



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

CASE NUMBER: 43469/2020

- (1) REPORTABLE: Yes/No
(2) OF INTEREST TO OTHER JUDGES: Yes/No
(3) REVISED: Yes



Signature

11 Feb 2021
Date

In the matter between:

NOMACHULE GIGABA (born MNGOMA)

Applicant

and

MINISTER OF POLICE

First Respondent

DIRECTORATE FOR PRIORITY

CRIMES INVESTIGATIONS

Second Respondent

MAJOR GENERAL MO NGWENYA

Third Respondent

CAPTAIN K.M MAVUSO

Fourth Respondent

SERGEANT NORTON NDABAMI

Fifth Respondent

DIRECTOR OF PUBLIC PROSECUTIONS:

JUDGMENT

SARDIWALLA, J:**Introduction**

[1] This is an urgent application in terms of Rule 6 (12) (a) brought by the applicant in respect of a series of conduct to obtain relief in the form of declaratory relief of the unconstitutionality regarding the egregious infringements of her rights. More specifically the applicant seeks the following relief:

1. Dispensing with the normal provisions of the Rules and dealing with this application on the basis of urgency, in terms of Rule 6(12) (a) of the Rules, read with the relevant directives.
2. Declaring that the decision of the third and fourth respondents to apply for the warrant of arrest of the applicant is unconstitutional, irrational and invalid.
3. Declaring that the decision to issue the warrant of arrest of the applicant is unconstitutional, irrational and invalid.
4. Declaring that the decision to execute the warrant of arrest by third and fourth respondents is unconstitutional, irrational, invalid and of no force or effect.
5. Setting aside the decision to effect the arrest and/or to prosecute the applicant.
6. Declaring the confiscation of the applicant's information and communication technology equipment to be unlawful, unconstitutional and accordingly invalid.
7. Ordering the respondents to restore all information unlawfully removed from ICT equipment.
8. Directing the third, fourth and fifth respondents to return the information which was downloaded from electronic gadgets of the applicant by the third and fourth respondents, including the information contained in Disc 1 to Disc 6 referred to in these papers, forthwith.
9. Directing that the costs of this application on an attorney and own client scale are

paid by those respondents who will deliver notice(s) to oppose.

9. Alternatively to paragraph 10 above: Directing that the third, fourth and fifth respondents to pay the said costs, in their personal capacities.

Factual Background

- [2] The applicant is lawfully married to Mr Malusi Gigaba (hereinafter referred to as Mr Gigaba) a national leader of the ruling party and a former Minister of Home Affairs, Public Enterprises and Finance in South Africa. They have two male children aged 9 and 7. They all currently reside at 308 Derrick Street, Waterkloof Ridge, Pretoria.
- [3] On or about 20 July 2020, the fourth respondent (hereinafter also referred to as “Captain Mavuso”) and the fifth respondent (hereinafter also referred to as “Sergeant Ndabambi”) arrived at the Gigaba residence, ostensibly to investigate two alleged offences related to:
 - 3.1. malicious damage to property in respect of a Mercedes Benz G- Wagon, which had been allegedly scratched on its body with a sharp instrument, which we now know to be a vegetable slicer. The car had been parked at the garage of the applicant’s house;
 - 3.2. *crimen injuria* in respect of a WhatsApp message which had been sent from the applicant’s cellular phone to one Mr Pietersen Siyaya, who is a friend or business partner of Mr Gigaba, which message Mr Siyaya had apparently found to be insulting.
 - 3.3 These offences were said to have been allegedly committed on 19 July 2020.
 - 3.4. Two days later, on 22 July 2020, the two policemen returned to the Gigaba residence. They identified themselves as members of the Hawks. They told the applicant, in the presence of her two minor children, that she was under investigation and facing arrest.
 - 3.5. They further demanded all the applicant’s electronic communication devices and gadgets in connection with the abovementioned *crimen injuria* complaint laid by Mr Siyaya.
 - 3.6 On 30 July 2020 the Hawks returned and placed the applicant under arrest.

The Issues

- [4] The applicant has asked this Court is to determine the following:
- 4.1. was the arrest lawful and constitutional?
 - 4.2. is the prosecution lawful and constitutional?
 - 4.3. was the confiscation of the ICT equipment lawful and constitutional?

The applicant's case

- [5] The applicant's version can be summed up as follows: -
- 5.1. The applicant voluntarily indicated which cellular phone she had used in respect of any communication with Mr Siyaya and offered it to the policemen. They stated that according to "the law", they had to take each and every such gadget in her possession, regardless of whether or not it had been used in the commission of the relevant offence.¹³
 - 5.2. The applicant requested to call her lawyer and was advised that the right to talk to a lawyer did not apply to the Hawks but only to investigations carried out by the regular police. As a lay person, the applicant believed this to be true.
 - 5.3. The applicant requested to use the bathroom and Sergeant Ndabambi followed her to the bathroom. When she came out, both members of the Hawks were standing outside and instructed her to go to her bedroom to fetch her other gadgets which were kept there. It is common cause that they went with the applicant into her private bedroom.
 - 5.4. Once they were in possession of all her gadgets, they demanded that she should tell them all the secret pin codes. When she refused, they threatened her that refusing an instruction from the Hawks was a criminal offence. She provided them with the secret pin codes which they tested on the devices before taking the devices away.
 - 5.5. The applicant pleaded that she required the use of her laptop, as she is a party-time student and depended thereon during the Covid-19 crisis.
 - 5.6. The applicant consulted a friend who advised her that the police conduct was unlawful and advised her to make enquiries at the Brooklyn Police Station.
 - 5.7. Upon arrival at the Brooklyn Police Station at about 9.00 pm, the applicant was informed that the two cases had indeed been opened but the dockets had been booked out by the Hawks. They knew nothing about the alleged assault charge.

They also advised the applicant to get the assistance of a lawyer. They also revealed that it was curious to them that the Hawks were involved in the investigation and, to make matters worse, it was the Hawks from the Mpumalanga province.

- 5.8. On 24 July 2020, the applicant consulted with her current attorneys, who contacted the Hawks and spoke to Sergeant Ndabambi who indicated that the devices “were with the experts” and would only be returned once they had finished examining them. He also gave him the contact details of General Ngwenya, from whom they took instructions in relation to the matter.
- 5.9. After doing what is known as a sim-swap, the applicant discovered that some of her information had been wiped off and she no longer had access to her social media applications. Some of the messages had been deleted.
- 5.10. On 30 July 2020, the applicant informed Mr Gigaba that unless her gadgets were returned by the evening, legal proceedings would be instituted for their return. On Friday 31 July 2020, Mr Gigaba informed the applicant that the Hawks would be arriving to return the gadgets. When the Hawks arrived instead of returning the gadgets, they informed the applicant that they were placing her under arrest.
- 5.11. At the police station, Sergeant Ndabambi repeatedly told the applicant that she would remain in the police cells until Monday 3 August 2020. The conditions in the cells were unpleasant in that apart from the winter cold, the other two inhabitants of her cell refused to wear their masks to prevent the possible risk of transmission of the Coronavirus.
- 5.12. At no point was the applicant shown a warrant of arrest. An argument ensued between the police station members and the Hawks about the necessity of the applicant’s arrest. When the applicant requested to call her lawyer, Sergeant Ndabambi refused again. It was the regular police who intervened and offered her the landline at the police station, stating that she was now under their custody and she had a constitutional right to call her lawyer. She accordingly made telephonic contact with Mr Nkhwashu.
- 5.13. When Mr Nkhwashu arrived at the police station before 18h00, it transpired that the members of the Hawks had already left with the dockets. This made it impossible to secure the release of the applicant on that Friday.
- 5.14. The following day, Saturday 1 August 2020, and while arrangements were underway to bring a High Court application to secure the applicant’s release,

her attorney and the prosecutor reached an agreement, which resulted in her release on R5,000.00 bail, approximately 26 hours after her arrest.

5.15. It later transpired that the Hawks had made an application in terms of section 43 of the Criminal Procedure Act and obtained a warrant of arrest from one, Magistrate King based on the information contained in the docket compiled by the Hawks.

5.16. On 2 August 2020 and following her release, the applicant instructed her attorneys to demand the release of her gadgets by no later than 17h00 on 3 August 2020, failing which to bring an urgent High Court application. The gadgets were returned at 09h00 on 4 August 2020.

5.17. When the applicant was provided with copies of the docket she discovered that the information from her confiscated gadgets had been downloaded onto two discs which had not been furnished to her lawyers and some specific information had been removed or erased which had no relationship to the allegations of the two criminal charges.

5.18. On 3 August 2020 the applicant appeared in the Hatfield Magistrates Court and by agreement the matter was remanded to 14 September 2020 to allow for the bringing of the present application.

- [6] It is the applicant's submission that her unlawful arrest and detention was tainted by improper and corrupt motives and was therefore executed for the unlawful purpose of gaining unlawful access to the applicant's ICT communications equipment and/or obtaining and deleting specific information. The applicant submits that the execution of the warrant and confiscation of her electronic equipment infringed upon her constitutional rights and was *ultra vires* the powers of the respondents. The applicant also contends that the affidavit that supported the warrant of arrest related to the crime of "defamation of character" which is different from the crimes of malicious damage to property and *crimen injuria* which the applicant has been charged with therefore the warrant is defective *ab initio*. It is the applicant's submission that her unlawful arrest, detention, confiscation of equipment and prosecution is ultimately a breach of the principle of legality and was an orchestrated scheme to intimidate and harass her.

The respondents' version

[7] The respondents who opposed this application raised two points *in limine* namely urgency and whether this Court has the jurisdiction to grant the relief sought. It submits that the application is without merit as the applicant is merely seeking to obstruct and delay the pending criminal proceedings against her. Its version can be summarised as follows: -

- 7.1. During June 2020 the former Minister Mr Malusi Gigaba laid a complaint with the Hawks that he had reason to believe that there was conspiracy to murder him and that such complaint was then directed to the task team to investigate further;
- 7.2. It submits that following the complaint the task team commenced investigations and inquiry docket was registered and opened as it regarded the conspiracy to commit murder a very serious crime;
- 7.3. The task team was subsequently informed of the other alleged offences that were committed which involved Mr Gigaba and that such offences may be linked or may influence the investigations of the conspiracy to commit murder of Mr Gigaba. The task team resolved to also investigate the related complaints as reported by and involving Mr Gigaba and that they did so lawfully;
- 7.4. Mr Gigaba laid a complaint at the Brooklyn Police station under CAs No 341/07/2020. In an affidavit deposed by Mr Gigaba he stated that a suspicious vehicle had come to his house which he later found that the people in the vehicle were people from the "counter-intelligence" and that they were called by the applicant. He stated that he felt unsafe in his own home;
- 7.5. On 21 July 2020 Mr Gigaba deposed to an affidavit that the applicant scratched his friend's car (a Mercedes Benz G-Wagon 63 with registration number FH13LPGP) which was parked at their marital home. He informed them that the malicious intent to property was perpetrated by the applicant and asked them to investigate the matter further.;
- 7.6. When the DPCI became aware of Mr Gigaba's complaints they resolved to investigate and that Section 17D93) of the Saps Act clearly permits the directorate to be involved in the investigation of any offence, which it suspects to be possibly connected to the subject of its pending investigations;
- 7.7. That the applicant voluntarily deposed to a warning statement before Captain Mavuso in which she admitted that she caused damaged to the Mercedes Benz G-Wagon 63;

- 7.8. A charge of *crimen injuria* was laid against the applicant by Mr Peterson Sibiya which the applicant admitted to the Whatsapp messages she sent but claimed that it was not wrongful or unlawful;
- 7.9. That on 30 July 2020 having satisfied itself that there was reasonable suspicion and sufficient *prima facie* evidence contained in the two dockets that the investigating officer applied for a warrant of arrest.
- 7.10. A warrant of arrest was secured on 30 July 2020 and lawfully executed on 31 July 2020 and processed at the Brooklyn Police Station.
- 7.11. The applicant was released on bail on 1 August 2020 and only launched the current application on 2 September 2020 and as such the nature of the matter should not be addressed on an urgent basis.

Urgency

- [8] The general principles applicable in establishing urgency are dealt with in Rule 6(12) of the Uniform Rules of this Court. The importance of these provisions is that the procedure set out in Rule 6(12) is not there for the mere taking. Notshe AJ said in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011) in paras 6 and 7 as follows:

'[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard.

[9] This leaves the requirement of the applicant's ability to obtain proper substantive redress in due course, for consideration. Obviously, and where a matter is struck from the roll for want of urgency, then the merits of the application remains undetermined. It follows that the application can still be considered and granted by a Court in the ordinary course. But I understand that in this case, there is a unique consideration. Considering the undeniable realities of litigating in the ordinary course, by the time the criminal matter proceeds, the applicant would be subjected to continuous and ongoing violations to her reputational dignity, restrictions of movement, privacy and abuse of power. The applicant is therefore not able to obtain substantive redress in the ordinary course. However even if the application failed on urgency, it is possible, in appropriate circumstances, to even dispose of the matter on the merits, where a matter is regarded as not being urgent, instead of striking the matter from the roll. The Court in *February v Envirochem CC and Another*¹ dealt with this kind of consideration, and even though the Court accepted that urgency was not established, the Court nonetheless proceeded to dismiss the matter in the interest of finality and so the matter should be dealt with once and for all.

[10] The applicants explained that pending the criminal trial which was postponed to allow for the bringing of this application, that she has been deprived of her equipment as well as certain information being provided to her legal representatives to adequately prepare and is direct result of the abuse of power by organs of the State and her politically affiliated husband.

Who will probably suffer irreparable harm?

[11] The determinative question is therefore who will suffer harm if the relief is not granted? I am of the view, that on a balance of probabilities, the applicant will suffer irreparable harm if the application is not heard, and respondents will not suffer irreparable harm. My reasons are essentially these:

11.1. The applicant is a private citizen who freedom and liberty has been deprived by the events leading up to the criminal proceedings. If in the

¹ (2013) 34 ILJ 135 (LC) at para 17. See also *Bumatech (supra)* at para 33; *Bethape v Public Servants Association and Others* [2016] ZALCJHB 573 (9 September 2016) at para 53.

meantime the respondents were permitted to act in accordance as they have done previously leading up to the arrest of the applicant, the applicants will have lost completely the benefit of the protection of her constitutional rights. Ultimately, she will have a court order in her favour but despite this fact, her rights will have been rendered meaningless. That harm is irreparable and cannot be ignored.

- 11.2. If the respondents succeed in the criminal case but in the meantime the relief is not granted, it would have suffered no harm and certainly does not constitute irreparable harm. The costs it would incur to remedy its unlawful conduct does not, in my view, constitute irreparable harm.

The Jurisdictional Challenge

- [12] In *Kwemaya v National Commissioner, Correctional Services and another*², Olsen J referred to the case *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) at paragraphs 71 and 72, where it was held that the proper approach for a court confronted with a claim, and an objection that the court lacks jurisdiction to entertain the claim, is to accept that the claim before the court is “a matter of fact”. If a claimant says that the claim arises from the infringement of a right to enforce a contract, then the court must deal with it accordingly. When the claimant says the claim is to enforce a right created by the Labour Relations Act then that is the one before the court, as a matter of fact. When the claim is said to be for the enforcement of a right derived from the Constitution then that as a fact is the claim. The question as to whether the claim is bad is beside the point. The court went on to say that a claim which exists as a fact is not capable of being converted into a claim of a different kind by the mere use of language; and a court cannot under the guise of “characterising” a claim purport to convert the claim placed before the court into a claim of another kind.

- [13] He went on to say that approaching the matter in the light of what was said in *Makhanya supra*, would mean that one should reach an understanding about what a claim is by having regard only to the label attached to it by the claimant; and not by looking to the elements of the cause of action pleaded by the claimant in order correctly to label the claim where the claimant might have done so incorrectly. His view was

² (13535/2016) [2017] ZAKZDHC 33 at paragraph 27

that *Gcaba v Minister for Safety and Security*³ illustrates that *Makhanya* should not be read that way and he went on to state the following:

“[29] Gcaba concerned a policeman who had applied for a position unsuccessfully. He approached the High Court with an application to review the decision not to appoint him. The High Court decided that it lacked jurisdiction to entertain the application because it was an employment matter. Before the Constitutional Court the applicant contended that his claim was from inception one which fell under PAJA, as he sought to vindicate his right to just administrative action. The respondents contended that the applicant’s claim was a labour matter which had to be adjudicated through the “finely tuned mechanisms provided for in the LRA”. The court in Gcaba held that before addressing the issue of jurisdiction, and indeed in order to address that question, the court had to decide whether the conduct complained of by Mr Gcaba was administrative action. (See paragraph 63 of the judgment.) Having found that it was not, the court held (in paragraph 75 of the judgment) that where the court’s jurisdiction is challenged in limine at the outset, the pleadings and, in motion proceedings, also the contents of the supporting affidavits, must be interpreted “to establish what the legal basis of the applicant’s claim is”. If, “properly interpreted”, that enquiry establishes that the applicant is asserting a claim within the exclusive jurisdiction of the Labour Court, the High Court would lack jurisdiction. On that basis the decision of the High Court in Gcaba was found to have been correct.

[30] It seems to me that I must follow the same approach as was followed in Gcaba. There (in paragraph 64 of the judgment) it was held that where a grievance is raised by an employee relating to the conduct of the State as employer, and there are “few or no direct implications or consequences for other citizens”, then the conduct complained of is not administrative action. Here, perhaps even more than in the case of Mr Gcaba, the conduct of the department in which the applicant was employed carried no implications and generated no consequences for anyone outside the particular relationship between the applicant (as employee) and her employer, the State. The applicant

³ 2010 (1) SA 238 (CC)

wrongly pleads in her papers that what happened is governed by PAJA. She erroneously attaches the label “administrative action” to the conduct she complains of. For that reason, following Gcaba, the conclusion must be that this court lacks jurisdiction if the characterisation of the conduct of the State as administrative action is the only basis upon which the applicant asks the court to decide her claim⁴.”

- [14] It is therefore important to consider the applicants’ interest in this matter. In ***Giant Concerts CC v Rinaldo Investments (Pty) Limited***⁵ Cameron J dealt with the requirements to establish own interest standing in a legality challenge. The following appears in paragraph 35 of the judgment.

“Hence, where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown.”

- [15] The requirement to be established is whether the illegality directly affects his or her rights or interests, or potential rights or interests. The applicants’ standing is that the confiscation of her equipment was convened unlawfully and without a warrant together with the fact that she was refused the right to legal representation, conduct which she claimed extinguished her rights and violated her right to dignity and privacy. The current rights applicant seeks to enforce are directly related to the unlawful arrest and confiscation of her equipment. Ultimately the applicant has come before this court to vindicate her constitutional rights which are protected by the provisions of section 38 (a) of the Constitution, whose task it is to protect those rights.

- [16] In the circumstances I conclude that this court has jurisdiction to determine the present application.

The functions and mandate of the Hawks

- [17] Established under Chapter 6A of the South African Police Service Act 68 of 1995, the essential job description of the Hawks is to “prevent, combat and investigate national

⁵ 2013 (3) BCLR 251 (CC)

priority offences, in particular serious organised crime, serious commercial crime and serious corruption”.

- [18] The Hawks was deeply rooted in the ashes of the Directorate of Special Operations formally known as the Scorpions. However, unlike the Scorpions, the Hawks are not located in the office of the National Prosecuting Authority, which is explicitly mandated by the Constitution to function without “fear, favour or prejudice”. The Hawks are located in the South African Police Service. Initially this created uncertainty because under section 206 of the Constitution, a politician is ultimately “responsible for policing”. The argument was that this political accountability could not be squared with the constitutional need for a corruption-busting unit to be adequately independent.
- [19] Section 205(3) of the Constitution requires the establishment of a national police service in order to “prevent, combat and investigate crime”. Section 205(2) requires that the legislature “establish the powers and functions of the police service” in order to “enable the police service to discharge its responsibilities effectively”. This means that for the police service to effectively discharge its responsibilities under the Constitution, it must not be subject to undue influence. That is the extent of the obligation imposed by the Constitution, and it is in this context that the obligation imposed by section 7(2) of the Constitution must be understood. The question therefore for determination was whether the impugned laws established an anti-corruption unit that has the capacity to “discharge its responsibilities effectively”, as required by the Constitution. The Constitutional Court declared the unconstitutionality and invalidity of Chapter 6A in *Glenister II v President of the Republic of South Africa and Others*⁶ where the court found that: “What is required is not insulation from political accountability, but only insulation from a degree of management by political actors that threatens imminently to stifle the independent functioning and operations of the unit.”

- [20] In that case the court went on to further say;

“[118] What is apparent from international instruments is that the requirement of independence is intended to protect members of the agency from undue influence. This is

⁶ (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) (17 March 2011)

necessary to ensure that the anti-corruption unit can “discharge its responsibilities effectively”. The independence of anti-corruption agencies is “a fundamental requirement for a proper and effective exercise of [their] functions.” This is so because corruption largely involves the abuse of power. In corruption cases involving the public sector, at least one perpetrator comes from the ranks of persons holding a public office. Hence the need to shield anti-corruption units from undue influence. This is a theme that recurs in the international and regional instruments cited by the amicus. Independence in this context therefore means the ability to function effectively without any undue influence. It is this autonomy that is an important factor which will affect the performance of the anti-corruption agency.

.....

“ [132] The starting point in determining the sufficiency of the independence of the priority offences, and to establish an independent anti-corruption unit that is apparent from the provisions of chapter 6A of the SAPS Act.¹¹¹ The core provision in this regard is section 17B. It provides that among the factors that must be taken into account in the application of the provisions of this chapter, is the “need to ensure that the Directorate . . . has the necessary independence to perform its functions . . . [and] is equipped with the appropriate human and financial resources to perform its functions”. Thus, chapter 6A is premised on the independence of the DPCI. To this extent, it provides an interpretive injunction for the application and implementation of its provisions. Those who are charged with the application and implementation of the provisions of this chapter are bound by this injunction. It is an injunction that is deeply rooted in the need for an anti-corruption unit, free from any undue political influence or otherwise.”

- [21] The sentiments of **Glenister II** was also echoed in *S v Shaik and Others*⁷, where the Supreme Court of Appeal pointed out that—

“the seriousness of the offence of corruption cannot be overemphasised. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is

⁷ 2007 (1) SA 240 (SCA).

halted. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe.”

[22] In *Helen Suzman Foundation v President of the Republic of South Africa and Others*⁸ the Court held that the amended Act does not ensure adequate independence for the Hawks, finding certain sections to be unconstitutional to the extent that they did not sufficiently insulate the Hawks from potential executive interference. In its judgment the Constitutional Court confirmed *inter alia* the following:

22.1. National priority offences. The Court found that the provisions in relation to national priority offences that provide for the policy guidelines (issued by the Minister of Police), that determine the functions of the Hawks, are inconsistent with the Constitution, and should be excised. The issuing of guidelines in relation to national priority offences by political actors who can then influence the functional activities of the Hawks was held to undermine the independence of the DPCI.

22.2. Selected offences. The term "selected offences" in section 17D (1) (aA) were not defined in the amended Act and there was no indication as to how they are selected and by whom. The Court found that this could easily limit the functional independence of the Hawks, and allow for undue executive or political interference. The Court held that an institution of this importance should never be left guessing as to what its functions are. The undefined "selected offences" were thus held to be a threat to the operational independence of the Hawks. The offending wording was thus severed from the provision.

22.3. Any other offence or category of offences. The Hawks were charged under the Act with the duty to prevent, combat and investigate "any other offence or category of offences referred to it from time to time by the National Commissioner, subject to any policy guidelines issued by the Minister and approved by parliament". The Court found that this provision, by vesting in the Commissioner the power to prescribe part of what the Hawks are to

⁸ 2015 (1) BCLR 1 (CC); 2015 (2) SA 1 (CC)

do, was a constitutionally impermissible encroachment and interference into the operational space of the Hawks and thus at odds with an adequately independent anti-corruption unit. It was thus confirmed that section 17D(1)(d) is constitutionally invalid.

[23] Subsequent to the declaration of invalidity The Directorate for Priority Crime Investigation has now been established as an independent directorate within the South African Police Service in terms of Section 17C of the South African Police Service Act, 1995 as amended by the South African Police Service Amendment Act, 2008 (Act 57 of 2008).

[24] Section 17D of the SAPS amended Act specifically deals the functions and/or mandate of the DPCI and provides as follows: -

“17D. Functions of Directorate.

(1) The functions of the Directorate are to prevent, combat and investigate—

- (a) national priority offences, which in the opinion of the Head of the Directorate need to be addressed by the Directorate, subject to any policy guidelines issued by the Ministerial Committee; and*
- (b) any other offence or category of offences referred to it from time to time by the National Commissioner, subject to any policy guidelines issued by the Ministerial Committee.*

(2) If, during the course of an investigation by the Directorate, evidence of any other crime is detected and the Head of the Directorate considers it in the interests of justice, or in the public interest, he or she may extend the investigation so as to include any offence which he or she suspects to be connected with the subject of the investigation.

(3) The Head of the Directorate may, if he or she has reason to suspect that a national priority offence has been or is being committed, request the National Director of Public Prosecutions to designate a Director of Public Prosecutions to exercise the powers of section 28 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998).

[25] Interestingly in a briefing held on 17 September 2014 titled Mandate and Activities Directorate for Priority Crimes Investigations⁹ which focused on the DPCI mandate and

⁹ <http://pmg-assets.s3-eu-west-1.amazonaws.com/140917saps.pdf>

operating model of “Seek, Find, Strike and Succeed with impact” the Hawks highlighted its mandate as follows:

“Any offence referred to in:

- *Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004);*
- *Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002);*
- *Chapters 2, 3 and 4 of the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998);*
- *Section 13(l) of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992);*
- *Non-Proliferation of Weapons of Mass Destruction Act, 1993 (Act No.87 of 1993);*
- *Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004);*
- *Regulation of Foreign Military Assistance Act, 1998 (Act No. 15 of 1998), or the Prohibition of Mercenary Activities and the Regulation of Certain Activities in Country of Armed Conflict Act, 2006 (Act No. 27 of 2006);*
- *National Conventional Arms Control Act, 2002 (Act No. 41 of 2002);*
- *High treason; and*
- *Sedition”.*

[26] It went on to further state that its mandate involved;

- *“Organised crime is defined as criminal entities that are designed for the commission of serious National and Transnational crimes geared towards profit achieved through illegal activities.*
- *They operate within an Organised criminal business system with a structure greater than any individual member and the potential for corruption and/or violence to facilitate the criminal activities and processes.*

[27] It also identified its mandated priorities, such as the types of National Threat problems that were being addressed by the DPCI:

- Narcotics
- Human Trafficking

- Rhino Poaching
- Illicit Mining
- Non Ferrous Metals
- Specific Violent Crimes
- Vehicles Crimes
- Illicit Cigarettes
- Economic Crimes

Women's rights are human rights

[28] Historically, women have been excluded from political life and decision-making processes. Women's campaigns for participation in the public and political arena date back to the nineteenth and twentieth centuries and continue today. Although women's many of women's rights have been secured in nearly every country of the world, in practice, those rights can sometimes be meaningless when other conditions make it virtually impossible or very difficult for women. Such as, the absence of free and fair freedom of expression, or lack of security, which tends to affect women disproportionately. Other obstacles such as stereotyping and traditional perceptions of men's and women's roles in society, as well as lack of access to relevant information and resources, also inhibit women's possibilities or willingness to exercise their rights fully. Traditional working patterns of many political parties and government structures continue to be barriers to women's rights in addition to patriarchy, discriminatory attitudes and practices. Patriarchy¹⁰ is very much a part of African life and is deeply entrenched in the "norms, values and customs". The male is seen as lord over the female and it is the males will and cultural norms which dominate and legislate the relationship. This domination over woman is reflected right from the process of contracting a marriage during which a man pays a bride price for his wife, which ultimately makes her the property of her husband.

[29] Women's human rights are abused when they cannot participate in decisions that affect their lives, are not given fair representations and suffer violence within their own homes. The Convention on the Elimination of All Forms of Discrimination

¹⁰ Ademiluka, "Patriarchy and Women Abuse," OTE 31/2 (2018): 339-362

Against Women (CEDAW), a key international agreement on women's human rights, was adopted by the United Nations General Assembly in 1979 and ratified by South Africa on 15 December 1995. CEDAW is often described as an international bill of rights for women. Its preamble and 30 articles aim to eliminate gender discrimination and promote gender equality. The convention defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex" that impedes women's "human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." It sets an agenda for national action to end such discrimination, requiring all parties to the convention to take "all appropriate measures, including legislation, to ensure the full development and advancement of women" and guarantee their fundamental freedoms "on a basis of equality with men."

The current application

- [30] The applicant seeks an order against The Minister of Police as the first respondent, The Directorate for Priority Crime Investigation, the second respondent, setting aside arrest warrant issued by members of the second respondent and ordering them to return to them all items seized from the applicants pursuant to the warrant. The application is opposed by all the respondents.

- [31] It is common cause that the applicant did not consent to the entry or the search of her property nor, obviously, to the removal of the various items which were seized. According to the applicant the search commenced over her objections. It is also not disputed that the applicant was not presented with a search warrant or an arrest warrant. More important is that no reason was offered by the respondents in this regard. Further that the fourth and fifth respondents made an application in terms of section 43 of the Criminal Procedure Act 51 of 1977.

- [32] The applicant was arrested and released on bail on 1 August 2020. The applicant appeared in the Hatfield Magistrate court on 3 August 2020 on one charge of malicious damage to property and one charge *crimen injuria*. These charges are still pending and according to the respondents the criminal court is the correct forum to deliberate on constitutionality of the arrest and the admissibility of the evidence. It has argued that this court must be mindful of making a preliminary finding in this regard. I have already

found that this Court has jurisdiction to hear the application, however what must now be determined is if it would be in the interests of justice to do so.

- [33] A basic rule of fairness is that a person who will be adversely affected by an act or a decision of the administration or authority shall be granted a hearing before he suffers detriment¹¹. Peach sums up the *audi* rule as follows:¹²

“The audi alteram partem rule implies that a person must be given the opportunity to argue his case. This applies not only to formal administrative enquiries or hearings, but also to any prior proceedings that could lead to an infringement of existing rights, privileges and freedoms, and implies that potentially prejudicial facts and considerations must be communicated to the person who may be affected by the administrative decision, to enable him to rebut the allegations. This condition will be satisfied if the material content of the prejudicial facts, information or considerations has been revealed to the interested party.”

- [34] The requirement that in certain circumstances decision-makers must act in accordance with the principles of natural justice or procedural fairness has ancient origins. In general terms, the principles of natural justice consist of two component parts, *to wit*; the first is the hearing rule, which requires decision-makers to hear a person before adverse decisions against them are taken. The second and equally important component is the principle which provides for the disqualification of a decision-maker where circumstances give rise to a reasonable apprehension that he or she may not bring an impartial mind to the determination of the question before them. The latter aspect is not relevant in this matter.

- [35] The principles of natural justice are founded upon fundamental ideas of fairness and the inter-related concept of good administration. Natural justice contributes to the accuracy of the decision on the substance of the case. The rules of natural justice help to ensure objectivity and impartiality, and facilitate the treatment of like cases alike. Natural justice broadly defined can also be seen as protecting human dignity by ensuring that

¹¹ See De Smith, SA (1955) “The right to a hearing in English Administrative Law” 68(4) *Harvard Law Review* 569-599, 569.

¹² See Peach, VL (2003) “The application of the audi alteram partem rule to the proceedings of commissions of inquiry” Thesis (LL.M. (Public Law))—North-West University, Potchefstroom Campus (Accessed at <http://hdl.handle.net/10394/58>), 8.

the affected individual is made aware of the basis upon which he or she is being treated unfavourably, and by enabling the individual to participate in the decision-making process. The application of the principle of natural justice has however proved problematic.

[36] The challenge is always how to strike the right balance between public and private interest. Whilst this court, in the circumstances of this matter seems compelled to respond to the vulnerability of the applicant facing the pervasive power of the Hawks, is also at the same time aware that the courts have to avoid a situation where the unconstrained expansion of the duty to act fairly threatens to paralyse its effective administration.

[37] In my respectful view, the public interest necessarily comprehends an element of justice to the individual. The competing values of fairness and individual justice on the one hand and administrative efficiency on the other hand, constitute the public and the private aspects of public interest. It seems plain to me that the principles of natural justice are intended to promote individual trust and confidence in the administration. They encourage certainty, predictability and reliability in government interactions with members of the public, irrespective of their stations in life and this is a fundamental aspect of the rule of law.

Search, Seizure and Privacy rights

[38] Section 14(a) of the Constitution¹³ specifically protects the right not to have one's person or home searched. A person's home, it is widely accepted, constitutes the highest expectation of privacy, which reflects the old adage that the home is a person's castle¹⁴.

[39] The most important legislative provisions that *prima facie* infringe on these rights are to be found in the Criminal Procedure Act¹⁵. The right to enter premises, search those

¹³ Constitution of the Republic of South Africa 1996. S 14 provides as follows: "Everyone has the right to privacy, which includes the right not to have – (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed."

¹⁴ *R v Silveira* (1995) 97 CCC (3d) 450 (SCC).

¹⁵ *Cheadle, Davis and Haysom South African Constitutional Law* 51

premises and remove goods therefrom is a significant invasion of the rights of an individual and must therefore be exercised within certain clearly defined limits so as to interfere as little as possible with the rights and liberties of the person concerned¹⁶.

- [40] It is significant to note that no right is absolute and perhaps applies more to privacy than any other right. The balance is struck in the Bill of Rights read together with legislation authorising searches. The Bill of Rights confers certain rights on individuals but it also authorises the limitation of those rights in the limitation clause. According to section 36 of the Constitution, rights in the Bill of Rights may be limited by a law of general application, provided that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Search and seizure will therefore be constitutional if it is authorised by a law of general application, such as the Criminal Procedure Act (which in itself contains reasonable requirements to be complied with before a search may be conducted and which indicates how it must be conducted).
- [41] Power of the police to enter premises in connection with state security is dealt with in section 25 of the Criminal Procedure Act¹⁷ and empowers a police official to enter premises in connection with state security. If it appears to a magistrate or justice from information on oath that there are reasonable grounds for believing that the internal security of the Republic or the maintenance of law and order is likely to be endangered by or in consequence of any meeting which has been held or is to be held in or upon any premises within his area of jurisdiction, or that an offence has been or is likely to be committed or that preparations for the commission of any offence are being made or are likely to be made upon any premises within his area of jurisdiction, he may issue a warrant authorising a police official to enter the premises at any reasonable time for the purposes of carrying out such investigations and taking such steps as such a police official may consider necessary for the preservation of law and order or the prevention of crime¹⁸.

¹⁶ Cited *National Director Public Prosecutions v Mahomed* 2008 (1) SACR 309 (SCA).

¹⁷ Act 57 of 1977

¹⁸ S 25 Criminal Procedure Act

- [42] Entering of premises by a police official for purposes of obtaining evidence is dealt with in section 26 of the Criminal Procedure Act. If a police official who is investigating an offence or alleged offence reasonably suspects that a person who may furnish information with reference to such an offence is on any premises, such a police official may enter such premises without a warrant for the purposes of interrogating such a person and obtaining a statement from him, provided that such a police official shall not enter any private dwelling without the consent of the occupier thereof¹⁹.
- [43] Since a search may also infringe upon the rights to dignity²⁰ and to bodily security, including the right against cruel, inhuman or degrading treatment²¹, it must be conducted consonant with those rights. In terms of section 29 of the Criminal Procedure Act the search of a person must be conducted with strict regard to decency and order.
- [44] The power to seize is limited to articles which are either involved in, used during, or may provide proof of the commission of an offence in the Republic or elsewhere, or provide proof of the fact that the commission of the offence was planned. The State may in terms of section 20 of the Criminal Procedure Act seize anything that:
- (a) is concerned or on reasonable grounds believed to be concerned in the commission or suspected commission of an offence within the Republic or elsewhere;
 - (b) may afford evidence of the commission or suspected commission of an offence in the Republic or elsewhere; or
 - (c) is intended to be used or on reasonable grounds believed to be intended to be used in the commission of an offence²².
- [45] In terms of section 21 of the Criminal Procedure Act, unless the circumstances set out in section 22, 24 and 25 of the Criminal Procedure Act exist an article may be seized only in terms of a search warrant. If it appears to a magistrate or justice of the peace

¹⁹ S 26 Criminal Procedure Act. *Minister van Polisie v Gamble* 1979 (4) SA 759 (A) at 764D-F.

²⁰ S 10 Constitution of the Republic of South Africa 1996 (hereinafter referred to as the Constitution)

²¹ S 12 (1) Constitution

²² S 20 Criminal Procedure Act.

that there are grounds for believing that such an article is in the possession or under the control of a person or upon any premises, and such information is provided to him or her under oath, a search warrant may be issued. In order for the search to be lawful, the premises to be searched must be clearly and properly identified in the warrant.²³

- [46] The applicants' case in the present application is that the search and seizure of her home was unlawful in that firstly, a warrant was not obtained, she was not shown a warrant and that she did not consent to the search and seizure nor was it authorised by any statutory provisions. Furthermore, she avers that search and confiscation of the electronic equipment was unfounded as it did not relate to the crime of *crimen injuria* and malicious damage to property which was allegedly being investigated by the Hawks, in connection with a conspiracy to murder Mr Gigaba and that only her cell phone was related to those charges. Further that the warrant of arrest secured in terms of section 43 of the Criminal Procedure Act was accompanied by an affidavit which related to a crime of "defamation of character" and not the crimes of *crimen injuria* and malicious damage to property for which she is currently facing charges for. Therefore, the warrant which was belatedly relied on, was also unlawful, both for procedural reasons and by reason of flaws in the warrant itself. The applicant's case is furthermore that the search, seizure and arrest was accompanied by egregious conduct on the part of the Hawks in that she was denied legal representation because they informed her that it was not an ordinary police matter. As she was not *au fait* with the law she believed there ascertains to be true. As a result, the applicant avers, her statement and equipment was taken as she believed she had no choice and that the officer who took the statement was also the commissioner of oaths. However, upon seeking legal representation her legal representatives are being denied copies of the material seized as it has not been disclosed in the copies of the dockets that they have been provided with. Lastly that she was treated in a degrading manner as she was not even allowed to enter her own bedroom alone and was followed to the bathroom, conduct which the applicant avers invaded her rights to privacy and dignity.

- [47] The respondents' notably in their case, firstly have not averred that arresting the applicant in the manner in which they did, was in terms of section 20 and principally

²³ *Toich v The Magistrate, Riversdale 2007 (2) SACR 235 (C)*.

under section 22 of the Criminal Procedure Act 51 of 1977 to conduct a search and seizure operation at the applicants' residence. Section 22 specifically sets out the circumstances in which articles may be seized without a warrant. In any event, the respondents' case proceeds, that section 17D of the SAPS Act mandates the Hawks to investigate cases regarding conspiracy to commit murder and aver that section 17D(3) specifically permits them to investigate any matter connected to the subject of its pending investigations. Further that the task team was appointed to investigate a complaint of such nature made by Mr Gigaba, who also informed them of the other alleged crimes involving him and so they were required to investigate them. It is significant to note that the respondents offered no explanation why a search warrant was not obtained first and did not deny that the applicant's version that she did not consent to the seizure of the articles as required by section 22 of the Criminal Procedure Act.

- [48] This Court is mindful that without a warrant and the consent of the applicant to enter her premises, the result was that the Hawks had license to search for and seize anything they considered relevant. The respondents also remain silent, particularly in regard to the detail of the search and seizure operation and in particular the alleged egregious conduct on the part of the Hawks officials. The question of the appropriateness of this court determining the lawfulness of the search and seizure operation rather than in the magistrate's court where the criminal proceedings are pending, was addressed in the heads of arguments which were filed. The question remains whether it is appropriate for this court to determine the application and if so, why this court should exercise its discretion by granting declaratory relief. In *Thint (Pty) Limited v National Director of Public Prosecutions and Others*²⁴ concerned the validity of six warrants of search and seizure in terms of Section 29(5) and (6) of the National Prosecuting Authority Act 32 of 1998, which had been executed. The warrants were challenged in two divisions of the High Court with varying results and were ultimately the subject of a consolidated appeal to the SCA which upheld the warrants. The applicants then approached the Constitutional Court to have the orders of the SCA set aside. Shortly after execution of the warrants, two of the subjects thereof were indicted to stand trial in the High Court on charges of corruption. The appeal to the

²⁴ [2008] ZACC 13; 2009 (1) SA 1 (CC)

Constitutional court threw up many issues, the first of which was whether it was in the interest of justice to grant leave to appeal. The court ultimately granted leave to appeal. Langa, CJ's reasoning, on behalf of the full Court in this regard, at paragraph 62 and 63, is instructive and I will quote it in full:

"62. The prosecution argues that regardless of whether the applicants' arguments bear reasonable prospects of success, it is not in the interest of justice to grant leave to appeal. It bases this submission on several grounds. First, this case concerns "justice in theory" not "justice in fact", because the applicants have made no attempt to establish that they have suffered any actual prejudice, despite having had ample opportunity to do so. Second, the applicants launched these proceedings for one purpose only, namely to prevent the state from using the seized items as evidence against Mr Zuma and the Thint companies in a subsequent criminal trial. They thereby are trying to circumvent the application of Section 35(5) of the Constitution, which is the way the Constitution chooses to admit unlawfully obtained evidence. This is particularly invidious, they argue, given that the evidence is incriminating of Mr Zuma and the Thint companies, and for that reason it is of great public importance that the truth emerges. Third, this form of preliminary litigation unduly delays the commencement of criminal trials and, therefore, should be strongly discouraged. The trial court, rather than preliminary courts, is best placed to balance the varying public and private interests at stake, namely the public and private interests in the emergence of truth, the applicants' interests in their privacy and property and the accused's persons fair trial rights. Leave to appeal should, therefore, be refused to allow the trial court to do so in this case.

63. There is certainly a great deal of merit in these arguments but I do not agree that it would be in the interest of justice for leave to appeal to be refused in these applications. There are several reasons for my conclusion. The first reason is that were this court to refuse leave to appeal, the Supreme Court of Appeal decision that the warrants and searches and seizures were lawful, would stand and would in all probability bind any subsequent trial court. It would follow that the seized evidence would have been lawfully obtained and Section 35(5) would have no application. The relevant competing interests would not fall to be balanced at all."

The Chief Justice when on to state in paragraph 65:

"65. I nevertheless do agree with the prosecution, that this court should discourage preliminary litigation that appears to have no purpose, other than to circumvent the application of Section 35(5). Allowing such litigation, will often place prosecutors between a rock and a hard place. They must, on the one hand, resist preliminary challenges to their investigations and to the institution of proceedings against accused persons. On the other hand they are simultaneously obliged to ensure the prompt commencement of trials. Generally, disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials start sooner rather than later. There can be no absolute rule in this regard, however. The court's doors should never be completely closed to litigants. If, for instance, a warrant is clearly unlawful, the victim should be able to have it set aside promptly. If the trial is only likely to commence far in the future the victim should be able to engage in preliminary litigation to enforce his or her fundamental rights. But in the ordinary course of events and where the purpose of the litigation appears merely to be the avoidance of the application of Section 35(5) or the delay of criminal proceedings, all courts should not entertain that. The trial court should then step in and consider together the pertinent interests of all concerned. If that approach is generally followed, the state would be sufficiently constrained from acting unlawfully by the application of Section 35(5) and by the possibility of civil and criminal liability. The nature and degree of unlawfulness of the search warrant, are important factors to be borne in mind for the purposes of a decision under Section 35(5). It is for this reason that the same court should consider the unlawfulness of the warrant and its impact."

- [49] Applying these principles to the present matter, it is clear that the purpose of the relief sought by the applicant is not to remove from the court hearing the criminal trial, any opportunity to weigh up the competing private and public interests in admitting any of the evidence found and seized in the search and seizure operation, if indeed it was legally obtained, but rather it is to have access to copies of evidence in the docket which was not provided to her to adequately address the charges against her. Secondly, that the applicant alleges that the warrant was unlawful and as such is entitled to engage in litigation to enforce her fundamental rights. Following the reasoning of the Chief Justice that since no court has yet made a determination on the legality of the search and seizure operation the trial magistrate in this matter will not be constrained by the finding of any other court in his or her judgment on this issue and the admissibility of any evidence so procured. This is especially so in view of the alleged egregious conduct on the part of

the Hawks and the invasion of privacy the applicant was subjected to when the Hawks gained entry to the premises; her bedroom and or followed her to the bathroom without any warrant to do so.

Parallel proceedings

- [50] Generally permitting parallel proceedings and risking inconsistent decisions in multiple forums on substantially the same dispute is undesirable even where a single event triggered the actions. The ultimate question in both these proceedings is whether the arrest and prosecution was lawful and constitutional. In a delicate balancing act, it is the duty of the courts to uphold and vindicate the constitutional rights of the applicant to her good name but in this particular case, which is unique by its circumstances, it cannot have the effect of precluding the Criminal Court from discharging duties and responsibilities exclusively assigned to it by the Constitution.
- [51] Resolving these disputes of fact through the hearing of evidence in any trial-within-a-trial relating to the admissibility of evidence, is preferable to determining them on affidavit. Any findings by this court could, quite conceivably, be the subject of an appeal or even a series of appeals, the effect of which will be to further delay the criminal trial. It is also not clear at this stage whether the state will, indeed, seek to use any of the material it obtained in the search and seizure operation against the applicant. It is conceivable that it might not, in which event there would have been limited point in this court pronouncing on the legality of the search and seizure operation at this stage.
- [52] What must also be taken into account is the desirability of the trial magistrate presiding over the criminal trial to do so without constraints in the form of pronouncements from this court, which encroaches on what evidence is admissible before him or her. The judgment in *Thint supra*, although landmark in the sense that it was a post-constitutional examination of the principles to be followed when higher courts are presented with challenges to search warrants before the admissibility of evidence so obtained is weighed in lower court proceedings, by no means adopted a novel approach. Sixty years ago in *Wahlhaus and Others v Additional Magistrate Johannesburg and*

Another 1959,²⁵ the Appellate Division confirmed the general approach later followed in *Thint* by the Constitutional Court. In *Wahlhaus* it was held:

"While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the uninterminated of course of criminal proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result, or where justice might not by other means be attained. In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal, will ordinarily be available."

- [53] In *Mineral Sands Resources v Magistrate for the District of Vredendal*²⁶. Rogers, J was faced with a review of a search warrant issued in terms of Section 21 of the Criminal Procedure Act and where he ultimately pronounced on its validity, but issued a preservation order in respect of the items seized pursuant to the warrant. Rogers, J found that the warrant was invalid for various reasons and declared its execution unlawful. Discussing the request by the respondents for a preservation order, which ultimately he granted, the learned judge stated as follows regarding inappropriate preliminary litigation at paragraph 215:

"I did not understand Mr Paschke to press for the dismissal of the application as constituting inappropriate preliminary litigation. As Langa, CJ observed in Thint, para 65, there is no absolute rule. He said that if a warrant is clearly unlawful, the victim should be able to have it set aside promptly. If the trial is only likely to commence far in the future, the victim should be able to engage in preliminary litigation to enforce its fundamental rights. The litigation which the courts should not entertain, is litigation having as its purpose to avoid the application of Section 35(5) of the Constitution or to delay criminal proceedings. This is not the case here. MSR has not yet been charged. No criminal trial is imminent. MSR has raised points of substance. The issue regarding the inspector's mandates requires resolution in any event."

²⁵ (3) SA 113 (AD)

²⁶ [2017] 2 ALL SA 599 (WCC)

[54] The factors in the present matter are slightly different in that the applicant has been criminally charged and criminal proceedings have commenced, however the criminal trial is not imminent. Significantly furthermore, the applicant has requested the return of the information that is not connected to the warrant of arrest or any search and seizure warrant. The applicant has stated that the only device in connection with the offences she has been charged with is her cell phone which she had voluntarily offered to the Hawks upon their arrival at her home and that the return of her communication equipment will in no way affect the criminal case pending. This Court cannot find that there are any indications that the purpose of the present application may well be to avoid the application of Section 35(5) of the Constitution.

[55] The point in this matter is clear, there are compelling reasons why these issues should be addressed by this Court. There are serious allegations of abuse of power and breach of privacy in that the applicant's home was searched and items seized without her consent all at the behest of her politically affiliated husband who directed a domestic dispute to the DPCI under the guise of a conspiracy to commit murder against him. This Court has noted significantly that whilst section 17D does confer a mandate to the Hawks, its mandate is limited to national priority offences and that any suspected national priority offence in terms of section 17D (2) must be referred by the National Head in terms of section. There is no evidence before this Court that the Hawks complied with this requirement. There were mere vague submissions by the respondents that the National Head of the Hawks Lieutenant Lebeya established a task to deal with cases regarding "conspiracy to commit murder" and that General Ngwenya was appointed the head of the task team with Captain Mavuso and Sergeant Ndabambi forming part of that team. What the submissions by the respondents do not establish is whether or not Lieutenant Lebeya sanctioned the operation into the investigation of the complaint laid by Mr Gigaba. There is also evidence before this Court that there is or was a conspiracy to commit murder against Mr Gigaba or how, if at all, the applicant is connected to this offence. The only suggested link that the respondents rely on is the vague ascertain by Mr Gigaba that the members of the counter-intelligence were called by the applicant to his home and for that reason he felt unsafe. The respondents furnished relatively little information regarding the material seized or any information regarding the case of conspiracy to commit murder. The applicant described the

necessity of the return of the equipment seized saying "I am a registered student and my work is done through my laptop, particularly because there are no longer contact classes during the period of Covid-19".

- [56] It is common cause that the electronic devices were returned to the applicant. What has sparked the present application is that the applicant is unaware of the extent of the material extracted from these devices and stored on discs 1-6 as attested to by Mr Ndlovu, a Sergeant in the Hawks digital forensic investigation in Mpumalanga, in his affidavit annexed to the section 43 application for an arrest warrant. The applicant submits that these discs do not appear in the docket and is uncertain why the Hawks of the Mpumalanga division were even involved as the matter was not a high level technical investigation. Given the applicant's grave and detailed contentions, I consider that there is a particular convincing case has been made out for the Court to determine at this stage the lawfulness of the warrant or the search and seizure operation generally, rather than leaving this to the trial court should these issues indeed arise in the trial. For all these reasons, I find that the applicant has satisfied me that this Court should intervene at this stage even before the criminal proceedings have properly commenced. What I must now consider whether the warrant of arrest is unlawful and must be set aside.

Unlawfulness of the warrant of arrest

- [57] Section 12(1)(a) of the Constitution provides that "everyone has the right to freedom which includes the right not to be deprived of freedom arbitrarily or without just cause. Section 13(3)(a) of the South African Police Service Act provides that "a member of the Police Service who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances".
- [58] It is common cause that this application is pursuant to the applicant's arrest on 31 July 2020 following the issue of a warrant in terms of section 43 of the Criminal Procedure Act issued on 30 July 2020. It is trite that the onus rests on a defendant to justify an

arrest. In *Minister of Law and Order and Others v Hurley and Another*²⁷ at paragraph 65 Rabie AJ explained:

‘An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.’

[59] As to whether the discretion is exercised properly the following was stated in *Minister of Safety and Security v Sekhoto*²⁸:

“[39] This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached.”

[60] The following was laid down by Bertelsmann J in *Louw v Minister of Safety and Security*²⁹ at 186a -187e, about an arrest where an offence listed in schedule 1 has been committed:

‘I am of the view that the time has arrived to state as a matter of law that, even if a crime which is listed in Schedule 1 of Act 51 of 1977 has allegedly been committed, and even if the arresting peace officers believe on reasonable grounds that such a crime has indeed been committed, this in itself does not justify an arrest forthwith. An arrest, being as drastic an invasion of personal liberty as it is, must still be justifiable according to the demands of the Bill of Rights. . . . Police are obliged to consider, in each case when a charge has been laid for which a suspect might be arrested, whether there are no less invasive options to bring the suspect before the court than an immediate detention of the person concerned. If there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained

²⁷ 1986 (3) SA 568 (A)

²⁸ (2011 (5) SACR 367 (SCA)

²⁹ 2006 (2) SACR 178 (T)

for his/her arrest, or a notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power to arrest.''

[61] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance, and undermine an important constitutional principle. See: ***Pharmaceutical Manufacturers Association of South Africa: in re Ex parte Application of President of the RSA [2000] ZACC 1; 2000 2 SA 674, 2000(3) BCLR 241 (CC) paragraphs [85] to [86].***

[62] An arrest pursuant to a warrant is *prima facie* lawful. The onus of proving the wrongfulness of the arrest by showing that the warrant was irregular, generally rests on the applicant. A warrant in the proper form and issued by a duly authorised official provides the arresting officer with a defence.

[63] Section 43 of the Criminal Procedure Act, reads:

"43 Warrant of arrest may be issued by a magistrate or justice;

(1) Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of police-

a) which sets out the offence alleged to have been committed;

b) which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and

c) which states that from information taken upon oath, there is a reasonable suspicion that the person in respect of whom the warrant is applied for, has committed the alleged offence.

(2) A warrant of arrest issued under this section, shall direct that the person described in the warrant shall be arrested by a peace officer in respect of the offence

set out in the warrant and that he be brought before a lower court in accordance with the provisions of Section 50.

(3) *A warrant of arrest may be issued on any day and shall remain in force until it is cancelled by the person who issued it or, if such person is not available, by any person with like authority, or until it is executed."*

[64] The first issue is whether or not the applicant has established that the Magistrate who issued the warrant acted *mala fides* in authorizing the warrant which is what she would need to prove according to the relevant authorities. In **May v Union Government**³⁰, it was inter alia stated

'It is not necessary for the issuing of the warrant that all the facts necessary for a conviction be given under oath. It is only necessary that reasonable grounds appear from the affidavit. The official requesting the warrant is not limited to the information under oath -when the suspicion is formed. The information under oath must be assessed in the context of all the facts which have been determined, both those under oath and others. The official also does not have to accept all the information under oath as true: he or she can accept some allegations and not others, even doubt them all He or she must have information under oath and, from that, in the correct context, form a reasonable suspicion.'

[65] The *bona fide* exercise of a discretion by a magistrate or justice of the peace under this section cannot be assailed in a court. See **Groenewald v Minister van Justisie**³¹ with reference to **Shidiack v Union Government**³². Although Groenewald is not fully supported in **Prinsloo v Newman**³³ at 500C and 505D it is nevertheless confirmed (at 500B-505C) that the discretion the magistrate or justice of the peace has to exercise cannot, barring exceptional circumstances, be questioned in a court. It is evident from the foregoing that a Magistrate's discretion, exercised in good faith, is not justiciable in a court of law.

³⁰ 1954 (3) SA 120 (N) at 125B confirmed in *Minister van Polisie v Kraatz supra* at 504H)

³¹ 1973 (3) SA 877 (A) at 883H

³² 1912 AD 642 at 651

³³ 1975 (1) SA 481 (A)

- [66] In *Minister of Safety and Security v Sekotho and Another supra*³⁴, contains a discussion on the role of peace officers and the discretion they hold in respect of an arrest which would, with respect, finds equal application in determining the discretion of a Magistrate.

"Harms DP (Nugent JA, Lewis JA, Bosielo JA and K Pillay AJA concurring)

[34] These principles are in substance no different from those formulated by Innes ACJ in Shidiack v Union Government. Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the Court will not interfere with the result Not being a judicial functionary no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own, . . . There are circumstances in which interference would be possible and right If for instance such an officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute — in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong,"

- [67] In applying the principals *supra* the applicant in her has failed to set out any basis upon which it could be inferred that the Magistrate acted *mala fides*. On the face of it, it is illustrated that the magistrate acted upon the evidence presented to her in the form of an affidavit by Sergeant Ndabambi. The magistrate had no reason to disbelieve what was contained therein or foresee that that Sergeant Ndabambi was acting with malice or ulterior motives. However, the *bona fides* of the Magistrate was not placed in issue as there would not be legitimate basis for rejecting that the Magistrate acted properly and prudently in issuing the warrant on the information placed before her and that such information compiled with the provisions of section 43 of the Criminal Procedure Act. She had no reason to disbelieve or question the veracity of the information given to her and she properly acted in accordance with that information. On the basis of the legal proposition, in the absence of *mala fides* the warrant by the Magistrate King was not wrongful, unlawful or *mala fides*.

³⁴ at paragraph 34

- [68] What can therefore only be attacked is the duty of the disclosure by the officer when the warrant was applied for. This raises the next question which is whether or not Captain Mavuso and Sergeant Ndabambi's decision to arrest of the applicant was lawful or unlawful and whether they are responsible for the malicious prosecution of the applicant.
- [69] In her founding affidavit the applicant alleges that when the two officers arrived at her home on 22 July 2020 they advised her that she was facing arrest for *crimen injuria* and malicious damage to property. She claims that her arrest and detention had been unlawful as the offence is not a priority crime and should not have involved the Hawks. Further that she was refused legal representation and that the arrest itself was unnecessary as the fourth and fifth respondents had visited her house 10 days prior to conduct the investigation on 21 July 2020 as stated in his affidavit in support of the warrant of arrest. She avers that it was unclear why her arrest became crucial only on 30 July 2020, ten days after the commission of the offence and that her attendance at court could have been secured by other means. The applicant also further contends that the entire arrest was orchestrated to obtain unlawful access to her information which was an invasion of her privacy.
- [70] The applicant submits that she was not shown a warrant of arrest and was merely informed by Captain Mavuso or Sergeant Ndabambi of the charges against her. She further testified that her constitutional rights were violated as she was forced to make a statement without legal representation. She also alleges that the docket pertained to *crimen injuria* and assault but the affidavit marked A3 by Sergeant Ndabambi states "defamation of character" which is untrue coupled with the nonsensical explanation about the text message which she sent to Mr Sibiya which the Hawks were already in possession of when they first arrived her home. The respondents are silent on these allegations save to mention that they are mandated in terms of Section 17D of the SAPS Act to investigate a conspiracy to murder and any subject matter related to pending investigations such as the complaints laid by Mr Gigaba involving the applicant as previously discussed in this judgment.

- [71] In *Minister of Safety and Security v Sekhoto supra*, the Supreme Court of Appeal did to some extent curb the approach adopted by the High Courts in assessing whether the arrest is justified when a summons could have been used. However, the court stated that where the case is trivial, an arrest would clearly be rational. The SCA went on to say the following:

"What I have said must not be understood as conveying approval of the use of arrest where there is no urgency and the person to be charged has a fixed and known address; in such cases, it is generally desirable that a summons be used".

- [72] The evidence in this case is clear that the whereabouts of the applicant were known as the Hawks arrived at the applicant's home and interrogated her. No information was forthcoming from the respondents why an arrest in the manner that it was conducted was necessary or imminent.

- [73] Notably in this case the respondents have not advanced any arguments regarding the validity or defectiveness of the warrant in its defence. Before leaving this topic there is an observation that needs to be made. The police have a duty to carry out policing in the ordinary way. They have no business setting out to turn an arrest into a showpiece. When executing a warrant of arrest, the police are obliged to do so with due regard to the dignity and the privacy of the person being arrested. In *Independent Newspapers Holdings Ltd v Suliman*³⁵ that to allege that a person has been arrested does not imply that he or she is guilty, but it does imply that there is a reasonable suspicion that he or she has committed the relevant offence, which is itself defamatory. In that case the majority held that before the suspect is brought before a court it is generally not in the public interest or of public benefit that the identity of the arrested suspect should be disclosed, even if the allegation is true. But once the suspect has been brought before a court his or her identity may be published with impunity.

- [74] In *Minister of Safety v Sekotho and Another supra*³⁶ the court discusses section 40(1) of the Criminal Procedure Act (arrest without a "warrant") as opposed to section 43

³⁵ [2004] 3 All SA 137 (SCA).

³⁶ 2011 (5) SA 367 (SCA) (also at [2011] 2 ALL SA 157 (SCA)) -

(arrest with a warrant), but the principles seem to be equally applicable. The Court reaffirmed that an arrest is *infraudem legis* when the arrestor has used a power for an ulterior purpose, but a distinction must be made between the object of the arrest and the arrest or motive - ‘object relevant while motive is not’

- [75] Courts have sometimes interfered to protect an injured party against an abuse of power, example, in those well recognised cases in which powers, given to public bodies to be used for certain purposes, are wrongly used by them to achieve other purposes. See *Sinovich v Hercules Municipal Council*³⁷, to profess to make use of a power which has been given by statute for one purpose only, while in fact using it for a different purpose, is to act in *fraudem legis*, see also *Van Eck and Van Rensburg v Etna Stores*³⁸. Thus, where a warrant of arrest is requested under the pretext that it is acquired for a legitimate purpose while in fact the intention is not to use it for that purpose, but for another unauthorized purpose such person acts *mala fide* and in *fraudem legis*. See *Minister van die SA Polisie v Kraatz*³⁹.

In Fraudem Legis

- [76] In fraud of the law; “A transaction is in *fraudem legis* when it is designedly disguised so as to escape the provisions of the law, but falls in truth within these provisions⁴⁰”. In such cases the important point is “not the interpretation of the law as the interpretation of the transaction⁴¹”. See also *R v Gillet 1929 AD 364*; *McAdams v Fiander’s Trustee* and *Bell 1919 AD 227*. As to the principles to be applied in determining whether a transactions See *Wills’s Principles of South African Law*⁴².
- [77] It appears in this matter that the arresting officers abused their powers and position as members of the Hawks presumably to avenge a wrong or perceived wrong as complained and alleged by Mr Gigaba and not for any lawful purpose and was accordingly *infraudem legis*. The warrant was obtained for an ulterior motive. The argument of the respondents that they were investigating a conspiracy to commit

³⁷ 1946 AD 783

³⁸ 1947 2 S 984 (A) 998

³⁹ 1973 3 SA 490 (A) 508

⁴⁰ *Dadoo Ltd v Krugersdorp Municipal* 1920 AD 547

⁴¹ *ibid* 544

⁴² 6ed 319 436 525

murder against Mr Gigaba is not sustainable in light of the fact they have alluded no further information on this alleged conspiracy or how the charges against the applicant are connected to it. There is also no evidence of this in the docket and takes the matter no further. It is clear that this is in fact a domestic dispute between two prominent members of society, however the offences are not deserving of the high priority of the Hawks and the involvement of the Hawks itself speaks to the abuse of power by Mr Gigaba as a former Minister in using the State administrations for his own personal benefit with an intention to intimidate his wife in a domestic spat. The scourge and dominance of patriarchy in our society must be pierced and women's right to fair and equal treatment must be protected.

[78] I have already found that the warrant itself was properly authorised as already indicated and cannot be set aside with regard to any deficiencies relating to the bona fides of the Magistrate. On the respondents own version, despite the warrant being issued on a weekday 30 July 2020, they chose to wait until Friday afternoon on 31 July 2020 to execute the same. Again the respondents have offered no plausible explanation to this court why if the applicant's actions were as threatening as they alleged, therefore the only way to secure her attendance at court was through a warrant of arrest, it then waited an entire day after obtaining the warrant to actually arrest her. If nothing else, this Court is of the view that this only further demonstrates the abuse of power by the fourth and fifth respondents who were called by Mr Gigaba. Their actions ensured that the applicant could not be taken immediately upon execution of the warrant and apply for bail, with the hopes that she would spend the weekend in a jail cell in the middle of winter during a pandemic.

[79] The actions of the fourth and fifth respondents in obtaining the warrant of arrest upon furnishing information about the *crimen injuria* and malicious damage to property to the Magistrate and executing the same clearly constitutes an abuse of rights, when there is no link between those crimes and that crime of conspiracy of murder it allegedly was initially investigating. There is no explanation why the docket was not returned to the Brooklyn police to take up the matter further and to them to secure the arrest. Although the warrant was properly issued their conduct tainted their ulterior motives and as such

unlawfulness of the execution as echoed by *Fourie J in Brown and Another v Director of Public Prosecutions and Others*⁴³ when he said;

"The question, however, remains whether the execution of the warrant in regard to ISI applicant on 9 May 2008 constituted a lawful arrest Put differently, is there merit in the contention of the 1st applicant that there was no need for the 2nd respondent to have had him arrested, as his attendance at Court could have been secured by less intrusive measures, such as warning or summoning him to appear in Court on these new charges? In this regard I (sic) incline to the view that, even if a warrant for the arrest of suspect has been lawfully obtained in terms of section 43 of the Criminal Procedure Act, this in itself does not justify an arrest to secure the attendance of the suspect in Court... Put differently the conduct of the person effecting an arrest should not constitute an abuse of the right given to such person to effect the arrest"

[80] I am satisfied that the evidence before me demonstrates that the fourth and fifth respondents acted with malice, in that their actions appeared to have been motivated by an abuse of power by a former minister and member of the Executive. There is no evidence that an investigation was conducted regarding a conspiracy to commit murder of Mr Gigaba and the respondents have failed to give any evidence to gainsay the applicant's version.

[81] Based on the evidence as tendered, the applicant has discharged the onus resting upon her to establish that despite the execution of warrant of arrest by the fourth and fifth respondents was wrongful and unlawful and that they set in motion her prosecution.

[82] **In the result the following order is made:**

1. **The application is granted on an urgent basis.**
2. **The decision of the fourth and fifth respondents to apply for the warrant of arrest of the applicant is unlawful.**
3. **The decision to execute the warrant of arrest by the fourth and fifth respondents is unlawful.**
4. **The confiscation of the applicant's information and communication technology equipment is unlawful.**

⁴³ 2009 (1) SACR 218 (CPD) at 226 J - 227 C. See also *Theobald v Minister of Safety and Security* 2011 (1) SACR 379 (GSJ) at 406 paragraph 320

5. The respondents are ordered to restore all information unlawfully removed from applicant's ICT equipment.
6. The third, fourth and fifth respondents are directed to return the information which was downloaded from electronic gadgets of the applicant by the respondents, including the information contained in Disc 1 to Disc 6 referred to forthwith.
7. The costs of this application are to be borne by the third, fourth and fifth respondents on an attorney and own client scale.



SARDIWALLA J

JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing	:	15 September 2020
Date of judgment	:	11 February 2021
Applicant's Counsel	:	DC Mpofu SC TN Ngcukaitobi SC
Applicant's Attorneys	:	Victor Nkhwashu Attorneys
Respondent's Counsel	:	D.J Joubert SC H.A Mpshe
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