



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

~~Reportable~~/Not Reportable

Case no: 2025-058488

In the matter between:

ANDRE JOCHEMS

APPLICANT

and

MAGISTRATE M.E. THIART N.O.

FIRST RESPONDENT

**MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

SECOND RESPONDENT

**DIRECTOR OF PUBLIC PROSECUTIONS
WESTERN CAPE**

THIRD RESPONDENT

MINISTER OF POLICE

FOURTH RESPONDENT

Neutral citation: *Jochems v Thiart N.O.* (Case no 2025-058488) [2024]
ZAWCHC ... (30 April 2024)

Coram: SALLER AJ

Heard: 29 April 2025

Delivered: 30 April 2025

Summary: Application for review of Magistrate's decision to postpone bail enquiry – Application for bail – Application for spoiliation order relating to cannabis, mushrooms and cash seized by the South African Police Force – Legal practitioner appearing before a commissioner of oaths and signing affidavit which on the face of it purports to be the applicant's evidence – application dismissed with costs ordered *de bonis propriis* and legal practitioner referred to the Legal Practice Council

ORDER

1. The application is dismissed.
2. The applicant's legal practitioner Mr Pillay is ordered to personally bear the costs of the application *de bonis propriis*.
3. The Registrar of the court is directed to provide a copy of this judgment to the Legal Practice Council for possible further investigation.

JUDGMENT

SALLER, AJ

- [1] This matter comes before the court as a matter of urgency, having been filed in the afternoon of the last working day before a long weekend. Service of the application on the respondents was effected around 9am on the day of the hearing. The matter was called at 12:00, affording the respondents some three hours to consider the papers filed in support of the application.
- [2] The facts appear from a founding affidavit purportedly deposed to by the applicant (I return to this below). The respondents did not file papers but were represented at the hearing and addressed the court on the record as it stood.
- [3] Mr Pillay appeared on behalf of the applicant. Mr Manuel of the State Attorney's office appeared on behalf of the 1st, 2nd and 4th respondents, and Ms Blows of the Director of Public Prosecutions' office appeared for the 3rd respondent.
- [4] It appears from the purported founding affidavit that on 19 March 2025, following a search of the applicant's premises by the South African Police Services ("the police"), the applicant was arrested on suspicion of dealing in drugs. The police also seized some 30kg of cannabis, certain mushrooms, and R 263 970,00 in cash.
- [5] Due to intervening public holidays, it appears the applicant was brought before a Magistrate only on 24 March 2025 for the purpose of bail. The

bail hearing has been postponed three times since then, on 31 March 2025 and again on 15 April 2024, and is currently on the roll to be heard on 6 May 2025, three working days and seven calendar days hence.

- [6] In the notice of application, the applicant asks the court to review and set aside the cumulative decisions of the Magistrate to postpone the bail hearing to 6 May 2025, to order that the applicant be released on bail of R 5 000, and to grant a spoliation order for the return of the seized goods.
- [7] Very briefly, in relation to bail, Mr Pillay on behalf of the applicant submitted that the Magistrate was obliged to hold a bail enquiry on the applicant's first appearance, and that she misdirected herself on each occasion when she postponed the bail hearing on what he submitted were irrational and improper grounds in the circumstances of the applicant's case.
- [8] In relation to the spoliation relief, Mr Pillay submitted the warrant was defective and authorised neither the search of the premises nor the seizure of the goods, and that the search had been conducted unlawfully on the grounds that the applicant was only handed the search warrant the following day.
- [9] The court canvassed with Mr Pillay the reasons for the delay in filing the application on 25 April 2025 after the bail application was postponed on 15 April 2025, including raising with him any potential impact the continuing incarceration of the applicant may have had. This was not an issue he took further.
- [10] In answer, Mr Manuel drew the court's attention to the fact that the signature of the deponent to the founding affidavit, above the printed name of the applicant, appeared identical to the signature which Mr Pillay had

affixed to his heads of argument. Mr Manuel also pointed out that the affidavit had been deposed to on 24 April 2025 at the Fishhoek police station, whereas the founding affidavit averred that the applicant remained in custody. Mr Manuel submitted that the conclusion appeared inescapable that the founding affidavit was not, in fact, deposed to by the applicant in whose name it is drafted, but likely signed and sworn to by the applicant's legal practitioner, Mr Pillay. In informal parlance, Mr Manuel submitted, that the affidavit was likely "*pp'ed*". In that, I surmise he made reference to a smudge of ink that appears by the applicant's name beneath the deponent's signature that may, charitably, be interpreted as the letters "pp" commonly used in correspondence to indicate that one person signs on behalf of another.

- [11] In those circumstances, Mr Manuel submitted, the court had no proper evidence before it on the basis of which the application could be granted.
- [12] On both these aspects, Ms Blows aligned herself with Manuel's submissions.
- [13] I must mention that both Mr Manuel and Ms Blows advanced additional cogent reasons why the application ought to be dismissed on the papers as they stood. Ms Blows further pointed out that if, against her submissions, the court were inclined to conduct a bail enquiry, she would require an adequate period to consult and prepare.
- [14] In reply, Mr Pillay conceded that it was he who had signed and sworn to the founding affidavit. This, despite the fact that the deponent to the founding affidavit is expressly identified by name in the notice of motion and in the affidavit itself as being the applicant, that the affidavit is drafted in the first person, and that it speaks to events at which Mr Pillay was not present and of which he could have no personal knowledge.

[15] Mr Pillay's explanation was that he was under the impression that the special power of attorney which the applicant had signed authorised him to depose to an affidavit on behalf of the applicant. He was unable to explain why the affidavit had been drafted in the first person, why it purported to be an affidavit of the applicant, identified by name, and how he could have sworn to events of which he had no personal knowledge.

[16] It is by now trite that in motion proceedings the affidavits stand as both pleadings and evidence (see *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) para 28; *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) para 43). An affidavit filed in support of a motion stands as evidence of a person with knowledge of the facts on which the applicant relies.

[17] In *Masako v Masako & Another* (Case no 724/20) [2021] ZASCA 168 the Supreme Court of Appeal considered the distinction between an attorney's right to institute proceedings and his or her authority to act on behalf of a client, and the basis for deposing to an affidavit in support of the client's case. At para 11, the court explained:

"It stands to reason that a deponent to an affidavit is a witness who states under oath facts that lie within her personal knowledge. She swears or affirms to the truthfulness of such statements. She is no different from a witness who testifies orally, on oath or affirmation, regarding events within her knowledge. Thus, when Ms Moduka deposed to the founding affidavit, she needed no authorisation from her client."

[18] In the present matter, the ostensible deponent to the founding affidavit, identified by name as the applicant, is not the person who signed the affidavit, nor the person who appeared before the commissioner of oaths to

swear to the truthfulness of its content, nor the person to whom the content of the affidavit, narrated in the first, person relates. In those circumstances, there is no evidence on record to support the relief sought in the present application.

[19] Mr Pillay suggested that the court might instead have regard to an affidavit deposed to by the applicant on 24 March 2025 in support of bail, which is annexed to the purported founding affidavit. That affidavit speaks neither to the legal nor the factual basis for the relief sought, nor is it properly before the court.

[20] The court proceeded to invite Mr Pillay to make submissions as to why he should not be held personally for costs *de bonis propriis* in these circumstances. While Mr Pillay offered his apologies, he did not advance cogent reasons as to why his client, rather than him, should be burdened with the fees incurred in the preparation of the present ill-fated application and today's appearance.

[21] In *South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board and Others* 2009 (1) SA 565 (CC) para 54, the Constitutional Court explained:

“An order of costs de bonis propriis is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy.” (Footnote omitted.)

[22] In *Multi-links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP) para 35, the Gauteng High Court discussed the

policy reasons militating against making personal costs orders against legal practitioners. It set out the circumstances in which such an order might nevertheless be made as follows:

“It is true that legal representatives sometimes make errors of law, omit to comply fully with the rules of the court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not, however, per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioner, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are, dishonesty, obstruction of the interest of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, and gross incompetent and a lack of care.”
(My emphasis)

- [23] This is such a case. The explanation given by Mr Pillay, relying on the special power of attorney granted to him, at best suggests a profound lack of knowledge of the law of evidence and civil procedure. It does little to assuage the court’s concerns, which arise as much from the misleading manner in which the purported founding affidavit was presented as from the unreliability of the information contained therein. One assumes that it was Mr Pillay who drafted the purported founding affidavit which states, in para 1 thereof that “My name is Andre Jochems”, and in para 3 thereof, that “I ... swear that the content of this affidavit is true and correct and within my personal knowledge and experience”.

- [24] As an experienced legal practitioner, it is near inconceivable that Mr Pillay would not have been alive to the potential of misleading the court and the respondents to accept the facts contained in the affidavit as constituting the applicant's own evidence, even if one has regard to the smudge of ink appearing next to the (false) name the deponent which might, charitably considered, constitute a "*pp*".
- [25] In those circumstances, a costs order *de bonis propriis* is warranted on the principles set out above. Additionally, a copy of this judgment will be forwarded to the Legal Practice Council for possible further investigation.

K. SALLER

ACTING JUDGE OF THE HIGH COURT

Appearances

For Applicant: Mr Naven Pillay
Instructed by: Naven Pillay Attorneys

For First, Second and Fourth Respondents: Mr Leon Manuel
Instructed by: State Attorney

For Third Respondent: Adv Megan Blows
Instructed by: Director of Public Prosecutions

