest without detention simply is not urgent.

[20] It is most certainly not within the power of this Court to instruct the Minister and his officials to summons the applicant versus to arrest her. There is in anyway no such prayer sought in the application before me. I cannot find this, firstly, because there are no grounds set out as to why this should be done, except that the applicant's standing in society and her dignity. The NDPP has stated, under oath, that her attorney can take her to Lyttleton Police Station and her attorney can take her to the court. This is already a courtesy and an exception to what ordinary citizens are afforded.

[21] There is not a single fact set out as to why the future arrest will be unlawful. Seemingly because there is a weak case made out. Yet, the applicant does not know what case has been set out and this is pure speculation. I can make no finding on such speculation that there will be an unlawful arrest or that there is a weak case. These facts cannot underpin urgency.

[22] The respondents argued that it would not be competent for this Court to interdict an arrest. I am in full agreement with this submission. Not on the facts presented, but more importantly, a Court has to take cognisance of the fact that if the Court grants such an order the floodgates will be opened. Every suspect will be in a position to approach a Court, on an urgent basis, setting out on speculation that there is a weak case against it and interdict an arrest.
Any suspect would merely have to set out in a founding affidavit that the arrest in future will be unlawful. The whole criminal justice system will fail and will be controlled by suspects.

[23] This applicant has been ensured that section 40 will only be utilised if she does not present herself to the police station. The applicant has failed to do for two weeks. The fact that section 40 will only be utilised if she does not present her to the police station, is in complete compliance with the standing orders, which sets out that arrest should be a last resort.

[24] I was referred to the matter of *President of the Republic of South Africa v Zuma and Others* 2023 (1) SACR 610 (GJ) at paragraphs 8 to 10, that it would not be

overreach for this Court to interdict arrest, but a Bench exercising judicial oversight. The matter is not comparable and does not sway me that I am entitled to judicial oversight of this nature. Firstly, nowhere in that matter does the Court find a Court has judicial oversight to interdict an arrest. Secondly, in that matter the summons was before Court and the plethora of grounds regarding its validity on the face thereof was raised. In this matter no arrest has been made and no unlawfulness on its own has been explained to Court, excepting for pure speculation being raised.

[25] Furthermore, the Court in that matter found that *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) was not applicable in that matter due to it being a private prosecution. The *OUTA* case held that where an interdict was sought against a statutory authority from performing a function within its domain a higher treshold existed then when seeking such relief against a private litigant; as in this instance.

[26] Much reliance was placed on the fact that the applicant has a right to legal representation of her choice. Clearly the NDPP and the police investigator is aware of this

right and has afforded her ample time to report to the Lyttleton Police Station with a legal representative. Mr Perumal already, on 09 March 2024, had asked who her legal representative is. On 17 March 2024 the legal representative, for the first time, made contact with Perumal. The delay in processing the applicant was done out of courtesy. It was made clear that it ws not a negotiation and was not open-ended. Mr May set out that due to a long trial in Durban he is only available on 03 April 2024. I was referred to section 35 of the Constitution and section 73 of the CPA. Firstly, all of those sections referred to an accused, or an arrested or a detained person, which on no construction this applicant before the Court is.

But I accept that pre-arrest there is informational duties in terms of section 73(2)(A). With these duties arising at the time of arrest of the accused, the accused is entitled to legal representation. This right does not include that the legal representative dictate when a police official, acting in terms of his authority, has to fulfil its duties. The averment that the respondents do not want an attorney present for her to incriminate herself is pure speculation and flies in the face of Perumal and the NDPP attempting to secure an attorney to be present at her arrest. Already at the gatehouse the applicant is afforded legal representation. She has been afforded the right to legal representation in

the pre-trial and pre-arrest stage. The Court cannot interdict to prevent statutory authorities to comply with its statutory duties. It is not as if the state representatives have been not lenient and has already let two weeks go by.

[27] The prayer that I take a judicial peek is for the Court to determine whether an arrest would be unlawful. In reply, on behalf of the applicant, persuant to a question by this Court, it was submitted that I only need to take a peek into the docket if I am uncertain.

I am not uncertain. I exercise my discretion not to take a judicial peek and find this inappropriate. This Court is not a means to declare an arrest, which has not taken place, unlawful or that it would be unlawful, or express a view thereon or make a value judgment. I am therefore also not granting this order.

[28] Although I do not address all the issues raised, it does not mean I did not not consider it. No remedy is prayed pertaining to the search and seizure. The respondents deny the media leaks eminate from their offices or agents; but in any event no remedy is sought pertaining to any leaks.

[29] In the applicant's affidavit there are a variety of emotive garnishing, which the Court cannot take cognisance of and make factual decisions on. However, even if the Court finds that the matter is not urgent, the Court must still make sure that there is substantial redress in due course.

[30] Not in the founding affidavit, of this application, or the main application, is any facts set out. This requisite, in terms of Rule 6(12)(b) and the practice directive is not at all addressed in the founding affidavits.

[31] But, even if I consider that despite the applicant setting out any of these facts, before me, even if I should consider it, then also persuant to a question by this Court, whether this Court would not be deciding already the matter as it seeks the same relief pertaining to arrest in the main application, counsel for the applicant strongly argued that that Court would make a final ruling, as this is just an interim interdict.
In that case the applicant will have substantial redress in the hearing to follow.

[32] As for the costs, the costs must follow the result. Both parties asked for costs, including the cost of two counsel.

Accordingly the application is struck from the roll. The applicant is to pay the costs, including the costs of two counsel.

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POTTERILL, J
JUDGE OF THE HIGH COURT
DATE: 2024-04-16