IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

REPORTABLE: ~~YES~~/ NO
OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
REVISED.

16 / 10 / 2015
DATE

SIGNATURE

16/10/2015

CASE NUMBER: 67943/ 2015

In the matter between:

KEVIN RENE RICHARDSON	FIRST APPLICANT
MANDY MARGARET RICHARDSON	SECOND APPLICANT
And	
MINISTER OF SOUTH AFRICAN POLICE SERVICES	FIRST RESPONDENT
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	SECOND RESPONDENT
MINISTER OF PUBLUC PROSECUTIONS SOUTH GAUTENG	THIRD RESPONDENT

SENIOR PUBLIC PROSECUTIOR	FOURTH RESPONDENT
HILLBROW MAGISTRATE COURT	
THE COMMANDER, NORWOOD	FIFTH RESPONDENT
POLICE STATION	

JUDGMENT

MAVUNDLA, J.

[1] The applicant approached this court by way of urgency, seeking an order in terms of which it is directed that: in the event that criminal charges on account of an alleged offences committed in terms of ss417 and 418 of the Companies Act and the prosecution electing to apply for a warrant of arrest of the applicants, or either of the applicants, that the respondents by their employees to present a copy of this application and any order granted pursuant thereto to the Magistrate who they so approach to authorize the warrant and specifically drew the application to the attention of the magistrate.

[2] The application was opposed by the first, third and fifth respondent while the second respondent indicated that it would abide by the Court's decision. The thrust of the opposition was firstly, that the matter was not urgent and secondly, that granting the order would amount to structural interference by the Court to overseeing an administrative function of the relevant respondent in how to exercise the discretion in issuing the warrant. It was further submitted that there was no

allegation that a warrant of arrest had been issued; therefore there was no basis for any perceived fear for the issuing of the warrant of arrest.

BACKGROUND

[3] The first applicant, a businessman, professes to be somewhat of a celebrity on account of his occupation and brand, the "Lion Whisper". In anticipation of reaching an agreement, he together with one Friedland registered a company which was promoted as the vehicle in which the business venture would eventually be conducted. The company was called Kingdom Wildlife Sanctuary (PTY) Ltd ("KWS"). The applicant and Friedland was each holder of 50% shares in this company. However, the substrata of their business relationship soured resulting in the company eventually being finally liquidated and Liquidators being appointed. Towards the end of 2013, Friedland applied to the Master for an inquiry to be held in terms of the provisions of section 417 of the Companies Act to deal with the affairs and property of KWS.

[4] On the 25 February 2014 the appointed joint liquidators commenced with the inquiry which is still on going. An application in terms of s69(3) of the Insolvency Act was applied for by the joint liquidators and issued through the Magistrate's Court Wonderboom, for a warrant to search for and take possession of the funds belonging to some of various entities in which the first and the second applicants currently have interest. According to the applicants, it is alleged, which they deny, that they hijacked the business of Kingdom Films. The majority of the funds

belonging to their various entities were appropriated by the joint liquidators.

URGENCY

[5] The applicants contend that the application is urgent because: the liquidators were not prepared to give a written undertaking that they would not press charges, consequently the applicants are extremely distressed that they will be arrested. They are parents of two minor children aged 5 and 2 years and the arrest of the applicants would have a devastating effect on the children. The first applicant is somewhat of a celebrity and a role-model to many. He can ill-afford to be arrested and allow his reputation to be tarnished, especially since same would be wholly unnecessary in the present instance. Although he would have a damages claim in the event of an arrest, however, prevention is better than cure. They could be arrested any day and they approach this court to avert same.

[6] In buttressing the aspect of urgency, it was submitted on behalf of the applicants that the applicants have received summons to re-appear at a continuation of section 418 enquiry on 13 August 2015. The only evidence which would be required from them during this inquiry would be to provide information in respect of the whereabouts of funds currently generated by them through their various entities. The applicants hold the view that this information cannot be lawfully obtained from them and that the object of the questions were to

improperly gain an advantage in various pending cases and to remove the funds currently in their various businesses' accounts, thereby ruining them financially and preventing them from properly prosecuting the various cases. They intend to refuse to answer questions sought in terms of s417 and 418 because these are not asked bona fide but with an ulterior motive to destroy them.

[7] In the matter of *Commissioner, SARS v Hawkers Air Services (Pty) Ltd* 2006 (4) SA 292 (SCA) at 299G it was held that: "[9] One of the grounds on which Patel J dismissed the applications was that at their inception they had lacked urgency. This was erroneous. Urgency is a reason that may justify deviation from the times and forms the Rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the Rules of Court permit a Court (or a Judge in chambers) to dispense with the forms and service usually required, and to dispose of it 'as to it seems meet' (Rule 6(12)(a)). This, in effect, permits an urgent applicant, subject to the Court's control, to forge its own Rules (which must 'as far as practicable be in accordance with' the Rules). Where the application lacks the requisite element or degree of urgency, the Court can, for that reason, decline to exercise its powers under Rule 6(12) (a). The matter is then not properly on the Court's roll and it declines to hear it. The appropriate order is to strike the application from the roll. This

enables the applicant to set the matter down on the ordinary motion court roll."[1]

[8] A party bringing an urgent application must depart as little as possible from rule 6(5)(a), depending on the degree of urgency; *vide Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 at 502E-503 D. The degree of relaxation of the time frames prescribed by 6(5) (a), should not be greater than the exigency of the case demands. It must be commensurate therewith.

[9] It is common cause that the application was issued on the 26 August 2015, calling upon the respondents to give notice of intention to oppose by 15:00 on Wednesday 26 August 2015 and to file their opposing affidavit by no later than 8h30 on Thursday, 27 August 2015. The respondents contend that the application was only served on the State Attorney's offices at 16:00 on Wednesday 1 September 2015.

[10] A person's liberty is one of those sacrosanct and constitutionally enshrined rights[2]. Where this right to liberty, is threatened, for instance with encroachment through arrest[3], the protection thereof, depending on the degree of the threat, becomes a matter of urgency requiring such threatened party to resort to rule 6(12) (a). However, the mere say so of

[1]. (FNT 4 *Luna Meubels Vervaaardigers (Edm) EDMS) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 139F-140A.),

[2] *Vide Ex Parte Minister of Safety and security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC) (2) SACR 105.

[3] *Vide Minister of Law and Order and Othetrs v Hurley and Another* 1986 (3) SA 568 (A) at 589E-F.

the existence of such threat, is not enough to establish urgency. The Court must objectively evaluate the allegations regarding the presence of such threat.

[11] Section 418 provides, *inter alia*, that:

"(5) Any person who—

(a) Has been duly summoned under this section by a commissioner who is not a magistrate and who fails, without sufficient cause, to attend at the time and place specified in the summons or —

(b) Had been duly summoned under section 417(1) by the Master or under this section by a commissioner who is not a magistrate and who—

(i) Fails, without sufficient cause, to remain in attendance until excused by the Master or such commissioner, as the case may be, from further attendance;

(ii) Refuses to be sworn or to affirm as a witness, or

(iii) Fails, without sufficient cause—

(aa) to answer fully and satisfactorily any question lawfully put to him in terms of section 417(2) or this section; or to produce books or papers in his custody or under his control which he was required to produce I terms of section 417(3) or this section

Shall be guilty of an offence."

[12] I take note of the phobia of the applicants that a warrant of arrest might be issued against them. However, before a warrant can be issued, there must first and foremost be a finding that the appellants have committed an offence. That finding can only be arrived at in the event the applicants failed to show that they have sufficient cause in refusing to answer questions. Absent such an inquiry, the issuing of a warrant of

arrest of the appellants would be arbitrary and *mala fide* [4] constituting an infringement of their right to liberty.[5]

[13] In my view, the perceived threat the applicants are petrified of is rather too remote to warrant the intervention of this court at this stage. Besides, the truncation of the time frames as mentioned herein above, where the threat is too remote, is a knee-jerk reaction on the part of the applicants, which need not be countenanced.

[14] In my view, the urgency contended for by the applicants is imaginary and does not warrant the intervention of this Court.

[15] In the result it is ordered that:

(i) The application is removed from the urgent roll for lack of urgency;

(ii) The applicants are jointly and severally, the one paying the other to be absolved, ordered to pay the costs of the respondents, such costs to include the costs occasioned by the employment of senior counsel.

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[4] *Vide Shidiack v Union Government (Minister of the Interior)* 1912 AD 642; *Pharmaceutical Manufacturers Association of SA & Another; In re President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) para 86.

[5] *Vide Bernstein v Bester NO* 1996 (2) SA 751 (CC) at 786-787, 797.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF HEARING	: 03 /09 /2015
DATE OF JUDGMENT	: 16 /10/2015
APPLICANTS' ATT	: WEAVIND & WEAVIND INC
APPLICANTS' ADV	: ADV W GIBBS
RESPONDENTS' ATT	: STATE ATTORNEY
RESPONDENTS' ADV	: Z. Z. MATEBESE