IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 659/2023

In the matter between:

MAZETTI MANAGEMENT (PTY) LTD	**FIRST APPLICANT**
DAVID GAVIN WILLOUGHBY	**SECOND APPLICANT**
and	
CLINTON VAN NIEKERK	**FIRST RESPONDENT**
FREDERICK WILHELM LUTZKIE	**SECOND RESPONDENT**
THE MINISTER OF SAFETY AND SECURITY	**THIRD RESPONDENT**
THE STATION COMMANDER, VERULAM SAPS	**FOURTH RESPONDENT**
THE STATION COMMANDER, SANDTON SAPS	**FIFTH RESPONDENT**
THE NATIONAL PROSECUTING AUTHORITY	**SIXTH RESPONDENT**

In re:

The matter between:

CLINTON VAN NIEKERK	**FIRST APPLICANT**
FREDERICK WILHELM LUTZKIE	**SECOND APPLICANT**
and	
THE MINISTER OF SAFETY AND SECURITY	**FIRST RESPONDENT**
THE STATION COMMANDER, VERULAM SAPS	**SECOND RESPONDENT**

THE STATION COMMANDER, SANDTON SAPS **THIRD RESPONDENT**

ORDER

I make the following order:

1. The application succeeds and the order of Shapiro AJ made on 27 January 2023 is set aside.
2. The first and second respondents are ordered to pay the costs on a party and party scale jointly and severally the one paying the other to be absolved.
3. The Registrar is directed to take the necessary steps to ensure that this judgment is brought to the attention of the National Director of Public Prosecutions.

JUDGMENT

Laing AJ

Introduction

[1] This is an application to intervene as interested parties and to rescind the court orders made on 26 and 27 January 2023 under case number D659/2023, either in terms of the common law or Uniform rule 42(1)*(a)* and/or *(b)* or in terms of the inherent powers this court has to regulate and determine its own processes. To avoid confusion, I have referred to the parties by their names and no disrespect is intended. The first applicant will be referred to as Mazetti; the second applicant as Willoughby; the first respondent as Van Niekerk and the second respondent as Lutzkie.

History

[2] On 18 January 2023 a warrant of arrest was issued by the magistrate, Randburg Magistrates' Court, Gauteng for Van Niekerk. The warrant of arrest arose out of a charge of theft laid during November 2022 by the applicants at the Sandton Police Station, Johannesburg. Van Niekerk had been an employee of the applicants when it was alleged that he had stolen 4 000 files of information from them.

[3] On 25 January 2023, Van Niekerk was arrested at King Shaka International Airport as he was about to leave the country. He was kept overnight at the Verulam Police Station, and then transferred the next day to the Randburg Magistrates' Court.

[4] At the time of arrest moves were afoot to secure his release and an urgent habeas corpus application was made. An order was granted ex parte in the form of a rule nisi on 26 January 2023. The order setting aside the warrant of arrest was made final the following day on 27 January 2023. On the same day Van Niekerk appeared in the Randburg Magistrates' Court but the matter was struck off the roll in view of the order granted by Shapiro AJ and Van Niekerk was released from custody. Thus there were two sets of proceedings, the first one which related to the release of Van Niekerk from custody and the second, the present case, which challenged that decision.

[5] It is perhaps worth mentioning at this stage that neither the National Director of Public Prosecutions nor the National Prosecuting Authority (the NPA) was joined in the first proceedings but were joined in these latter proceedings. However, they chose to abide by the decision of this court.

[6] The applicants have also challenged Lutzkie's authority in these proceedings and have also disputed the authority of Mrs Karen Botha, the mother of Van Niekerk to bring the habeas corpus application via their counsel. The stance is that Lutzkie had no authority to represent anyone let alone be part of the proceedings. Furthermore, they argue, that there was no reason for Lutzkie to be joined with the first respondent in these proceedings.

[7] The matter was part-heard when the applicants served further affidavits and brought an application on the second day of the hearing of these proceedings to introduce same. The application was not opposed by the respondents; however, the application was refused with reasons to be provided in this judgment. I accordingly provide the reasons.

Reasons

[8] On 16 March 2023 the case was partly heard and adjourned to 13 July 2023. On 21 June 2023 a further affidavit found its way into the court file. On resumption of the hearing on 13 July 2023 the applicants sought to hand that further affidavit. The application was not opposed by any of the respondents.

[9] The first respondent also sought to hand into court further heads of argument should the application be granted.

[10] The further affidavit by the applicants related to new evidence which confirmed the strength of their allegations that Van Niekerk had indeed stolen their documents. They intended showing that subsequent reports in the media confirm that indeed Van Niekerk could only have been the source of the information that found itself in the media.

[11] This evidence in my view is not new as it merely bolsters the criminal charge the applicants have laid which can be dealt with in the criminal courts if need be. The issue in the present application does not relate to the strength of the criminal case but whether the procedure followed in the arrest of Van Niekerk was correct or not.

[12] Furthermore, to accept the affidavit at that late stage would have unnecessarily prolonged the case and was not in the interests of justice.

The warrant of arrest

[13] The warrant of arrest form J50, is a one-page document that consists of two portions. The top part is the application for a warrant for the arrest of Van Niekerk on a charge of theft of information. It is signed and date stamped by someone on behalf of the NPA reflecting the date as 18 January 2023. The second portion of that form confirms that a warrant of arrest on a charge of fraud, for Van Niekerk was issued and signed on 18 January 2023 by a magistrate/justice of the peace. This document also indicated that the Van Niekerk was to be arrested and taken to the Randburg Magistrates' Court.

[14] The document was criticised particularly in view of what appears to be two different charges that were referred to. It was accordingly suggested that the document

may have been a fraud and that the arrest was thus an attempt to silence Van Niekerk in one way or another.

[15] There is no response from the NPA as to the correctness of these allegations and although there appears to be two different charges it could have meant that the charge upon which the NPA thought it fit to apply for a warrant of arrest was different to the magistrate's view, who thought it was a charge of fraud and hence issued the warrant of arrest.

[16] This is indeed speculation but I must conclude that on the face of it, the warrant was correctly authorised. I accordingly find that the warrant of arrest mentioned above was for all intents and purposes valid. There is no justifiable reason to hold otherwise. If indeed, it was applied for and/or authorised in a negligent or corrupt manner, a simple investigation will reveal that to be the case.

[17] In view of the warrant of arrest being cancelled, this application is now only of academic importance. It is however necessary to ensure that correct procedures are put in place, otherwise every justifiable arrest could result in an application habeas corpus instead of bail application procedures being followed.

The application - *interdictum de libero homine exhibendo* (habeas corpus order)

[18] Section 35(2)*(d)* of the Constitution gives every person the right to challenge the lawfulness of his/her detention. It follows that if such detention is unlawful the detainee ought to be released. Section 50 of the Criminal Procedure Act[1] (the CPA) also allows a lawful detention for a maximum of 48 hours before a person is brought before a court, depending on the time and day of the week that the 48-hour period expires. These safeguards are put in place to protect an infringement of an individual's right to freedom. These provisions confirm the common law remedy of habeas corpus.

[19] A habeas corpus application is usually brought on an urgent basis for the release of someone who is in unlawful detention or custody. It can be brought ex parte or on notice depending on the circumstances.

[1] Criminal Procedure Act 51 of 1977.

[20] This application was brought on an ex parte basis, on very short notice, and cited the various respondents, but not the NPA.

[21] The central focus in this application was the issue of the lawfulness of Van Niekerk's arrest and detention coupled with the fear that his life may be in danger.

[22] The procedure that was followed in the habeas corpus application is concerning for the following reasons:

(a) The manner in which evidence was provided was an address by counsel which was effectively hearsay, followed by the evidence of two witnesses. Whilst it is permissible for parties to testify about the merits and the inability of Van Niekerk to depose to an affidavit counsel should not relay what is in effect hearsay to convince a court to grant the order.

(b) There is no explanation as to why an affidavit from Van Niekerk could not be obtained, after all he was in custody at a police station within this court's jurisdiction and had been consulted by counsel. Therefore, there is no issue about Van Niekerk not having access, especially to his counsel, to at least obtain an affidavit to form the basis of this application. As stated by Rumpff CJ:[2]

> '…it does not mean that when the liberty of a person is at stake the interest of the person who applies for the interdict *de libero homine exhibendo* should be narrowly construed. On the contrary it should be widely construed because illegal deprivation of liberty is a threat to the very foundation of a society based on law and order. The approach "that a person may apply for *habeas corpus* for another if he sets forth in the application a reason or explanation satisfactory to the Court showing why the detained person does not make the application himself" is based on sound reason and is in accordance with our law. In such a case the applicant would not purport to act "on behalf of the public" and would not, therefore, institute what in Roman law was an *actio popularis*. He would be allowed to act on behalf of a detained person because he would satisfy the Court that the detained person could not make the application himself. The Court would, of course, require to be satisfied that the applicant had good reason for

[2] See headnote in *Wood and Others v Ondangwa Tribal Authority and Another* 1975 (2) SA 294 (A) at 294D-F.

making the application and that the detained person would have made the application himself if it had been in his power to do so.'

[23] Clearly the authorities suggest that the court hearing the application, must be satisfied that Van Niekerk could not make the application himself. Considering the circumstances of this case there is no reasonable explanation as to why Van Niekerk could not make the application himself. He could very well have explained the fears and concerns he had about his safety and the merits of the charges, after all he was represented by senior counsel.

[24] On the return date, some 24 hours later the rule nisi was confirmed effectively granting the order, with the result that on Van Niekerk's first appearance in court the matter was struck off the roll effectively releasing Van Niekerk from custody.

The position of Lutzkie

[25] The second respondent Lutzkie, was cited as such but merely testified orally on behalf of Van Niekerk in the habeas corpus proceedings. He was a not a party seeking any personal relief but merely a witness that testified about the criminal activities of one Zunaid Moti. Lutzkie was apparently a business partner of Moti but broke off the relationship when it was established that Moti was involved, as he put it, "in several high profile crimes in the public domain including the government officials". He said that Van Niekerk, who was an attorney that worked with Moti, found evidence linking Moti to murder and corruption. He showed this evidence to Lutzkie who then broke off his relationship with Moti.

[26] Because of the strong influence Moti had with the South African Police Service, he and Van Niekerk feared for their lives, so much so that they instead trusted the Australian police who then in turn contacted the police in London. The Australian police arranged for a visa for Van Niekerk to go to London to testify on international crimes but he was arrested at the airport based on this warrant of arrest. It appears that Van Niekerk's arrest was orchestrated to prevent him from testifying abroad.

[27] This evidence given under oath, is all the more reason why the NPA should not have adopted a supine attitude. There are serious allegations involving government and police corruption. The decision of the NPA not to participate in these proceedings

is concerning to say the least. They have a constitutional duty to participate in these proceedings as it is in the public interest that any form of corruption or criminal activity is exposed. Perhaps this is the fear that concerned Van Niekerk and Lutzkie which caused them to seek the assistance of the Australian police. This decision or the lack of one by the NPA certainly demands an investigation. It is in the public interest to know why and under what circumstances:

(a) a warrant of arrest for Van Niekerk was authorised;
(b) what became of the criminal charges laid against him that led to the warrant of arrest being authorised;
(c) was he in a witness protection programme;
(d) who gave instructions to abide by the decision of this court in these proceedings; and
(e) what were the circumstances which led to the decision to abide, was it on the merits; a financial decision or a lack of interest?

Lutzkie has given prima facie evidence under oath concerning serious allegations of fraud, corruption and murder against Moti.

[28] Coming back to the position of Lutzkie as a participant in these proceedings, clearly there was no relief that he sought or that is sought against him. His involvement and opposition was totally unnecessary and only bolstered the increase in costs.

Urgency

[29] These proceedings were brought as a matter of urgency. Whatever urgency that may have existed at the time has certainly passed. In retrospect it cannot be said that at the time any urgency existed for this application to be made. I say so for the following reasons.

[30] It seems that there certainly is some animosity between the parties. The fact that an application was made on behalf of Van Niekerk on an urgent basis does not warrant that the applicants herein also have the right to pursue their application to rescind that order on an urgent basis. This application sought the rescission of a court order which declared that an arrest was unlawful. In effect the application was a personal justification on an academic issue. Under the circumstances there is no justifiable reason to find that this application was urgent.

Locus standi of the applicants

[31] As complainants in a criminal case the applicants contend that they are affected and interested parties as envisaged in terms of Uniform rule 42 and under the circumstances have the necessary locus standi to bring these proceedings to protect their interests.

[32] Uniform rule 42 relates to the variation and rescission of orders and reads as follows:

'(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.'

[33] Of relevance to these proceedings is the application of rule 1*(a).* It will thus be necessary to determine the interest, the applicants have in bringing this application, in particular whether the applicants rights are affected as complainants in the criminal case. As stated in *SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others*: [3]

'…What constitutes a direct and substantial interest in the subject-matter of the case which could be prejudicially affected by the order of the court.'

[34] It is common cause that a charge of theft of documents was laid at the instance of the applicants, which resulted in a warrant of arrest being subsequently authorised. The validity and substance of the charge has been placed in issue, but is not an issue that this court can reasonably be expected to pronounce upon. In terms of Uniform

[3] *SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others* 2017 (5) SA 1 (CC) para 9.

rule 42(1), the person with locus standi to bring a rescission application is a person who is “affected’’ by the order or judgment.

[35] This Division (per Ploos van Amstel J), in *KwaDukuza Municipality v Tiger Tales (Pty) Ltd and Others*[4] recently had the opportunity to clarify what is meant by “any person affected’’ in Uniform rule 42. The learned judge stated:[5]

‘The approach in *United Watch* solves the difficulty to which I have referred, of an applicant who succeeds in a rescission application but has no *locus standi* to defend the merits of the case. If a successful applicant has a sufficient interest to entitle him to intervene as a defendant, then it makes sense to allow him to apply for a rescission so that he can defend the action.’

[36] Thus the test for establishing locus standi in the context of Uniform rule 42 is whether that person would have been entitled to intervene in the main proceedings. The requirements for a party to intervene are set out in *Minister of Finance v Afribusiness NPC*:[6]

‘A party is entitled to join and intervene in proceedings where they have a direct and substantial interest in the matter. A person is regarded as having a direct and substantial interest in an order if that order would directly affect that person's rights or interests. The interest must generally be a *legal* interest in the subject-matter of the litigation and not merely a financial interest. In this matter, the prejudice being suffered by Fidelity and SANSEA is a financial interest and does not relate to a right or legal interest.’ (Footnotes omitted.)

[37] A complainant in a criminal case has a legal interest in criminal proceedings. The criminal proceedings are instigated as a result of his/her desire for justice to prevail. To suggest otherwise would be against his/her constitutional right to ensure that justice is seen to be done. Further s 7 of the CPA gives the right to a private person to institute a private prosecution where the State has declined to prosecute.

Prosecuting authority

[38] Section 179 of the Constitution states:

‘(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament and consisting of:

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[4] *KwaDukuza Municipality v Tiger Tales (Pty) Ltd and Others* [2022] JOL 55316 (KZP).
[5] Ibid para 12.
[6] *Minister of Finance v Afribusiness NPC* 2022 (4) SA 362 (CC) para 23.

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.'

[39] It is accepted that the NPA is dominus litis in criminal matters. However, it is important to note that being dominus litis is not the same as having locus standi. In this regard see the article by L Mhlongo and A Dube where they state the following:[7]

'In criminal matters the designation of the prosecutor as *dominus litis* means that he is regarded as the person in control of the criminal proceedings. He determines not only whether adjudication takes place, but also the charges to be preferred. The only exception is in the case of a private prosecution, where the private prosecutor is *dominus litis*.

Standing, on the other hand, is not necessarily synonymous with *dominus litis*. Whilst the party considered to be *dominus litis* must as a matter of fact also have standing in a particular matter, there is no requirement that all parties with standing be regarded as *dominus litis*.'

[40] The applicants/complainants have shown that they have a *direct and substantial interest* in the habeas corpus application. The test, as stated earlier, is whether an applicant/complainant would have a right to intervene in the main proceedings.[8] The applicants/complainants are victims of the crime concerned, hence they have a right to participate in criminal proceedings.

[41] As already mentioned, the NPA has chosen not to provide any input in this application. Surprisingly it was at the instance of the NPA that a warrant of arrest was authorised and in order to have done so they must have had at least a prima facie case for applying for a warrant against Van Niekerk and reasonable grounds to believe he was planning to evade the long arm of the law. This court is thus left in the dark in deciding if the warrant was correctly authorised or not. To sit back and abide by the decision of the court is not what is expected of this constitutional body. They are duty bound to assist the court in cases of this nature. The NPA could have provided the

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[7] L Mhlongo and A Dube 'Legal Standing of Victims in Criminal Proceedings: *Wickham v Magistrate, Stellenbosch* 2017CLR 121' [2020] 23 *PER* at 11-12.

[8] See *KwaDukuza Municipality v Tiger Tales* above fn 4.

necessary information about the strength of the State's case; the background into the authorisation of the warrant of arrest; the protective custody allegations and the truthfulness thereof. The approach of the NPA as a party actually involved in this process leaves much to be desired.

[42] I, however, must accept as mentioned earlier in this judgment, that despite all the negative suggestions, the warrant of arrest was correctly authorised and there is no reason to accept otherwise. I was referred to the Supreme Court of Appeal decision of *Minister of Safety and Security v Kruger*[9] where it was found that the failure of the warrant of arrest to reflect an offence, makes the arrest unlawful.

[43] In the warrant for Van Niekerk's arrest, the charge that he was faced with was fraud. The difference is that the prosecutor who applied for the warrant suggested that the charge was theft of documents but the magistrate changed it intentionally or otherwise to fraud. The facts in this case are thus distinguishable to that of *Kruge*r where no charge was reflected on the warrant of arrest.

[44] It then follows that the detention was lawful. That being the case the habeas corpus application could not be used as a means to secure the release of Van Niekerk. It was procedurally incorrect for the following reasons:

(a) In particular the application did not include the NPA as a respondent. One would have thought that the NPA who represents the State and the complainants, would have been party to the habeas corpus proceedings. Under the circumstances the interests of the complainants were not placed before the court despite them having a direct and substantial interest in those proceedings.

(b) The notice to abide by the decision of this court in the subsequent proceedings to which this judgment relates, does not make sense. One would have thought that the failure to cite the NPA in the habeas corpus proceedings would have encouraged the NPA to support this application.

(c) The habeas corpus application is generally only available for arrests which are unlawful. The arrest in this case of Van Niekerk was not unlawful.

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[9] *Minister of Safety and Security v Kruger* 2011 (1) SACR 529 (SCA).

(d) The manner in which the application was brought in view of Van Niekerk having access to his legal representatives trumps the evidence provided by his counsel and that of Lutzkie. There is also no reason why Van Niekerk's mother, Mrs Botha, could not testify or depose to an affidavit, if the procedure was correct in the first place.

(e) Likewise, an affidavit deposed to by Van Niekerk would have been the appropriate approach. The situation would have been different if no access was granted to Van Niekerk or if he was kept at some secret place.

[45] It follows that the ex parte procedure was flawed and the order was incorrect. The habeas corpus application was erroneously sought and erroneously granted. The applicants do not seek a reinstatement of the warrant of arrest but merely an order that the order granted was erroneous.

Order

[46] I accordingly make the following order:

1. The application succeeds and the order of Shapiro AJ made on 27 January 2023 is set aside.
2. The first and second respondents are ordered to pay the costs on a party and party scale jointly and severally the one paying the other to be absolved.
3. The Registrar is directed to take the necessary steps to ensure that this judgment is brought to the attention of the National Director of Public Prosecutions

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Laing AJ

Case information

Counsel for the applicants: Adv P Strathern SC
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Instructed by: Goodrickes Attorneys

Date of hearing:14 July 2023
Date of judgment: 16 November 2023