



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable Yes/No
Case No: 4698/2024

In the matter between:

NOMALANG MOROADI SELINA CHOLOTA

Applicant

and

**THE DIRECTOR OF PUBLIC PROSECUTIONS
FREE STATE**

First Respondent

THE MINISTER OF POLICE

Second Respondent

CAPTAIN BENJAMIN FREDEMAN CALITZ

Third Respondent

CORAM: Hefer AJ

Heard: 7 NOVEMBER 2024

Delivered: 23 JANUARY 2025

ORDER

The application is dismissed with costs.

JUDGMENT

Hefer AJ

Introduction:

- [1] The applicant is currently the subject of a criminal prosecution for a number of crimes surrounding the now 'notorious' Asbestos Eradication Project Procurement conducted by the Free State Provincial Department of Human Settlements between 2014 and 2017.
- [2] The applicant was at all relevant times the Personal Assistant to the Former Premier of the Free State Province, Mr Ace Magashule and as such employed in the Office of the Premier.
- [3] The applicant testified during a televised sitting of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State ("**the Zondo Commission**") during December 2019.
- [4] The applicant, together with amongst others Mr Magashule and a number of other accused, is an accused in the matter of **State v Mokhesi and Others** set down for trial in the Free State High Court, commencing 15 April 2025, facing charges comprising of:
 - (i) Four counts of fraud, resulting in a loss to the State in an amount in excess of R86.5 million; and

- (ii) Five counts of corruption in terms of s 3 of the Prevention and Combatting of Corruption Activities Act 12 of 2004 totalling the amount of approximately R1.1 million together with alternative charges.
- [5] Ms Cholota is further accused of having acted in common purpose or being part of a conspiracy to commit the aforesaid crimes.
- [6] Upon consideration of the relief sought by the applicant, it appears that the aim of the applicant is to have the prosecution against her put to an end at this stage already.
- [7] Prior to the applicant being charged, she was interviewed by members of the investigating team of the SAPS in the United States and extradited from the US to South Africa.
- [8] The relief sought in the present application are premised firstly on the basis that the charges brought against the applicant are, according to the applicant, inconsistent with the prescripts of the Constitution and ought to be set aside.
- [9] Secondly, according to the applicant, there is no reasonable or probable basis for the charges of fraud, money laundering and corruption levelled by the State against her. Applicant asks this Court to order that the charges against her be withdrawn.
- [10] Finally, according to the applicant, the South African Criminal Court lacks the requisite jurisdiction over the applicant and her case, due to the extradition of the applicant from the USA to South Africa being unlawful.
- [11] Before consideration of the merits of the applicant's relief sought, a brief summary of the factual and legal context is necessary.

Historical background:

- [12] During mid 2012, the applicant allegedly had her first interaction with the Office of the Premier, Free State when she sought financial assistance for tuition fees to complete her B. Tech degree. She had been aware at the time of the long-established practice of financial needy students approaching the Office of the Premier with the funding of their tuition fees.
- [13] In spite of her application being unsuccessful, she was, due to her '... ample experience for a very senior official' before, considered as a suitable replacement to and appointment as the Personal Assistant of the Premier of the Free State at the time, Mr Ace Magashule.
- [14] Applicant worked for Mr Magashule for a period of five years. Upon his appointment as Secretary General of the ANC, she then was the Personal Assistant of his successor, Ms Sisi Ntombela.
- [15] During June 2019 she vacated the position as the Personal Assistant to Premier Ntombela because she had been awarded a full scholarship for her studies in Political Science at the Bay Atlantic University in Washington DC, in the United States of America.

Factual matrix that underpins the application:

- [16] According to the applicant, a few months into her studies in the USA, she was summoned to testify before the Zondo Commission regarding the bursary scheme in the Office of the Premier, Free State. This was because the Commission needed clarity and information as to what exactly the bursary scheme facilitated by the Office of the Premier entailed.
- [17] During the beginning of December 2019, applicant travelled to Johannesburg and testified in a televised sitting of the Zondo Commission chaired by the then Deputy Chief Justice Raymond Zondo.

- [18] Subsequent to the applicant's appearance before the Zondo Commission, the State Prosecutor then announced on national television that the applicant has agreed to be a state witness which then resulted in the e-mail correspondence, already referred to. The applicant then explains that approximately ten months after the e-mail correspondence, investigators from the South African Police Services accompanied by agents of the Federal Investigations Bureau (FBI), presented at her apartment in the US unannounced, on 22 September 2021.
- [19] The applicant was then escorted by the FBI agents to the Sheraton Hotel in Baltimore, Maryland. According to the applicant she went with the FBI for what she was informed to be a witness interview.
- [20] According to the applicant she was then questioned by Captain Calitz and Brigadier Gerber of the SAPS (in consultation with Adv De Nysschen – the prosecutor) for two days.
- [21] The applicant alleges that on the first day the line of questioning at that stage differed starkly from the line of questioning she had been subjected to before the Zondo Commission. Applicant put it as follows:
- 'In fact so different was the line of questioning, that it made me uncomfortable as the investigators have pressuring me to speak to facts I knew nothing about ...'.
- [22] On the second day, being the 23rd of September 2021, the applicant was then again interviewed by the same investigators, this time at the South African Embassy in Washington DC. During the first half of this interview, the applicant was still regarded as a state witness, according to the applicant.
- [23] The applicant then alleges:

'... When I could not refuse to give answers that were 'useful' to them, they directly threatened me that if I continued 'doing what you did yesterday' I would leave them 'no choice but to treat you as a suspect'.'

[24] The applicant then, importantly so, alleges that the investigators of the NPA intimidated and coerced her that if she continued not to confirm certain facts and refuse to make statements in matters she knew nothing about as a Personal Assistant to Mr Magashule, '... they would bring charges against me and I would be pooled together with the rest of the co-accused in the matter'. When she '... still refused to buckle under their mental torture, threats and coercion and intimidation, they followed through and brought charges against me for money laundering, fraud and corruption'.

[25] The applicant asks that this Court declares the conduct of the investigators and prosecutors as falling short of the conduct envisaged by the Constitution's prescripts and declare it unconstitutional and invalid.

Constitutional invalidity of the prosecution and absence of reasonable and probable cause:

[26] It is further applicant's case that her prosecution had not been brought with the aim of obtaining a conviction. Instead, according to the applicant, the prosecution against her was brought after her subjection to threats, intimidation, coercion and mental torture and is a continuation of such aims.

[27] The applicant contends that no reasonable or probable cause have been established by reports of State agencies and Chapter 9 (of the Constitution) institutions which include the Auditor General, the Public Protector and the Zondo Commission.

[28] As far as the Auditor General is concerned, the applicant states that the AG had conducted an audit during 2014 / 2015 financial year and has, in its report

of July 2015 found that the tender in relation to the Asbestos Project had been irregularly procured.

- [29] According to the applicant however, no reasonable or probable cause of an in impropriety illegality or misconduct of any kind was established against her by the report of the AG in the award of the Asbestos Project tender.
- [30] As far as the Public Protector is concerned, the applicant contends that after the Public Protector had thoroughly investigated the Asbestos Project following the report of the Auditor General and a complaint submitted by a member of the opposition in the Provincial Legislature, the findings, recommendations and remedial actions was published in her 'report 147'.
- [31] Nowhere in this report, according to the applicant, was she named or impugned in impropriety, nor is there any mention that the Office of the Premier Bursary and Financial Assistance Scheme was untoward or unlawfully receiving gratification from proceeds of the Asbestos Project.
- [32] No reasonable or probable cause by the Public Prosecutor Report 147 has been established against her, according to the applicant.
- [33] The applicant then refers to a report by the Special Investigations Unit (SIU), in which nowhere was the applicant mentioned or implicated in impropriety, misconduct or wrong doing. No reasonable or probable cause was established by the investigations and subsequent report of the SIU, according to the applicant.
- [34] In regards to the Zondo Commission, the applicant's contention is that the 290 page report of Chief Justice Zondo should be proof beyond reasonable doubt that she, is not implicated and no impropriety had been found against her. The result is that no probable cause was established against her by the Zondo Commission.

- [35] Attending to the NPA, the evidence according to the applicant, indicates that as at 18 November 2020, with reference to e-mail from the NPA to applicant, the NPA believed that reasonable and probable cause to bring charges against and prosecute her, was absent.
- [36] According to the applicant, there is no nor was there any reasonable or probable cause for her prosecution. Applicant therefore asks that the Court declares her prosecution lacking probable and reasonable cause.

Jurisdiction of the South African Court:

- [37] As far as the applicant's extradition from the USA to South Africa is concerned, the applicant contends that the United States authorities have, in motivation for her extradition, been informed that the applicant was evading justice, refusing to attend trial and causing great delays in the trial. This however, according to the applicant, emerged to be facts that were fabricated by the South African Government and misrepresented to the United States.
- [38] Furthermore, compounding the unlawfulness of the representations made by the NPA, were the allegations emerging during the applicant's bail proceedings in South Africa, to the effect that the State has fabricated the assertion that had been made to the effect that the applicant was a flight risk owing to her 'connections in Kenya'.
- [39] According to the applicant, these material fabrications of fact and misrepresentations render her extradition unlawful, wrongful and unconstitutional notwithstanding the *bona fides* on the part of the United States. The applicant further contends that the latter renders the jurisdiction of the South African Criminal Court over her non-existent.

- [40] The applicant alleges that she has been arrested, detained for four months in the USA and then transported back to South Africa as a fugitive from justice, shackled and under heavy guard. Whereas this was done without her consent, the applicant contends that there is a violation of her fundamental human rights and international law and, again, that the South African Criminal Court does not have jurisdiction over her.

Opposition by first respondent:

- [41] In answer to the allegations contained in the applicant's founding affidavit, an opposing affidavit had been deposed to by Navilla Somaru being the first respondent.
- [42] The first respondent specifically alleges that whereas the majority of factual allegations are not within her personal knowledge, she relied upon Adv J de Nysschen, a senior state advocate and the lead prosecutor in the criminal matter involving the applicant, to provide her with his responses to the allegations by the applicant.
- [43] Adv De Nysschen prepared the affidavit utilized in the extradition proceedings which the applicant takes issue with.
- [44] The first respondent firstly raises a point of non-joinder *in limine*. According to the first respondent, the Minister of Justice and Constitutional Development is the Member of the Executive responsible for facilitating extraditions under the Extradition Act 67 of 1962 and, to the extent the applicant seeks declaratory relief pertaining to the lawfulness of her extradition, the Minister ought to be given an opportunity to respond thereto.
- [45] As what is being described as an 'overarching basis of opposition', the first respondent in the first instance denies that any persons in the office of the first

respondent or that of the NPA had acted in any unlawful or unconstitutional manner with regards to the applicant and her prosecution.

- [46] The first respondent further contends that the applicant has not set out facts, when viewed together with the first respondent's answer thereto, which renders her prosecution or her extradition unconstitutional, unlawful or invalid. 'Reasonable and plausible cause exist for her arrest and she has a case to answer. That is not only my view, but that of the Magistrate presiding at the bail proceedings and two Judges of the USA District Court for the district of Maryland' – according to first respondent.
- [47] Furthermore, according to the first respondent, the objection of unlawful conduct, pertains to the clearly specified plea which is available to the applicant in terms of s 106 of the Criminal Procedure Act 51 of 1927 ("**the CPA**").
- [48] The first respondent further contends that the extradition is of a *fait accompli*, whilst the prosecution however is ongoing and '... this court still has a discretion whether or not to grant it in terms of s 21(1) of the Superior Courts Act 10 of 2013 and must examine all relevant factors in doing so'.
- [49] Finally, the first respondent contends that the applicant ought to have brought a review application under the principle of legality to seek to have the decision to prosecute her set aside. According to the first respondent s 179(2) of the Constitution, read with the Doctrine of Separation of Powers reserves the power to institute and conduct criminal proceedings on behalf of the State and to discontinue criminal proceedings for the National Prosecuting Authority.
- [50] According to the first respondent, it was 'not announced on national television' that Ms Cholota was to be a state witness, but it was rather requested during ordinary court proceedings that she, together with other witnesses on the State's witness list be forbidden to have contact with one of the accused, Mr Ace Magashule, pending the conclusion of the criminal trial.

- [51] The prosecution is, according to first respondent in any event empowered by s 179 of the CPA to compel the attendance of any person to testify at a criminal trial and that no fore-warning or consent on the part of the witness is required by the CPA.
- [52] The first respondent concedes that the position of the State regarding Ms Cholota's status in the criminal trial pertaining to the Asbestos Project changed between 17 November 2020 and 23 September 2021. This was, according to first respondent, because the view of the prosecuting team became more circumspect as regards to Ms Cholota's role in the alleged criminal conduct once the State obtained the electronic device and documentary evidence from the State Capture Commission Investigators on 9 December 2020 and then further once FTI Consulting, the forensics expert, were appointed during April 2021 and had found more e-mails and evidence on Ms Cholota's devices.
- [53] After that time, while Ms Cholota was still not regarded as an accused, it became evident that the State would have further questions for her regarding her role in the matter, and that there was evidence that she would need to provide answers for and need to co-operate with the State in order for her 'to remain a state witness' (emphasis added).
- [54] In respect of applicant's allegations relating to the conduct of the third respondent as well as the then Brigadier Gerber when they interviewed Ms Cholota in the US during September 2021, first respondent relies upon the contents of the answering affidavit of the second and third respondents in this regard and supports their version.
- [55] The first respondent denies the version of events as put up by the applicant and that '... any mental torture, threats, coercion and intimidation took place during her questioning'.

- [56] According to the first respondent, communications between Brigadier Gerber and Adv De Nysschen was limited to two telephone calls – the first made after the interview had been concluded on the first day so as to update him as to what transpired and the second, after the applicant had been formally informed that she was a suspect, on the second day, when he was informed that the decision had been taken by the investigating officers to treat her as a suspect. Neither Adv De Nysschen nor anyone else from the NPA played any role in the questioning of Ms Cholota in the US.
- [57] The first respondent alleges in no uncertain terms that the NPA is desirous of obtaining a conviction against the applicant as she has contravened the law. This is based on portions of the FTI Consulting report which was submitted to the Magistrate during the bail application and which summarises the evidence against the applicant and show the existence of reasonable and probable cause.
- [58] From this report, it *inter alia* emerges that during Ms Cholota's employment as Personal Assistant to Mr Magashule:
- (i) The Free State Department of Human Settlements appointed two entities to conduct the Asbestos Eradication Project in the Free State;
 - (ii) Although one of the firms did not perform the work, it still received payment from the said Department in the sum of almost R230 million between December 2014 and August 2016;
 - (iii) Through the Office of the Premier of the Free State, headed by Mr Magashule and at the request of the applicant, the directors of such entities made several payments in respect of, amongst others, student fees, a Cuba school donation and trips to Cuba, in the total amount of R1,371,260.98;

- (iv) In respect of many of these payments, the e-mail records show that applicant was intimately aware of the request for payments and effectively facilitated the payments between benefactor and recipient; and
- (v) Ms Cholota also received a number of payments from persons related to Mr Magashule, being service providers or parties related to them in her personal Capitec banking account.

[59] In respect of the alleged threats, intimidation, coercion or mental torture by the NPA, the first respondent states that this has always been denied. In this respect, the first respondent refers to the affidavit by the third respondent where he stated as follows:

'Ms Cholota was not very co-operative and had shown irritation and frustration at many of our questions especially when she was pushed for more details or further answers. Accordingly, we did inform her during our questioning on 22 September 2021 that Ms Cholota should think about the matter overnight as her failure to co-operate may lead us to considering her to be a suspect. This was not a threat but a fair warning.'

[60] According to first respondent, Ms Cholota was charged at a later stage because the case has changed as the investigations continued and more evidence came to light.

[61] According to the first respondent, the report of the Public Protector was focused on the procurement in issue and the alleged irregular awarding of the contract to the service providers. Her report makes no mention as to what was done with the payments received by the service providers from the Free State Department of Human Settlements.

[62] The apparent limited scope of the investigation conducted by the office of the Public Protector is why would it would be that there is no reference made therein to the applicant and the Office of Premier and any bursary or financial

assistance schemes conducted by it/them. This does not, according to the first respondent, mean that there is no probable cause for the State to charge the applicant with fraud and corruption.

- [63] In respect of applicant's contention that no reasonable or probable cause had been established by investigations and subsequent report of the SIU, the first respondent's response is that it is because the investigation by this Unit was limited to the Asbestos Project procurement within the State Department of Human Settlements which did not include an investigation as to what happened to all payments made by the said Department to the joint venture of entities referred to in the report by the forensic experts.
- [64] As far as dealing with the report of the Zondo Commission, the first respondent pointed out that although no recommendation as to criminal charges was made against Ms Cholota in her personal capacity, it is evident from a reading of this report that the applicant was certainly not exonerated.
- [65] Regarding the NPA, the first respondent explains that at the date when Adv De Nysschen addressed his e-mail to the applicant during November 2020, "... he was satisfied with the applicant's version and this was based on the evidence at the time'. Subsequently, as the investigation progressed, the position has however changed.
- [66] It is first respondent's contention that neither the applicant, due to her failure to have requested the docket, nor this Court, as it is not the criminal court, are in possession of all the evidence the State has against the applicant. This Court, according to first respondent, simply cannot find that there is no probable and reasonable cause for her prosecution.
- [67] As to the applicant's contention that she did not voluntarily return to South Africa to face trial, with reference to certain e-mail correspondence by applicant's former attorney addressed to Adv De Nysschen, it is evident that

the applicant quite clearly took numerous steps to oppose her extradition from the United States when she could, at any stage, have voluntarily undertaken to return. She did not do so and instead fought her extradition both in the United States and in South Africa.

- [68] The first respondent states that the State did not oppose the applicant's bail on the grounds that the applicant has attempted to evade her trial or to flee justice, but on the basis that it believed it has sufficient evidence to show that it was likely that the applicant would evade her trial.
- [69] The first respondent points out that the applicant's previously pending extradition did not hamper the commencement of the criminal trial as the State was ready to proceed with the trial against her co-accused even if the extradition process had not been completed by 15 April 2025. Furthermore, the Magistrate at the bail proceedings, in her judgment, held that the applicant is not the cause for the delay in the trial commencing, '... and it is supported by the arguments presented by the State as well'. The applicant was and is therefore accordingly completely incorrect when saying that she was alleged to be a delay in the commencement of the trial, a fact which emerged according to her during the bail proceedings. According to the first respondent, this has never been the position of the State and was not referred to in Adv De Nysschen's communications with the US authorities. It is also a further fact that the applicant had either misled her then legal representatives or they had misled the Court during January 2023 about voluntarily returning to South Africa to stand trial and then in correspondence between the applicant's then attorney and Adv De Nysschen from such time until May 2023.
- [70] As to the allegations surrounding Ms Cholota's 'connections in Kenya' were raised by her in her replying affidavit in the bail proceedings for the first time, the State did not have an opportunity to reply thereto. Nevertheless, Adv De Nysschen in his argument indicated to the Court that that was information available to him at the time he deposed to his affidavit dated 28 August 2023.

The first respondent in any event points out that there is nothing unusual or wrongful about this.

- [71] According to the first respondent, with reference to the number of Chapter 9 (of the Constitution) institutions' reports relied upon by the applicant in respect of the absence of reasonable and probable cause, the first respondent contends that no Court can be bound by the findings of state agencies and Chapter 9 institutions.
- [72] From the affidavit by Adv De Nysschen which was sent to the US authorities in support of the request for the applicant's extradition, it emerges that, contrary to the applicant's allegations the State did then, and still maintains that the applicant was involved in criminal activity, either individually or together with her co-accused and facilitated payments amounting to corruption persons involved in the Asbestos Project.
- [73] As far as the extradition of the applicant is concerned, according to the first respondent, Ms Cholota's extradition which has taken four months and during which she was detention, has nothing to do with the respondents as they are and was not involved in such process.
- [74] In reply to the first respondent's submissions regarding mis-joinder, in particular in regards to the Minister of Justice and Constitutional Development, the applicant contends that while indeed this Minister is a member of the Executive responsible for extraditions (in tandem with the Minister of International Relations), she has no case to answer in the present proceedings as they relate almost exclusively to the conduct of state officials employed within the Free State Prosecutor's office under the Director of Public Prosecution's office and members employed by the South African Police Service, a Department falling under the Minister of Police.

- [75] The applicant further contends that the Minister of Justice's interest will not be affected by an order to the effect that the conduct of the State investigators and State Prosecutor was unconstitutional which will result in the invalidation of the charges brought against her as well as ascertained the lawfulness of the extradition, but will however in the words of the applicant '... hopefully assist the Minister in reviewing the conduct of State officials in extraditions however, to avoid any more innocent people like myself being subject to torture, intimidation and threats at hands of State investigators and State Prosecutors'.
- [76] In reply, the applicant further submits that the interests of justice require that this Court ventilate the merits of the matter as the matter is of great public interest. I agree with these submissions, also in regards to the non-joinder of the Minister . In view of my findings in respect of the merits of the matter I do not deem it necessary to deal with this point any further.

Opposition by second and third respondents:

- [77] Captain BJ Calitz, the third respondent, also deposed to an affidavit in his personal capacity as well as on behalf of the second respondent, being the Minister of Police.
- [78] Captain Calitz *inter alia*, also supports the first respondent in its plea of non-joinder in respect of the Minister of Justice and Constitutional Development as already referred to above.
- [79] Pertaining to the events on 22 and 23 September 2021, the third respondent explains that because of new evidence obtained by the investigating team during December 2020, which was thereafter analysed by them and FTI Consulting, he had numerous questions for Ms Cholota relating to this evidence. Given that it was understood that the applicant had agreed to co-operate with the State, they had requested to interview her more fully and in relation to the facts within her knowledge while she was employed as the Personal Assistant of Mr Ace Magashule.

- [80] The interviews with the applicant had been arranged through Special Agent Denise Biehn of the FBI who was at the time based at her corresponding Embassy in South Africa. The FBI had previously located Ms Cholota in the United States and they made arrangements for a small team to drive to her residence and escort her to attend an interview with Brigadier Gerber of the South African Police Services and Captain Calitz himself.
- [81] On the morning of 22 September 2021 Captain Calitz together with Agent Biehn met two or three other FBI agents and travelled in two sedan vehicles, neither of which were SUVs or blacked out as alleged by the applicant and arrived outside the applicant's residence. Agent Biehn and her colleagues from the FBI went alone into the department building where Ms Cholota was residing and a short while thereafter, the applicant emerged outside her apartment building together with the agents. Ms Cholota travelled alone, using her own vehicle and followed the two vehicles which the agents were travelling in to the Sheraton Hotel. The Hotel is situated in Baltimore, about 15 minutes' drive from the applicant's residence. The conference room had been organised for use in the hotel by the FBI.
- [82] Ms Cholota attended the interview voluntarily and was informed that she was to be a witness for the State and that Captain Calitz and the others had questions for her based on her statements and testimony before the Zondo Commission as well as e-mail correspondence she had sent and received while employed at the office of the Premier of the Free State.
- [83] Brigadier Gerber and Captain Calitz then commenced on questioning Ms Cholota and during the course thereof, showed her various documents which she would have known about, most notably her e-mails. According to Captain Calitz he recalls asking Ms Cholota many questions which she seldom answered fully and completely, often questioning their relevance. All her

answers, according to Captain Calitz were measured and careful and it was evident that she had been taken off guard by the interview.

- [84] In the early afternoon before they had finalised their questions and after approximately three hours since their arrival at the hotel, the applicant informed them that she needed to leave in order to reach her university in time for her classes. Captain Calitz and the others then agreed, but indicated that they had further questions for her and she agreed to meet them the following morning in Washington DC. It was further agreed that she was to be picked up at a certain train station in Washington DC and she was informed that the second day of the interview was to be conducted at the South African Embassy in Washington DC. The applicant indicated that she intended contacting an attorney about the interviews to which Captain Calitz and the others did not have any objection to.
- [85] Later in the afternoon of the 22nd of September, Brigadier Gerber and Captain Calitz made telephonic contact with the Prosecutor in the Asbestos Project criminal matter, being Adv De Nysschen, and informed him that in their view, the applicant was not very co-operative and had shown irritation and frustration at many of their questions, especially when she was pushed for more details or further answers. According to Captain Calitz, between the three of them they discussed the possibility of the State charging the applicant criminally alongside the other accused if she did not provide full answers to them, but it was agreed that a decision would be made the following day depending on Ms Cholota's demeanour and co-operation after having considered her position and recollected her thoughts.
- [86] During this second interview on 23 September, it appeared that the applicant's demeanour and attitude towards the questioning had still not changed. She was still irritated with many of their questions, declined to provide detail when she was asked for it and regularly became frustrated

when she was pressed to provide facts which had to have been within her knowledge.

- [87] At some point in the morning, Captain Calitz and Brigadier Gerber decided, owing to Ms Cholota's lack of co-operation that they would now have to issue her with a warning statement and treat her as a suspect in relation to the Asbestos Project. At that stage, the applicant was informed accordingly and Captain Calitz began completing a document titled 'Statement regarding interview with suspect'. According to Captain Calitz, the completion of a warning statement does not mean that a person is arrested, but rather is a standard document completed by the members of the South African Police Service prior to a person who has become a suspect being questioned as a suspect.
- [88] When the applicant at that stage indicated to Captain Calitz that she wished to exercise her right to consult a legal practitioner, he then paused the taking of the statement and Colonel Mabalane who was stationed at the Embassy, was approached to enquire whether there were any legal representative available. Colonel Mabalane advised in the negative, the applicant was informed accordingly and Captain Calitz continued completing the warning statement.
- [89] Ms Cholota was interviewed in total for approximately three hours on this day.
- [90] After the applicant had been informed that they were treating her as a suspect, neither Captain Calitz nor Brigadier Gerber asked her any questions pertaining to the Asbestos Project. According to Captain Calitz, he simply proceeded to complete the warning statement. It was only during the taking of that statement that, for the first time on either day, Ms Cholota requested to consult with a legal practitioner. As one could not be found for her, no statement in relation to the allegations against her was taken. According to Captain Calitz, it emerges from the events described that the applicant was never detained, threatened or denied her constitutional rights nor was she mentally tortured by Brigadier Gerber or him during the course of the interviews on 22 and 23 September 2021. In fact, according to him, the

applicant was allowed to travel on her own accord, she met with her boyfriend, she was accommodated for her class schedule and was taken from and dropped off at where she was required to be. According to the second respondent, the applicant has not set out any facts, when viewed together with the respondents' answers, which render her prosecution or her extradition unconstitutional, unlawful or invalid.

[91] According to Mr *Makapela*, appearing on behalf of the applicant, the point of departure of the first, second and third respondents (the State) namely at the point at which the applicant is now accused number 17, awaiting the commencement of the criminal trial on 15 April 2025, is incorrect.

[92] The correct genesis of this application and the point from which the Court ought to commence its enquiry, is the point at which the applicant, as witness for the State, walks into the South African Embassy in Washington DC for an interview with the State's investigators and walks out a suspect, charged and accused of money laundering, corruption and fraud in relation to a tender worth R230 million.

[93] It is, according to Mr *Makapela* necessary to delineate right at the outset, what this application is from what this application is not:

- (i) This application concerns State accountability specifically, State accountability in relation to the treatment and handling of witnesses;
- (ii) This application is centred around the vindication of constitutional rights;
- (iii) This application raises issues of great public importance that implicate public interests;
- (iv) The consideration and determination of the issues raised in this application is in the interests of justice;

- (v) The application is not brought to delay the criminal proceedings of 15 April 2025 and there is little proof that indicates that it has/will;
- (vi) This application is not preliminary litigation as the issues primarily dealt with herein concerned conduct that took place while the applicant was still a witness; and
- (vii) This application is not an abuse of process whereas the right to access a competent court of law for the vindication of rights is a right available for the equal benefit of all, according to the Constitution.

Constitutionality of applicant's prosecution and lack of probable cause:

The State's conduct during witness interviews and the public interest ramifications:

- [94] It is the applicant's case that there is a complete absence of a legal basis for the unlawful and unconstitutional conduct of the investigators in the handling of the applicant as a witness during the witness interview process.
- [95] It has been argued that beyond the State's denial that the utterances, actions and interpretation made by the investigators do not amount to torture, threats, coercion or intimidation the State fails to provide adequate and justifiable legal reasons why such conduct is permissible or in line with the constitutional prescripts. The public interest ramifications and implications on the interests of justice in relation to this aspect are paramount, according to Mr *Makapela*.
- [96] The applicant then points out several points in regards to which the handling of the applicant as a witness and later suspect was not in line with the constitutional prescripts.

[97] Amongst such points raised, the applicant deals with the fact that it appears to be common cause that during the applicant's witness interviews, which has taken place on 22 and 23 September 2001:

- (i) Initially the investigators informed applicant that she was to be a witness for the State and that the purpose of the interview was based on the statements and testimony before the Zondo Commission and also e-mail correspondence which she has sent and received while employed at the office of Mr Magashule;
- (ii) During the interview applicant often questioned the relevance of the questions put to her;
- (iii) On the first day, the investigators made contact with the State Prosecutor and between the three of them (Adv De Nysschen, Captain Calitz and Brigadier Gerber) they discussed the possibility of criminally charging the applicant alongside the other accused;
- (iv) Third respondent admits that he was not '... happy about Ms Cholota's attitude towards our questions'. He further concedes that he did warn her to reconsider her position and attitude towards their questions over night as they may had to charge her as a suspect if there was no co-operation from her side.

[98] The third respondent admits that he, together with his co-investigators, gave the applicant fair warning of the consequences of her actions.

[99] At around 12h05 on the second day of the applicant's interview, the investigators decided to issue applicant with a warning statement and treat her as a suspect in relation to the Asbestos Project. At that stage, the applicant had however not been charged, as advanced by Mr *Makapela*.

[100] As pointed out by third respondent, the purpose of a warning statement is to comprehensively warn a suspect of his/her constitutional rights before that person makes a statement regarding the offences such person is suspected of having committed.

[101] It appears from a copy of such warning statement put before Court that:

- (i) At some stage during the interview, third respondent required from the applicant whether she wished to consult with her legal practitioner before she makes a statement, upon which the applicant indicated that she wished to consult with a legal representative of her choice;
- (ii) Whereas the interview was held at the South African Embassy in Washington, and no legal representative was available, applicant was provided the opportunity to consult with an attorney of her own discretion;
- (iii) The applicant was not willing to answer any questions at that stage; and
- (iv) Applicant undertook to provide a statement as agreed on or before 23 October 2001.

[102] According to Mr *Makapela*, the public interest ramifications of the common cause facts are apparent, in that:

- (i) law enforcement officials are not allowed to tell witnesses to reconsider their positions in witness interviews;
- (ii) law enforcement officials are not allowed to warn (fairly or otherwise) witnesses about the consequences of their actions;
- (iii) law enforcement officials are not allowed to tell witnesses that failure to co-operate with them will lead to charges being brought against them;

- (iv) law enforcement officials are not allowed to mislead witnesses as to the reasons / subject matter of the interview and the question witnesses on the subject matter that differs to that of originally communicated;
- (v) law enforcement officials are not allowed to bring charges against any individual on any basis other than reasonable and probable cause;
- (vi) law enforcement officials are not allowed to refuse any one legal representation; and
- (vii) law enforcement officials are not allowed to have any one, suspect or otherwise, sign any binding legal document in the absence of a legal representative, particularly where one has already been requested.

[103] It is common cause that the signature of the applicant does appear on the warning statement. The statement itself was however disposed to and signed by the third respondent and not the applicant.

[104] The instructions of the SAPS which appear on the standard form to the 'Statement Regarding Interview with Suspect' also specifically contains a paragraph to the following effect:

'At the end of this statement, was read by herself and she confirmed the contents thereof to be true and correct and a reflection of the interview.'

[105] The signature of the applicant appearing on this document can only be to confirm the statement by the third respondent to be true and correct as it was the statement by the third respondent and not the applicant as a suspect.

[106] In reply, the applicant states that: 'It was during the taking of the warning statement that I indicated I wished to consult with a lawyer ...'. However, no statement was taken from the applicant. This must be read in conjunction with the relevant portion

of the document which indicates as follows: 'Suspect was not willing to answer any questions at this stage and will provide her statement as agreed on or before 23 October 2001'.

- [107] This document further recorded that when the applicant indicated to consult with a legal practitioner before she makes a statement, as a result of a legal representative not being available at the Embassy at that stage, the applicant was provided with an opportunity to consult with an attorney and provide her statement at a later stage.
- [108] The applicant does not dispute the correctness of this document. Taken all these factors into account, it cannot be held that the applicant's constitutional rights have been infringed by not allowing her legal representation.
- [109] An aspect which does warrant particular scrutiny is the point raised by Mr *Makapela* to the effect that law enforcement officials are not allowed to mislead witnesses as to the reasons / subject of an interview and then question a witness on a subject matter different to that that was originally communicated.
- [110] According to Mr *Makapela*, the State has failed to provide a legal basis for the unlawful and unconstitutional conduct of the investigators and prosecutors in the handling of the witness (the applicant) during the witness interview process. Furthermore, it was contended that the State failed to provide adequate and justifiable reasons why such conduct is permissible or in line with constitutional prescripts.
- [111] However, the facts relating to what transpired before as well as during the interview must be considered in perspective. This is also in respect of the absence of reasonable and probable cause for the applicant's prosecution as contended by the applicant.

- [112] Upon consideration of the facts leading to the interview of the applicant in Washington, it appears that the reason the relevant officials travelled to America was indeed to the mind of the applicant, to question her as a witness and preparation for the upcoming trial.
- [113] In the answering affidavit filed in the Constitutional Court by the State, which formed part of the papers in the present application, (filed by the applicant herself in the present application) , it was stated that the applicant has initially co-operated with the Zondo Commission as well as the investigating team. For that reason, during November 2019, she was still considered to be a witness for the State.
- [114] The third respondent then also stated in the same affidavit before the Constitutional Court, that during the course of his investigations he received a statement and testimony of Ms Cholota which she had given to the Zondo Commission. He also had access to her computer and e-mails. Pursuant to this, third respondent then '... located e-mail correspondence indicating that Ms Cholota seemingly on behalf of some senior to her in the Office of the Premier of the Free State, had requested and received payments towards her bursary scheme orchestrated and managed by the Office of the Premier, and or payments for other education related activities, from a number of service providers to the Free State Province', which service providers had been criminally charged in connection with the Asbestos Project.
- [115] The third respondent then further stated that the investigating team had numerous questions for Ms Cholota relating to these documents which had been evaluated. Given that the investigating team understood that Ms Cholota had agreed to co-operate with the State, they requested to interview her more fully and in relation to the facts within her knowledge whilst she was employed as a Personal Assistant of Mr Magashule and regarding the e-mails she sent and received as these documents, together with the payments received, met the jurisdictional facts for the crime of corruption.

- [116] The third respondent then also stated that at that stage the applicant had not been cited as an accused because she had co-operated with the law enforcement authorities.
- [117] In third respondent's answering affidavit in the present application, he states that the view of the prosecuting team became more circumspect as regards Ms Cholota's role in the alleged criminal conduct once the State obtained the electronic device and documentary evidence from the investigators of the Zondo Commission on 9 December 2020 and then further once FTI Consulting, the forensic experts, were appointed during April 2021 and found more e-mails and evidence on her electronic devices.
- [118] He further stated that after that time, while Ms Cholota was still not regarded as an accused, it became evident that the State would have further questions for her regarding her role in the matter, that there was evidence that she would need to provide answers for and that she would need to co-operate with the State in order for her to remain a state witness.
- [119] According to Mr *Makapela*, it is wholly impermissible for law enforcement officials such as the investigators that interviewed the applicant and office bearers such as the State Prosecutor to discuss and conspire to conduct any witness interview in that manner. According him, their conduct is invalid and inconsistent with the Constitution.
- [120] Mr *Makapela* further argued that the State has disregarded the applicant's rights under s 12(1)(e) of the Constitution which guarantees everyone the right to freedom and security of the person which includes not to be treated or punished in a cruel, inhuman or degrading way.
- [121] The common cause facts show that when, on the first day of the interview, it became apparent to the officials conducting the interview, that the applicant

became less co-operative, she was warned of the consequences of her actions.

[122] According to the argument on behalf of the applicant, these warnings amount to conduct which is inconsistent with the Constitution. I cannot agree with this contention. If during an interview by law enforcement officials, of a potential witness for the State, it becomes apparent that such witness is not co-operating by questioning the relevance of certain questions and not answering in a satisfactory way, such officials should warn such witness of the consequences thereof. This is even more so when it appears to such officials that such witness may also be guilty of the offences which formed the subject of such interview. That is for the benefit of the witness. Had the applicant made a statement the following day pursuant to such warnings, the position in this regard may have been different. However, that is not the case.

[123] During the early afternoon of the first day, before the conclusion of the interview, the applicant was accommodated by the relevant officials to leave to enable her to attend her lectures at the university.

[124] It is important to note that it appears that at no stage during the course of the first day of the interview did the applicant ask for an attorney to be present. Before leaving the hotel in Baltimore, the applicant did however indicate to the officials that she was to contact an attorney about the officials to which the officials had no objection. On the second day of the interview, when asked whether she did speak with her attorney overnight, the applicant replied that she has not done so. The conclusion is inevitable that had the applicant felt to be coerced or threatened during the first day of the interview, she would have insisted upon consulting with a legal representative which she had not done.

[125] On the second day of the interview, it then appears that because of Ms Cholota's demeanour and attitude towards the questioning had not changed, she was eventually informed that she was to be treated as a suspect and the

warning statement referred to, pertaining to her interview was made by third respondent.

[126] Taken all these facts into consideration, it cannot be held that the applicant's rights in terms of s 12(1)(e) of the Constitution nor any other constitutional right had been infringed.

[127] Turning to the next stage of enquiry, is the question whether it can be held that the prosecution of the applicant, lacks reasonable and probable cause.

[128] In **National Director of Public Prosecutions v Zuma**¹, the Supreme Court of Appeal held as follows:

‘A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, something not alleged by Mr Zuma and which, in any event, can only be determined once criminal proceedings have been concluded.’ (emphasis added).

[129] Subsequent to the **Zuma**-decision, there had been numerous authorities indicating that Courts should within the confines of fairness actively discourage preliminary civil litigation which is to be dealt with by a criminal court.

[130] Counsel on behalf of the respondents (the State), *Adv Cassim SC*, in this respect referred to the now well-known ‘Stalingrad defence’ which as it appears from the media as become ‘... the first step in any criminal litigation involving a prominent person that they will challenge the constitutionality of the charge or the process leading up to the commencement of criminal proceedings’.²

[131] In opposition to the application, the State also relies on the provisions of s 35 of the Constitution of South Africa and in particular subsection (3) and (5)

¹ 2009 (2) SA 277 (.....)

² *Moyo v Minister of Justice and Constitutional Development and Others; Sontu v Minister of Justice and Correctional Services and Others* 2018 (2) SACR 313 (SCA).

thereof, dealing with the right to a fair trial and the exclusion of any evidence which had been obtained in violation of any right contained in the Bill of Rights and which would render the trial unfair or otherwise be detrimental to the Administration of Justice.

[132] In the matter of **Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others**³ relied upon by the State, the Constitutional Court dealt with the validity of various search and seizure warrants and the lawfulness of the manner of the execution. It was in this context that the following was stated:

'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 it. A trial court would 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.'

[133] In terms of s 172(1)(a) of the Constitution, when deciding a constitutional matter within its power, a Court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of inconsistency.

[134] In **Van der Merwe v National Director of Public Prosecutions**⁴ Bertelsman AJA said as follows:

'In the context the word 'when' means 'in the, or any, case or circumstances in which (the Shorter Oxford English Dictionary on Historical Principles Oxford University Press 1988 reprint, p. 2534). A Court faced with an unmeritorious forensic finesse, clothed in constitutional garb, designed to delay and avoid the necessity of having to

³ 2008 (2) SACR 421 (CC)

⁴ 2011 (1) SACR 94 (SCA)

plead in a criminal trial, or to pre-empt a consideration by the trial court of the admissibility of evidence in terms of section 35(5) of the Constitution, as a duty to refuse an order that would encourage preliminary litigation. In *National Director of Public Prosecutions v King* – Harms DP said:

'Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment, but also requires fairness to the public as represented by the State. This does not mean that the accused's right should be subordinated to the public's interest in the protection and suppression of crime; however, the purpose of the fair trial provision is not to make it impractical to conduct a prosecution. The fair trial does not mean a predilection for technical necessities and ingenious legal stratagems, or to encourage preliminary litigation – a pervasive feature of what other crime cases in this country. To the contrary: Courts should within the confines of fairness actively discourage preliminary litigation. Courts should further be aware that persons facing serious charges – and especially minimum sentences – have little inclination to co-operate in a process that may lead to the conviction and 'any new procedure can offer opportunities capable of exploitation to obstruct that delay'. – one can add the tendency of which accused, instead of confronting the charge, of attacking the prosecution'.⁵

[135] Bertelsman AJA further stated that no grave injustice would result where the constitutional issues raised by the applicants is to be determined by the trial court. He continued stating that a Court '... has the duty to ensure that a trial is fair and that duty necessarily requires it to determine at times whether its constitutional rights have been breached'.

[136] 'I have pointed out above that a Court is not obliged to entertain a constitutional claim in a vacuum and thus declaratory relief is not there for the asking. At this stage, the appellant asked for a declaration to be made in vacuo. No good reason commence itself why a Court should consider such a claim'.⁶

[137] In the matter of **Mokhesi and Others v S**⁷ four of the applicant's co-accused in the upcoming criminal trial, approached the Free State High Court for certain declaratory orders. After referring to the matter of **Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National**

⁵ Par. [31].

⁶ Par. [34]

⁷ SACR 326 (FB)

Director of Public Prosecutions and Others as well as **Van der Merwe v National Director of Public Prosecutions**⁸, Naidoo J stated as follows:

'The hallmark of all four applications is that the accused have not yet pleaded to the charges against them, yet each seeks declaratory orders without any evidence being led against any of them. They have given no indication of why these challenges in respect of the charges and the evidence to be presented are being brought before this court and not the courts that will hear the trial, which is, to use the words of the court in *Moyo*, the constitutionally compliant forum. Each one appears to have simply ignored the provisions of section 85 and other relevant provisions of the CPA, which is the constitutionally compliance statute, promulgated specifically to deal with the aspects of criminal proceedings.'⁹

[138] The Learned Judge continued as follows:

'Upon a consideration of the relief prayed for by each accused and the grounds upon which such relief is sought, it is clear that this court is being called upon to consider these applications in a vacuum, without the benefit of knowing the full extent of the evidence that will actually be led against each accused, so that a proper assessment of all relevant evidence and circumstances is not possible at this stage. What is clear is that, on the papers, the State has an arguable case in respect of the grounds and relief claimed by the accused. It is for this reason that I refrain from dealing with the State's exposition of the case it claims to have against each accused. It is for the same reason that I am of the view that it would not be appropriate for this court to consider the merits of each accused's application.'¹⁰

[139] For these reasons as expressed by Naidoo with reference to the relevant authorities, this Court is not in a position to make any declaration in regards to the probable cause in prosecuting the applicant. This is to be done by the trial court after all the relevant evidence had been placed before such Court.

[140] Upon consideration of all the facts placed before Court, I am in any event in agreement with Mr *Cassim* that the facts in the State's possession disclose

⁸ *supra*

⁹ Par. [43].

¹⁰ Par. [45].

that there is a *prima facie* case for prosecution owing to the payments for education and other activities facilitated by Ms Cholota from persons involved in the Asbestos Eradication Project and there are reasonable prospects of success for prosecution emanating against Ms Cholota from these payments and the request she made therefore and of her knowledge thereof.

[141] Furthermore, the State has pointed to precise examples of the applicant's request and knowledge in this regard. Ms Cholota has also made repeated references to the bursary scheme which was involved in her replying affidavit. She has indeed a case to answer to as to explain why certain businessmen connected with the Asbestos Project were approached by her for gratifications and at times when they had recently received payments from the Free State Department of Human Settlements in connection with the relevant tender.

[142] The applicant further contends that prosecution was/is not intended to obtain a conviction. However, in the absence of evidence in that respect, such submission cannot be upheld. That is the primary reason for my finding on the question whether the charges against applicant lacks reasonable grounds. That is for the trial court to decide.

[143] For the above reasons, this Court cannot and is in any event not obliged to do so as expressed by Bertelsman AJA, to make an order to the effect that the prosecution of the applicant lacks reasonable and probable cause.

[144] I cannot agree with the submission by Mr *Makapela* to the effect that the aspects in question, do not constitute preliminary litigation whereas it deals primarily with the handling of the applicant whilst she was a witness. All the aspects under this heading affect the prosecution of the applicant in the criminal court and therefore qualify as preliminary litigation to the criminal trial.

Withdrawal of charges by the NDPP:

[145] The respondents further submit that the relief sought by the applicant to the effect that the Director of Public Prosecutions in the Free State is to be ordered to withdraw the unconstitutional charges against her, is incompetent and cannot be granted.

[146] In this regard I agree with the submissions by Mr *Cassim* that such an order would be to breach the doctrine of separation of powers and the provisions of s 179(2) of the Constitution which reads:

‘The prosecuting authority has the power to institute criminal proceedings on behalf of the State, and to carry out any necessary functions incidental to instituting criminal proceedings.’

[147] The Supreme Court of Appeal in **National Director of Public Prosecutions and Others v Freedom Under Law**¹¹ adopted English Law Authority to the effect that even, where a judicial review of a prosecutorial decision is sought (and no review has been pursued in the present matter) such power is to be exercised sparingly, because the primary decision to prosecute or not to prosecute has been entrusted by the legislature to the relevant prosecutor, as head of the independent, professional prosecuting service, answerable to the National Director of Public Prosecution as the guardian of the public interest.¹²

[148] The Court per Brand JA continued as follows:

‘... precludes the Court from impermissibly assuming the functions that forward in the domain of the executive. In terms of the Constitution the NDPP is the authority mandated to prosecute crime ...’

¹¹ 2014 (4) SA 298 (SCA)

¹² Par. [26].

[149] For the same reasons, whereas this Court cannot intrude into the powers of the executive, the relief sought by the applicant in this regard cannot be granted.

The extradition of the applicant:

[150] According to the applicant, during the bail application it emerged that the criminal trial in the Asbestos matter has yet to commence and it therefore could not be said that she evaded trial or fled from justice..

[151] These allegations are denied by the respondents. The reference is then made of the transcribed copy of the judgment in the bail proceedings attached to the opposing affidavits. From this judgment, it appears that the Magistrate stated that the main reason for the State being oppose to bail is the fact that they regard the applicant as a flight risk and there is a likelihood that she will not stand trial.

[152] This aspect is, according to the applicant, crucial in that the applicant contends that the United States was informed that she was evading justice, refusing to attend trial and causing great delays in such criminal trial. According to the applicant, this emerged to be facts that were fabricated by the State and misrepresented to the United States. Specifically, according to the applicant, the United States had been informed by the National Prosecuting Authority during 2022 (without valid basis) that:

- (i) She was part of an illicit criminal scheme (related to funds of the Asbestos Project) in which she facilitated kickbacks;
- (ii) She had refused / failed to voluntarily return to South Africa to stand trial for the criminal charges against her;
- (iii) Her failure to return to South Africa was delaying the trial; and

- (iv) The only way that her attendance at the trial could be ensured was through her arrest in the United States and extradition back to South Africa.

[153] In answer to this, the first respondent answered that the State never alleged that the criminal trial of the applicant had started. Quite obviously, according to the first respondent this could not have been the case as our law does not provide for a criminal trial in *absentia*.

[154] The trial, according to first respondent, had been delayed previously due to numerous of the applicant's co-accused having pursued similar applications to the present one on an interlocutory basis already referred to before Judge Naidoo. Other co-accused have been sick or indisposed and yet others have applied for legal basis. All these issues have already delayed the commencement of the trial.

[155] In this regard, it appears from the judgment of the Magistrate that it is confirmed that it appeared from the replying affidavit by the applicant that she was not the cause of delay for the trial which was supported by arguments presented by the State as well. The Magistrate also confirmed that the delays were caused by the applicant's co-accused bringing different applications in the Courts in South Africa.

[156] It further emerges from the affidavit by Adv *De Nysschen* which was sent to the US authorities in support of the request for the applicant's extradition that, contrary to the applicant's allegations the State did then, and maintains that the applicant was involved in criminal activity, either individually, or together with her co-accused, and facilitated payments amounting to corruption from persons involved in the Asbestos Project.

[157] As already indicated, the applicant's former legal counsel had communicated to this Court on 20 January 2023 in open Court during pre-trial proceedings

that Ms Cholota would return voluntarily to the country to face trial. By 3 May 2023 her former attorney advised Adv *De Nysschen* that he had not received any instructions from Ms Cholota or her family pursuant to that undertaking made in January 2023 as to her voluntary return to South Africa.

[158] Further, according to the applicant, compounding the unlawfulness of the representations made by the State (via the National Prosecuting Authority to the United States) was the emergence during bail proceedings that the State had fabricated the assertion that they had made that she was a flight risk owing to her 'connections in Kenya'. The applicant then points out that Magistrate De Lange noted in her judgment that the state did not deny that it had made such misrepresentation nor had it denied that she indeed has no connections in Kenya to speak of and never had.

[159] In answer to this, the first respondent states that the allegations surrounding Ms Cholota's 'connections in Kenya' were raised by herself in her replying affidavit in the bail proceedings for the first time and the State did not have an opportunity to reply thereto. Nevertheless, according to the first respondent, Adv *De Nysschen* in his argument indicated to the Court that that was information available to him at the time he deposed to his affidavit during August 2023. The first respondent then further points out that reference was made to Ms Cholota's 'connection with Kenya' in the context of the process that would be followed upon her successful extradition to South Africa and her right to apply for bail, which the State indicated to the US authorities it may oppose on the basis that there was a possibility that Ms Cholota was a flight risk owing to this Kenyan connection.

[160] Dealing with this aspect, the third respondent then states that the applicant, on her own version do have contacts in Nigeria, these being her minor child and the father of such child. According to the third respondent, whether her connections in another African country were in Kenya or Nigeria it is submitted to be of no moment whereas she does have connections outside of

South Africa and the United States Department of Justice was informed accordingly during the application for extradition. According to the applicant, these material fabrications of fact and misrepresentations by the State are what her extradition (and four month long detention pending its finalisation) was based on by the United States. The applicant then further states and misrepresentations render the extradition unlawful, wrongful and unconstitutional notwithstanding the *bona fides* on the part of the United States.

[161] The applicant further contends that such unlawful, wrongful and unconstitutional extradition renders the jurisdiction of the South African Criminal Court over her non-existent. According to her, the South African Criminal Court does not have the requisite jurisdiction.

[162] According to Mr *Makapela*, it means that the State gave false information knowing full-well that such information was not true.

[163] There is however no reason not to accept the version by the third respondent to the effect that according to the information he had at that stage, it appeared that the applicant indeed has connections in Kenya. This is to some extent supported by the fact that it is common cause that many of the flights undertaken by the applicant had indeed been to Kenya.

[164] It can be taken as a fact that the information provided by the State had been incorrect. More importantly, upon the most cursory reading of the judgment of the Magistrate, Judge E Aslan presiding over the extradition hearing, it is clear that the entire basis of the extradition proceedings was information the State had provided on the applicant. The US did not conduct its own separate investigation or confirmation of the facts. It relied solely on the accuracy and veracity of information given to it by the State.

- [165] It is patently clear that the State is therefore to blame for putting this incorrect information before Court during the extradition proceedings. The State should have made certain of its facts.
- [166] I agree with the submissions by Mr *Makapela* to the effect that the State would provide false / incorrect information to authorities of another country concerning a South African citizen presents serious public interest concerns and has serious implications on the interests of justice. I also agree with his submission that the above conduct by the State grossly infringes on International Law and on Constitutional Law.
- [167] It is clear that the reason why the applicant wishes to have her extradition declared unconstitutional is because unconstitutional extradition may have an impact on the South African Criminal Court.
- [168] Recently, in the matter of **Magudumana v Director of Public Prosecutions, Free State and Others**¹³ it was held if it is to be found that an extradition was unlawful, the South African Courts will not have jurisdiction over such a person.
- [169] According to Mr *Cassim*, the two cases relied upon by the applicant in support of her submissions that the South African Courts have no jurisdiction, are completely distinguishable from the facts in this matter. In **S v Mahala**¹⁴ the Court dismissed the accused's special plea to the effect that the Court lacks jurisdiction whereas in that matter, the accused themselves has travelled from the erstwhile Ciskei to South Africa to stand trial.
- [170] In the matter of **Horseferry Road Magistrate Court and Another**¹⁵, the persons were brought into the jurisdiction of the Criminal Court in question unlawfully to stand trial. In that regard, according to Mr *Cassim*, these two

¹³ 2023 ZAFSHC 223

¹⁴ 1994 (1) SACR (A)

¹⁵ 1 AC 429/1993

matters are distinguishable from the present in that the applicant in this matter was lawfully extradited by order of the US District Court for the district of Maryland.

[171] Presently however, it appears that the constitutionality and therefore the lawfulness of the extradition of the applicant remains in dispute.

[172] In this regard, the **Mahala**-matter referred to, is of importance. In that matter the accused unsuccessfully raised the absence of the Court's jurisdiction as special plea when pleading at the criminal trial.

[173] That brings me to the conclusion as far as this point is concerned. In terms of s 106 of the Criminal Procedure Act 51 of 1977, when an accused pleads to a charge he or she may, *inter alia*, plead that the Court has no jurisdiction to try the offence. That is to be dealt with by the judge presiding at the criminal trial. In this regard I referred to the authorities dealing with discouraging preliminary litigation prior to criminal trials and in particular the *dictum* of Naidoo J in the matter of Mokhesi and Others v State .

[174] In addition , as stated by Bertelsman AJA, this Court is not obliged to make a declaratory order in this regard. Therefore, the relief sought by the applicant in regards to declaring her extradition unconstitutional and unlawful, can also not be granted.

Costs:

[175] Where the application stands to be dismissed in totality, the costs should follow the result in that the applicant is to pay the costs of the application.

[176] The respondents seek an order for punitive costs on an attorney and client scale. According to the respondents it is simply incompetent to pursue this type of relief as preliminary litigation.

[177] According to Mr *Cassim* the applicant should have been forewarned of this when the respondents successfully opposed the application on the basis of urgency.

[178] It is further Mr *Cassim*'s submission that despite the applicant having been informed that four of her co-accused unsuccessfully pursued similar applications in relation to the charges they face, the applicant has pursued this application, despite, at the time of drafting respondents' heads of argument, not having filed any replying affidavit within the time period provided by the uniform rules, not having filed heads of argument or a practice note as required by the Court's practice directives and not having herself set the matter down for hearing and taking steps to ready the court file.

[179] In this regard, it is true that the respondents' heads of argument together with the practice note were filed on the 1st of November 2024 whilst that of the applicant had been filed on the 5th of November 2024, a mere two days before the hearing.

[180] It is further the respondents' contention that the applicant has impermissibly:

- (i) chosen to file an amended Notice of Motion without giving notice of her intention to amend her Notice of Motion;
- (ii) used the incorrect form for a matter which is not brought *ex parte*; and
- (iii) not awarded the State the requisite time periods provided for them to oppose the application as provided for in rule 6(13).

[181] Furthermore, according to the respondents the non-compliance with recognised litigious principles continues in that the applicant's founding affidavit contains numerous references to and quotes or paraphrases from,

legislation and case law (some of which is not even referenced) and includes multiple conclusions of law based thereupon, for which no factual foundation is laid. Such references ought not be included in affidavits as they amount to argument. This practice, according to the respondents, has unduly lengthened the founding affidavit and prejudiced the respondents.

[182] With these latter points of criticism raised by the respondents, I fully agree. It is a well-known principle in the drafting of pleadings and affidavits in motion proceedings, that such pleadings should not contain legal argument nor references to decided cases. That is the basic principles being taught during vocational training of pupils and candidate attorneys. However, I do not deem it just and equitable to always penalise a litigating party for that party's legal representative's incompetent drafting skills, particularly so where the manner of drafting does not have little /any substantial prejudicial affect on the other litigating party/ parties to the matter.

[183] From my side, I would like to add that the manner in which the applicant's heads of argument were prepared made it difficult in preparing for the hearing and also in preparation of the judgment. All references to the relevant portions of documentation and affidavits, have no reference to the relevant paginated page numbers. Furthermore, most of the references to the authorities relied upon by the applicant do not have any reference to the relevant portion (the paragraph or page) of the decision referred to by counsel on behalf of the applicant. This made the task of the Court considerably difficult and I take it also for the legal representatives on behalf of the respondents. However, the inconvenience of the Court cannot always be a basis for a punitive cost order.

[184] Apart from the procedural defects pointed out by the respondents, the respondents argued that a punitive cost order should be awarded because of the applicant persisting in her application which is premature, abusive and without factual or legal foundation.

[185] It is trite law that the award of costs and also the scale on which such costs is to be awarded, is within the Court's discretion. Although some of the authorities relied upon by the respondents, states that preliminary litigation in criminal matters should be discouraged, the dismissal of an application accompanied by a punitive cost order, should not be seen as a manner in which the Court's doors are closed to litigants, who approach Court in an attempt for the vindication of constitutional rights. Each case have to be adjudicated upon its own facts.

Order

Therefore, I make the following order:

The application is dismissed with costs.


J J F HEFER, AJ

Appearances:

On behalf of the applicant:

Instructed by:

Adv L Makapela
Morakile Tibane Attorneys Inc.
Johannesburg

On behalf of the respondents:

Instructed by:

Adv N A Cassim SC
C E Cawood
State Attorney
Bloemfontein