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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 1276/2024

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO

(3) REVISED.

DATE: 20/05/2024

SIGNATURE

In the matter between:

Rianda Van Der Merwe

Applicant

And

**The station Commander:
Westenburg Police Station**

First Respondent

Chari Johan Bloem

Second Respondent

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be the 20th May 2024.

JUDGEMENT

LEDWABA AJ

[1] On the 10th February 2024 and on an urgent basis, the applicant obtained an interim order returnable on the 20th February 2024. Apart from the order which granted urgency, the court order reads:

2. The First Respondent is ordered to immediately release the Applicant from its custody, where she is currently being detained at the Westenburg or Polokwane Police Station. The Station Commander or officer in command of the Westenburg Police Station is ordered to do so on the 10 FEBRUARY 2024 on receipt of this Court order.
3. The service of these papers on the Respondents by way of a personal service of the attorney of the Applicant is hereby authorized.
4. The Applicant will file a confirmatory affidavit confirming the founding affidavit and supplementing it with facts if necessary, before or on the close of business on the 12 FEBRUARY 2024.
5. The First and the Second Respondents shall be entitled to oppose this application and shall file opposing affidavits before or on the 14 FEBRUARY 2024.
6. The Applicant will be entitled to file a replying affidavit on 15

FEBRAURY 2024

7. The Order in paragraph 2 above shall be an interim order, implemented immediately, but shall thereafter be subject to confirmation on the return date which shall be on the urgent roll of this Honourable Court of 20 FEBRUARY 2024. The applicant will be released from detention by the Station Commander or officer in command of the Westenburg or Polokwane Police Station on 10 February 2024, upon the receipt of order to do so.
8. The First and the Second Respondents are ordered to pay the costs of this application, jointly and severally, the one to pay the others to be absolved on a scale as between attorney and client. The determination of the costs order shall take place on 20 February 2024 with regard to the costs of 10 February 2024 as well as the costs of 20 February 2024

[2] The clear message of the court orders 2 and 7 is to immediately release the applicant from police custody on an interim basis pending the confirmation or discharge of the order on the return date of the 20th February 2024. The court orders 4,5 and 6 set out the dates by which the parties were directed to deliver their respective supporting affidavits.

[3] On the 13th instance, I issued the directive which reads:

The legal representatives of the applicant and the second respondent are directed to file written short heads of argument:

- a with authorities where applicable, with regard to the dispute or disputes to be determined by the hearing of the 20th February

2024, save the common cause that the applicant is to permanently released from police custody;

b with authorities where applicable, addressing the question how do they understand order number 8 which deals costs. In particular, they are required to address the question as to which party is to pay the costs of the 10th February 2024, the costs of the 20th February 2024 and the balance of the costs up to the 20th February 2024. This is because of the possible pending malicious prosecution and why should these costs not be reserved until the fate of malicious prosecution is certain? and

c as to whether there is any prejudice with noncompliance with the court order numbers 4 and 5 with regard to the delivery of the supplementary papers.

d The legal representatives of the applicant and the second respondent are directed to comply with this directive by the 16th May 2024.

[4] Thomas Grobler Attorneys, who represents the second respondent, indicated that Mr Grobler, who is dealing with the matter is out of country from the 7th May 2024 to the 27th May 2024. The law firm requested indulgence until the 31st May 2024 to file the requested- short heads of argument. I indicated my intention to deliver this judgment on the 20th instance and did not accede to the request to delay the delivery of the judgment. The short heads of argument on behalf of the applicant were timeously submitted.

[5] The supporting affidavits do not make the case for the applicant to be

returned to police custody. It is common cause that the applicant's permanent release from police custody is to be confirmed.

- [6] There is dispute whether the second respondent fully and timeously complied with the time frames set out by the court order of the 10th February 2024. I found no prejudice to noncompliance with time frame order. The parties were able to place their respective version before this court.
- [7] The first part of order number 8 directs the first and second respondents to pay the costs of the application, jointly and severally, the one to pay the others to be absolved on a scale as between attorney and client. The second part of this order deals with the costs aspect. It is the subject of this judgment and also refers to the costs of the 10th February 2024 and the 20th February 2024. The second part is contradictory to the first part, alternatively and at the very least unclear or confusing. This court order appears to be based on the applicant's draft order. The applicant's short heads describe this part of the court as being contradictory. I do not attempt to interpret this part of the court order and decline the invitation to interfere with this order, including the first part by reversing the cost order against the second respondent. There is no basis to do that.
- [8] The background is that the interim order followed the strained relationship between the applicant and the second respondent. The applicant's version is that they were married in community of property and were also business partners and/ or interest members in the legal entities which acquired assets. On the basis of irretrievable breakdown of their marriage relationship, the applicant sued for and was granted the decree of divorce. The applicant's version is that after the divorce, she assumed

the use of her maiden surname, Van Der Merwe and resigned from the parties' CB Systems CC. On behalf of transferor, CB Systems CC the applicant signed the documents transferring the BMW X 5 motor vehicle with registration number C[...] 8[...] (the car) on the eNatis system into her name.¹ The applicant states that she was authorized to do so.² While the CIPC records still reflects the applicant's surname as Bloem, she submitted her resignation under Van Der Merwe. She says that despite the second respondent's confirmation that Bloem and Van Der Merwe surnames refer to the applicant, the CIPC rejected her resignation application using Van Der Merwe surname.³ She says that taking the position that this is the applicant's fault, the second respondent issued court papers under case number 11605/2023 to force the applicant to undertake further steps to have the changes registered. The applicant submits that the second respondent laid a fraud charge against her in an attempt to force her to do more to ensure the amendment of the CIPC documentation. She regards the second respondent's laying of a fraud criminal charge as malicious prosecution.⁴

- [9] It is common cause that at the time of the registration of the car from the close corporation to the applicant the car was registered in the name of the close corporation. The parties are in dispute whether at that point, it belonged to the applicant or the close corporation .⁵ It is not the applicant's case that as the member of CB System CC, the second

¹ Paragraph 3.17 of the founding affidavit.

² Paragraph 3.13 of the applicant's supplementary affidavit

³ In response the second respondent states that the only thing the applicant needs to do is to sign the transfer of shares in her surname "Bloem" of which she is registered with the Department of Home Affairs for the shares to be successfully registered with the CIPC: paragraph 24.2, 24.3, 24.4, 25.1 and 25.2 of second respondent's opposing affidavit.

⁴ Paragraphs 3.27 and 3.30 of the applicant's supplementary affidavit . The second respondent says when the applicant acquired the shares, she used Bloem surname: paragraph 35.2 of his supplementary opposing affidavit.

⁵ The applicant says although the car is registered to the name of CB Systems CC, it was her property, and has always been her personal vehicle: paragraph 3.17 of her supplementary affidavit. The second respondent denies this allegation: see paragraphs 26.3 and 27.1 of his supplementary opposed affidavit.

respondent signed the transfer documents or that she was authorized by CB System CC to sign the transfer documents on behalf of the close corporation.

[10] The second respondent's version is that in order to have the car registration documents changed from the parties' close corporation to the applicant's name, the applicant forged his signature, alternatively signed transfer document to transfer the ownership of the car from CB Systems CC into her name without authority to do so. He attaches the documents he alleges prove this assertion. His version is to the effect that the applicant represented to the registration authority that she had CB Systems CC authority to change the car ownership registration from CB Systems CC into her personal name. He states that the applicant's conduct amounts to fraud and/or forgery and uttering with the result that he laid criminal charges against the applicant at the first respondent's police station for investigation. He states that after laying criminal charges, he had no further dealings with the South African Police Services and that it is the Public Protector's prerogative to prosecute the applicant after consideration of the provided facts. The court will then make the decision based on the evidence led. The second respondent states that the laying of criminal charge led to the arrest and the police detention of the applicant on the 9th February 2024. The applicant issued urgent application against the first respondent, on the basis of her arrest and detention by the investigating officer Seargent Baloyi, and the second respondent for having laid the fraud charge. The only relieve the applicant claimed against the second respondent relates ti he cost. He states that the reservation of costs does not make sense and submits that the applicant should be ordered to pay his costs. ⁶

⁶ Paragraphs of the respondent's opposing affidavit 106.5, 106.6, 125.2 and 3

- [11] While the second respondent has laid fraud charge against the applicant which awaits the Public Prosecutor's decision, the applicant is yet to take steps to finalise the fate of her alleged malicious prosecution claim against the second respondent.
- [12] Both parties appear to acknowledge that there is a portion of the costs which depends on the fate of the fraud charge laid by the second respondent and malicious prosecution claim the applicant intends to pursue. Both the fraud charge and the malicious prosecution claim are not before this court and if the parties are correct, that portion of the costs will have to wait until they are dealt with.
- [13] The applicant request that the costs of these proceedings be reserved to be determined at the trial and will issue summons for unlawful arrest and amend them to include malicious prosecution.⁷ She again request that the costs of the urgent application be reserved and determined in an action for unlawful arrest, to be issued by the applicant within thirty days The reason to reserve the costs is that the applicant intends joining Baloyi .⁸
- [14] The second respondent submits that should the applicant be charged, the criminal trial court will decide whether there are merits in the charges laid against her. He further submits that the civil court trial will, after the leading of evidence, be in a position to decide whether the charge laid against the applicant was malicious. He further submits that it is not for this court to make such a decision.⁹
- [15] On the basis that the applicant cited the second respondent and claim no relief other than the costs order, the second respondent claims the

⁷ Paragraphs 3.31 and 32 of the applicant's supplementary affidavit.

⁸ Paragraphs 5.2 and 5.2 applicant's supplementary)

⁹ Paragraphs 84.2 , 3, 88.4 , 89.2 , 91.3, 96.1 and 97.2 of the opposing affidavit

costs order against the applicant for the alleged malicious and erroneous citing of him as a parry.¹⁰ The success or failure of the costs order sought may depend on the fate of malicious prosecution claim.

[16] Whether the second respondent maliciously prosecuted the applicant depends on whether he did anything more than laying the criminal complaint. This is for the Public Prosecutor to decide and not this court. The applicant's position is that she still intends to prosecute what she regards as malicious prosecution not only against the second respondent but also in relation to the conduct of the arresting officer Seargent Baloyi. The merits or demerits of the fraud complaint and the malicious prosecution claim may influence the decision relating to the awarding of the costs. This decision should not be preempted by the awarding of the costs order at this stage. At the finalization of the fraud complaint and the malicious prosecution claim, it will hopefully be clear where the costs should lie and to what extent.

[17] There is no prejudice in reserving the balance of the costs until there is certainty and clarity about the second respondent's complaint and the applicant's claim. The fate of this complaint and claim lies in the hands of both parties.

[18] The issue of costs is within the court's discretion with the default practice being that the costs ordinarily follow the results.¹¹

[19] The primary purpose of a costs order is to minimize the extent to which a successful litigant will be out of pocket as a result of litigation such party

¹⁰ Paragraphs 49.2 and 124.2 of opposing affidavit.

¹¹ Public Protector v South African Reserve Bank (2019) ZACC 29; 2019(6) SA 253(CC); 2019(9) BCLR 1113(CC) -at 224 and 227

should not endure.¹²

[20] The principle that the costs generally follow the results does not apply to frivolous and vexatious litigation.¹³ My view is that this include the costs which were maliciously incurred and those incurred as result of the abuse of court processes.

[21] The finding that the second respondent maliciously prosecuted the fraud claim against the applicant may affect which party is liable for the costs of this matter or part thereof, excluding the already ordered costs.

[22] I refrain from making any costs order at this state. The applicant and the second respondent have the right to apply to this court for an order for the balance of the costs, when any of them decides that it is appropriate to do so.

Order

[a] The arrest and detention of the applicant which occurred on the 9th February 2024 is set aside.

[b] The interim order number 2 read with 7 granted by this court on the 10th February 2024 in terms of which the applicant was released is confirmed.

[c] Save for the costs order granted by this court on the 10th February 2024 in terms of the first part of order number 8, the balance of the costs are reserved.

¹² Mkhathswa & Others v Mkhathswa & 6 Others (2021) ZACC 15 paragraph 20

¹³ Mkhathswa & Others v Mkhathswa & 6 Others (2021) ZACC 15 paragraph 18.

**LEDWABA LGP
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION : POLOKWANE**

APPEARANCES

FOR THE APPLICANT: Mr Moolman
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FOR THE SECOND RESPONDENT: Mr Grobler.

THOMAS GROBLER ATTORNEYS

14 LANDDROS MARE STREET POLOKWANE

DATE OF HEARING: 20 FEBRUARY **2024**

DATE OF JUDGEMENT: 20 MAY 2024