



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

Case Number: 22007/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

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E.M. KUBUSHI

DATE: 17-08- 2021

JACOBUS JOHANNES KLEINHANS

APPLICANT

and

THE MINISTER OF POLICE

FIRST RESPONDENT

**THE MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

SECOND RESPONDENT

**THE DIRECTOR OF THE NATIONAL
PROSECUTING AUTHORITY**

THIRD RESPONDENT

JUDGMENT

KUBUSHI J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 17 August 2021.

INTRODUCTION

[1] This is an opposed *mandamus* application in which the applicant, Jacobus Johannes Kleinhans, seeks an order to compel the first, second and third respondents to duly complete the criminal investigation before the trial date scheduled for 25 May 2021.

[2] The applicant had initially approached court on urgency, however, the urgent application was struck from the roll on 12 May 2021 and a cost order awarded in favour of the second respondent, with the costs order for the first respondent reserved.

[3] The application is determined on the papers filed on Caselines without oral hearing as provided for in this Division's Consolidated Directives re Court Operations during the National State of Disaster issued by the Judge President on 18 September 2020.

FACTS

[4] The application is based on the case of theft that the applicant reported at Wonderboompoort Police Station CAS 116/2/2019 and Sinoville Police Station CAS 81/6/2020 against one Samantha Jane Wright ("Ms Wright").

[5] The applicant alleges that the investigating officers in both, the Wonderboompoort CAS 116/2/2019 and Sinoville CAS 81/6/2020, failed to fully comply with the instruction of the prosecutor dated 15 December 2019.

[6] The contention is that since the instructions by the prosecutor were issued on 15 December 2020, little or no effort was made by the investigating officers in both the Wonderboompoort CAS 116/2/2019 and the Sinoville CAS 81/6/2020 to carry out the said instructions, and little to no effort was made by the prosecutor to ensure that such

instructions are carried out. Despite continuously following up on the progress made in respect of the prosecutor's instructions the applicant has only been met with animosity and treated with disdain. The concern by the applicant is that the matter is not trial ready due to the prosecutor's instructions not being carried out, which will in all likelihood result in the State failing to successfully prosecute Ms Wright.

[7] The purpose of the application is, therefore, to obtain an order to direct the relevant state organs (the respondents) to diligently perform their prescribed mandates in order to investigate the case and to successfully prosecute Ms Wright.

THE RELIEF SOUGHT

[8] In essence the relief that the applicant is seeking is for an order in the following terms:

8.1 that the respondents be ordered to properly investigate and prepare the theft charges filed by the applicant against Ms Wright in Wonderboompoort CAS 116/2/2019 and Sinoville CAS 81/6/2020;

8.2 that the investigating officers, in Wonderboompoort CAS 116/2/2019 and Sinoville CAS 81/6/2020, be ordered to fully comply with the instructions of the prosecutor dated 15 December 2020;

8.3 that the third respondent be ordered to oversee the prosecution of Ms Wright and to ensure that the investigation and prosecution is conducted thoroughly; and

8.4 that the respondents be ordered to pay costs of the application on a punitive scale as between attorney and own client.

[9] From the perusal of the evidence in the founding affidavit, it does not appear that the applicant seeks any specific relief against the second respondent other than an order of costs on a punitive scale as between attorney and own client. The second respondent is opposing the application only on the base of the order of costs sought by the applicant against it.

[10] The first respondent is opposing the application on the ground that the applicant has failed to establish the requirements of a *mandamus* interdict, and that the applicant is not entitled to a punitive cost order as prayed for in the notice of motion. There is no appearance for the third respondent.

ISSUE TO BE DETERMED:

[11] The issue sought to be determined in this application is whether the applicant has established the requisite for a mandatory interdict (*mandamus*) entitling him to the relief he seeks against the respondents; and, if so, whether the applicant is entitled to the punitive cost order on an attorney and own client scale.

[12] I deal hereunder with the issues in turn.

Whether the Applicant has established the requirements of a mandamus

[13] An application for mandatory interdict (*mandamus*) is an application to compel the performance of a specific statutory duty and or to remedy the effects of unlawful action already taken by the first respondent. In the light of the fact that the act to be performed must be carried out by a public official, the order is known as a *mandamus*.

[14] In order to succeed in establishing such an interdict, the applicant must allege and prove the following jurisdictional facts of a *mandamus*, namely, a clear right; injury actually committed or reasonably apprehended; and the absence of similar protection by other ordinary remedy.¹

[15] It is the respondents' submission that the applicant has failed to establish all these requirements.

[16] It is trite that a mandatory interdict, which is final in nature, can only be granted if all the requirements of an interdict have been established.²

¹ See *Setlogelo v Setlogelo* 1914 AD 221 at p227.

² See *Lipschitz v Wattrus* 1980 (1) SA 662 (T) at 673C – D and at 317E – H.

[17] From the reasons that follow hereunder, I am satisfied that the applicant has been able to establish all the requirements of a final interdict.

A Clear Right

[18] The applicant's evidence in the founding affidavit is that

"It is important to highlight and stress that I am the Complainant and in this regard I submit that the South African Police and Prosecution should assist me as the Complainant in order to prepare a proper case for trial. Instead I am dealt with as a criminal and am met with animosity by the officials who should represent me as the Complainant."

[19] The applicant explains this further in the heads of argument that as a complainant in the criminal charges he has the right in terms of the Constitution which entitled him to have the criminal charges filed being properly investigated by the South African Police and prosecuted by the Prosecuting Authority.

[20] It is undoubtedly so that every citizen of this country is, in terms of the Constitution, entitled to have any criminal charge that she/he filed with the South African Police Service, properly investigated and eventually prosecuted. Put differently, it can be said that it is expected of the South African Police and the Prosecuting Authority to properly investigate and prosecute any criminal charge filed. The applicant, is as of right, in terms of the Constitution, entitled, therefore, to be provided the same treatment. This is a clear right which the applicant has been able to establish.

Injury Actually Committed or Reasonably Apprehended:

[21] The uncontested evidence of the applicant is that the accumulated value of the damages that he suffered due to the theft of his goods by Ms Wright is in excess of R 1,000,000.00 (one million rand). In this regard, the injury has already been actually committed but it is continuing in the sense that the injury incurred is being perpetuated by the authorities' failure to bring the case to finality.

The Absence of Similar Protection by other Ordinary Remedy

[22] The applicant submits in his papers that he does not have any other remedy but to approach the court as he has done, in light of the fact that all his efforts to ensure the prosecution has failed and he has no other option but to approach the court for assistance. The contention is that the Prosecutor's instructions to seize certain goods as well as to obtain further affidavits requires to be attended to before the matter proceeds to a hearing, otherwise, the prosecution of Ms Wright is doomed to fail.

whether there are special grounds for the relief on a costs order at a punitive scale.

[23] The court has a discretion in awarding costs, such discretion to be exercised judicially upon consideration of the facts in each case, and that in essence the decision is a matter of fairness to all the parties.

[24] The issue, in this regard, is that a punitive cost order on the scale between attorney and own client scale is sought against the respondents. This entails whether there are special reasons to be considered arising either from the circumstances which give rise to the action or from the conduct of the respondents which the court would consider just to make a punitive order of costs on the scale as between attorney and own client.

[25] Unfortunately for the applicant, he has failed to set out the circumstances which would render the respondents liable for costs on a punitive scale as between attorney and own client, in the event that the application is successful. There are, thus, no special grounds in the applicant's founding affidavit in support of the nature of the cost order sought against the respondents, which would entitle this court to grant cost on a punitive scale, as between attorney and own client.

[26] Upon consideration of the facts of the case, it is fair that no order as to costs against the second respondent and the third respondent should be made. There is no specific relief sought against the second respondent and the third respondent is not opposing this application.

[27] As regards the first respondent, having not succeeded in its defence, it is fair and just that the first respondent be ordered to pay cost of the application on a party and party scale.

[28] I was not addressed in respect of the costs reserved in favour of the first respondent when the urgency application was struck off the roll. I, as a result do not make any order in that regard. As to the cost order made in favour of the second respondent at when the urgent application was struck off the roll, the applicant is bound by that order.

ORDER

[29] It is ordered that –

1. The first respondent is ordered to properly investigate and prepare the theft charges filed by the applicant against Samantha Jane Wright in Wonderboompoort CAS 116/2/2019 and Sinoville CAS 81/6/2020;
2. The investigating officers in Wonderboompoort CAS 116/2/2019 and Sinoville CAS 81/6/2020 are ordered to fully comply with the instructions of the prosecutor dated 15 December 2020 to wit:
 - 2.1 to obtain a Supplementary Affidavit from the applicant to address the prosecutor's queries,
 - 2.2 to obtain the video footage of the content of the storage units taken by the Hawks at Talisman Storage, Sinoville;
 - 2.3 to obtain the CCTV footage of the Talisman Storage, Sinoville which was provided to the Hawks;
 - 2.4 to obtain the access control data for the Talisman Storage, Sinoville which was provided to the Hawks;

- 2.5 to consult with the applicant to compile an inventory of the goods stolen by the accused Samantha Jane Wright;
 - 2.6 to obtain a Supplementary Affidavit from the witness PHILIP JOHAN VLOK to identify the platform where the goods were advertised on behalf of the accused Samantha Jane Wright;
 - 2.7 to obtain the affidavits of the individuals who bought the applicant's goods from the accused, specifically RONALD WRIGHT, TYRON WRIGHT and VICTOR HOLDEN;
 - 2.8 to follow the procedure to seize and attach the laptop computer identified by the applicant, which laptop the prosecutor instructed should be attached to find the items sold by the accused, Samantha Jane Wright;
 - 2.9 to investigate and prosecute the theft of the BMW X5 which the accused unlawfully sold with the assistance of the witness PHILIP JOHAN VLOK;
 - 2.10 to prosecute any individual who aided the accused to unlawfully misappropriate the applicant's goods, knowing that the accused was not the owner of such goods.
3. The third respondent is ordered to oversee the prosecution of Samantha Jane Wright and to ensure that the investigation and prosecution is conducted thoroughly;
4. Costs of the application are awarded against the first respondent in favour of the applicant on a party and party scale; and
5. No order of costs is made against the second respondent and the third respondent.

6. The applicant is ordered to pay to the second respondent the costs as *per* the court order dated 12 May 2021.

E.M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearance:

Applicant's Counsel : **NONE**

Applicant's Attorneys : **J JANSE VAN RENSBURG**

1ST & 2nd Respondents' Counsel : **ADV NETSIANDA SC**

1ST & 2nd Respondents' Attorneys : **STATE ATTORNEY OFFICE, PRETORIA**

Date of hearing : **08 June 2021**

Date of judgment : **17 August 2021**