

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: 8045/2008

DATE: 2 JUNE 2008

5 In the matter between

JOSEPH ARTHUR WALTER BROWN: 1st APPLICANT

SUSAN JENNIFER BROWN 2nd APPLICANT

and

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

10 DIRECTORATE OF SPECIAL

OPERATIONS 2ND RESPONDENT

DISTRICT CONTROL MAGISTRATE

CAPE TOWN (MR MAKU) 3RD RESPONDENT

DISTRICT MAGISTRATE CAPE TOWN

15 (MR MHALANGU) 4TH RESPONDENT

JUDGMENT

FOURIE, J

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Applicants have brought an urgent application in which the following relief is sought. Firstly, that the immediate release of First Applicant be ordered in terms of Section 35(2)(d) of the Constitution. Secondly, that Respondents immediately furnish Applicants' attorneys with copies of the affidavits and

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other documents and information which were used in support of the application to the Magistrate, Mr Maku, at Cape Town Magistrate's Court, to issue and authorise the warrants for the arrest of First and Second Applicants on or about 3 April 2008.

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The affidavit on which Mr Maku, Third Respondent in this application, relied when issuing the warrants for the arrest of Applicants, was deposed to by a special investigator appointed to Second Respondent, one Shireen Fraser, and a copy thereof is annexed to the affidavit of Third Respondent in the present proceedings. Applicants have also been supplied with the other relevant documentation on which Third Respondent based his decision to issue and authorise the said warrants. It follows that the remaining issues which I have to deal with, relate to the order for his immediate release sought by First Applicant as well as the issue of the costs of this application. The application is opposed by Second and Third Respondents while First and Fourth Respondents abide the decision of the Court.

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Mr Khan appeared for Applicants while Second and Third Respondents were represented by Mr Webster SC. I am indebted to both of them for their assistance in the adjudication of this matter.

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In view of the urgency of the matter, I do not intend traversing the wide-ranging allegations of the parties in any great detail. Where necessary, I will briefly refer to the relevant evidence. It appears that the following facts are common cause. First

5 Applicant was first arrested on 6 March 2007 on Fidentia-related charges and on 24 March 2007 he was released on bail of R1 million. In August 2007 additional charges against First Applicant were added. He was granted further bail of R5 000 in respect thereof. On 3 April 2008 Third Respondent issued

10 and authorised the present two warrants for the arrest of both Applicants on new charges. These warrants were not executed. On 4 April 2008 there was a meeting at the offices of Second Respondent in Cape Town. First and Second Applicants as well as their attorney, Mr Booth, attended the

15 meeting. Adv Morrison employed by Second Respondent as Deputy Director of Public Prosecutions and Adv Du Toit, a Senior State Advocate in the employ of Second Respondent, as well as Special Investigator Edwards, were also present. At this meeting, the new charges to be preferred against both

20 Applicants and one Theart, as well as the warrants which had been issued for the arrest of both Applicants, were discussed. On 25 April 2008, Second Applicant and the two minor children of the Applicants left for Australia. They are presently still in Australia. On 9 May 2008 the warrant for the arrest of First

25 Applicant, issued by Third Respondent on 3 April 2008, was

executed by the arrest of First Applicant. He is presently still detained and has appeared in the Cape Town Magistrate's Court from time to time.

5 Section 12(1) of our Constitution protects each person's right to freedom, which includes the right not to be deprived of his or her freedom arbitrarily or without just cause. Section 35(2)(d) of the Constitution accordingly provides that every
10 detained person has the right to challenge the lawfulness of his or her detention before a Court and if the detention is unlawful, to be released. It follows, upon a proper interpretation of these provisions of the Constitution, that if a detained person challenges his or her detention and the State cannot prove the lawfulness of the detention, the Court
15 declares the detention unlawful and the right to be released follows automatically from the decision of the Court. See Constitutional Law of South Africa, Second Edition at 51-55.

Mr Khan and Mr Webster accordingly accepted that the onus of
20 proving the lawfulness of First Applicant's detention rests on Respondents. This onus has to be discharged on a balance of probabilities. As explained by Du Toit et al in Commentary on the Criminal Procedure Act at 5-2, an arrest is fully regulated by legislation and, in general, the object of an arrest must be
25 to bring the arrested person before a court to be charged, tried

and then either convicted or acquitted. If the person effecting the arrest has an ulterior motive for the arrest, for example, to intimidate or punish the arrested person, the arrest will be unlawful.

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It was stressed in Louw vs Minister of Safety and Security 2006 (2) SACR 175 (T), that as an arrest is *prima facie* wrongful and unlawful, therefore it is for the State to prove that the arrest was lawful.

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Bertelsmann J, who handed down the Louw judgment, further expressed the view that if the police *bona fide* fear that a suspect will evade justice, then an arrest is the correct option. But, by the same token, this makes an arrest *ultra vires* when exercised against a suspect under circumstances where the suspect is perfectly willing to come to court on warning or on notice or summons.

In my opinion, there is much to be said for this view of the Learned Judge provided, of course, that each case has to be dealt with on its own merits. A caveat of this nature was added by Bertelsmann J at 187 d – e namely:

“If there is no reasonable apprehension that the suspect will abscond or fail to appear in court if a warrant is first obtained for his or her arrest or a

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notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power of arrest."

I should add that in Charles vs Minister of Safety and Security 2007 (2) SACR 137 (W), Goldblatt J differed from Bertelsmann J and held that the law in this regard is as was stated in the pre-constitutional decision of Tsose vs Minister of Justice and Others 1951 (3) SA 10 (A) at 17H, namely:

10 "There is no rule of law that requires the milder method of bringing a person into court to be used whenever it would be equally effective."

It should, however, be noted that Goldblatt J added the following qualification at 144 d – e:

15 "Obviously the position will be different if the action of the policeman is *mafa fide* or an abuse of the right of arrest given to him."

Finally, in this regard, reference should be made to the recent decision of Gellman vs Minister of Safety and Security 2008 (1) SACR 446 (W). In this case a two judge bench differed from Goldblatt J and endorsed the approach followed in the Louw case, namely that an arrest is such a drastic interference with the constitutional rights of an individual to freedom of movement and to dignity, that an arrest should only be the last resort as a means of producing an accused person or a

suspect in court.

In my view, a further caveat should be added when considering and applying the principles enunciated in the Louw and Gellman judgments. In those cases, as well as the Charles case, the arrests were effected by policemen without first obtaining warrants of arrest in terms of Section 43 of the Criminal Procedure Act No. 51 of 1977. The arrests were made in terms of Section 40(1) of the Criminal Procedure Act on the strength of witness statements only. Part of the mischief with which the courts were faced in those instances, is described as follows in paragraph 82 of the Gellman judgment:

“Our own experience in these courts indicates that the practice of effecting warrantless arrests on the strength of a sworn statement only is all too prevalent in our society. While there may be circumstances in which the police are justified in effecting an arrest on the strength only of a witness statement, the police should be circumspect in doing so.”

The court accordingly held that if no exigent circumstances exist, for example, that the suspect would not attend his or her trial, the police should preferably seek corroborative evidence before making a warrantless arrest.

In the instant case, warrants of arrest were obtained on 3 April 2008. Same were issued on the strength of an application by Adv Morrison, read with an affidavit deposed to by Shireen Fraser, the Special Investigator employed by Second
5 Respondent. First Applicant, however, maintains that his detention is unlawful as the warrant for his arrest was unlawfully obtained and thereafter unlawfully executed.

Before considering the grounds upon which First Applicant
10 relies in contending that the warrant for his arrest was unlawfully obtained and executed, I have to deal with the allegation made by his attorney, Mr Booth, in his affidavit, that when appearing in the Magistrate's Court subsequent to his arrest, the Presiding Magistrate, Fourth Respondent in this
15 application, denied First Applicant the opportunity of adducing evidence to challenge the lawfulness of his detention. Firstly, in this regard, I should stress that I am not sitting in review of or in an appeal against any order made by Fourth Respondent. What I am dealing with is a substantive application by First
20 Applicant seeking his immediate release in terms of Section 35(2)(d) of the Constitution. Be that as it may, it is, in my view, in any event clear from the transcript of the proceedings in the Magistrate's Court that Fourth Respondent did not refuse First Applicant the opportunity to testify as to the
25 alleged unlawfulness of the issuing of the warrant and its

execution. Fourth Respondent, in fact, postponed proceedings to enable First Applicant to testify, but thereafter First Applicant's medical condition precluded him from doing so.

5 Turning to the issue of the lawfulness or not of the warrant for the arrest of First Applicant, the starting point has to be Section 43 of the Criminal Procedure Act. The relevant provisions of Section 43 are the following:

10 "1. Any magistrate may issue a warrant for the arrest of any person upon the written application of an Attorney General, a Public Prosecutor or a commissioned officer of the Police-

(a) which sets out the offence alleged to have been committed;

15 (b) which alleges that such offence was committed within the area of jurisdiction of such magistrate, and

(c) which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence."

It is clear from the contents of the written application of Adv Morrison, read with the accompanying affidavit of Special Investigator Fraser, that the requirements of Section 43 of the

Criminal Procedure Act had been met and that the warrant for the arrest of First Applicant had correctly been issued by the magistrate, Third Respondent, in accordance with Section 43.

5 It was submitted on behalf of First Applicant that having regard to the prevailing circumstances, there was no need for the obtaining of the warrants of arrest and that First Applicant was never approached to obtain an explanation about the new charges, prior to the application for the warrants of arrest.

10 The prevailing circumstances referred to by First Applicant include the fact that he had on two previous occasions been granted bail on Fidentia-related charges, and that he had always attended all his court appearances and complied with all his bail conditions. He contended that if Second

15 Respondent wished to add any more charges emanating from the Fidentia matter, these charges should have been joined to the existing charges without the need to apply for a warrant for his arrest. He also maintained that Second Respondent could merely have warned or summoned him and Second Applicant

20 to appear in court.

There is no obligation on Second Respondent or, for that matter, the State, in any intended prosecution to approach a suspect for an explanation about the intended charges, nor

25 does the suspect have a right to demand that he or she be

approached for an explanation prior to the State applying for a warrant of arrest. I can, in any event, imagine that in certain circumstances it would be rather unwise for the State to adopt such an approach. Similarly, an accused person cannot, as of right, demand that additional charges brought against him or her, should be joined to any existing charges. The State, or Second Respondent in this instance, is *dominus litis*. It should also be borne in mind that, according to Second Respondent, the Fidentia investigation is wide-ranging and comprises a number of distinct and separate legs. Each is based on different facts, involve different legal entities, different charges and different persons as accused. The common denominator in all the different matters, however, is the involvement of First Applicant. The charges forming the subject matter of the present application are based on separate facts, have different persons as accused, i.e. Second Applicant, Theart and First Applicant, and relate to a separate legal entity namely the Antheru Investment Trust. As submitted by Mr Webster, steps to join all matters on one charge sheet where a number of different accused are involved, may even amount to a mis-joinder.

It is appropriate at this stage to deal with a separate ground upon which reliance was placed, in submitting that the warrants of arrest were unlawful. This is the fact that one

Heydenrych, the managing trustee of Antheru Investment Trust, deposed to an affidavit stating that he had never laid any criminal charges on behalf of the Trust against Applicants. However, prior to deposing to this affidavit, Heydenrych had 5 deposed to a statement as a state witness and on the strength thereof the new charges were preferred against Applicants and Theart. Second Respondent intends calling Heydenrych as a state witness to testify in respect of the new charges. As submitted, correctly in my view, on behalf of Second 10 Respondent, the prosecution in respect of the new charges may proceed with Heydenrych as a state witness, and the fact that such proceedings may not have been initiated by a formal complaint by Heydenrych, is of no material consequence.

15 In argument Mr Khan submitted that the issuing of the warrant of arrest was tainted as it infringed upon First Applicant's constitutional right to fair pre-trial procedures. In particular, he submitted that the representatives of Second Respondent ought to have told Third Respondent that they did not intend 20 arresting First Applicant at that stage and should have given Third Respondent details of the aforesaid prevailing circumstances leading up to the application for a warrant for the arrest of First Applicant. In my view, there was no duty, constitutionally or otherwise, upon Second Respondent to have 25 informed Third Respondent that at that stage they did not

intend executing the warrant for the arrest of First Applicant. Second Respondent did, in my opinion, have a discretion to decide if and when the warrant would be executed and was under no duty to inform Third Respondent of its intention in this regard. Third Respondent, as the magistrate to whom application was made for the issuing of a warrant, had a duty to determine whether the requirements of Section 43 of the Criminal Procedure Act were met and there was no need for him to enquire into the intention of Second Respondent insofar as the execution of the warrant was concerned. Nor would there, in view of this discretion of Second Respondent as the authority entitled to execute the warrant, have been any need for Second Respondent to have informed Third Respondent of the circumstances leading up to the application for the issue of a warrant of arrest on these new charges.

Insofar as the discretion of the Second Respondent in this regard is concerned, reference can be made to a decision of the Appellate Division in Minister van die S A Polisie vs Kraatz

20 1973 (3) SA, at 510 C-D where the following was said:

“In die onderhawige geval het Sersant Pieterse twee hoedanighede bekleë, dié van Staatsaanklaer en dié van polisiebeampte. En, na my mening, het sy bevoegdheid in eersgenoemde hoedanigheid ’n diskresie ingehou, beide met betrekking tot die

vraag of hy die betrokke persoon by wyse van inhegtenisneming, ingevolge 'n lasbrief, voor 'n regterlike beampte sal laat bring, in plaas van hom voor so 'n beampte te daag (by wyse van waarskuwing of dagvaarding), asook 'n diskresie om te besluit of hy die lasbrief onder sekere omstandighede, of na gelang van sekere gebeure, sal laat uitvoer al dan nie."

10 I accordingly conclude that there was no infringement of First Applicant's right to fair pre-trial procedures in this regard. I further find, for the reasons already furnished, that the warrant for the arrest of First Applicant was lawfully obtained.

15 This brings me to the question whether the warrant for the arrest of First Applicant was lawfully executed. As I have already mentioned, First Applicant maintains that there was no need to have him arrested as Second Respondent could merely have warned or summoned him to appear in court. I have also alluded to the intention of Second Respondent not to arrest First Applicant at the initial stage after obtaining the warrant for his arrest. According to Adv Morrison, it was intended to formally execute the warrant of arrest only on First Applicant's next court appearance on the earlier charges, namely on 24 April 2008. It was, however, Second Respondent's intention to

arrest Second Applicant on 4 April 2008. To this end, the meeting of 4 April 2008 was arranged. At this meeting the new charges were discussed and it was mooted that First Applicant would take personal responsibility for money that may have emanated from Antheru Investment Trust and which was paid into a joint account of Applicants. There is, however, a dispute of fact as to the final decision reached by the parties at this meeting. Morrison maintains that it was agreed that the warrant for the arrest of Second Applicant would not be executed at that stage, but would be held in abeyance pending finalisation of the terms upon which First Applicant would take responsibility for the charges relating to the Antheru Investment Trust matter.

Booth and First Applicant, on the other hand, say that the terms upon which First Applicant accepted responsibility for the new charges, were finalised at this meeting and it was agreed that Second Respondent would not execute the warrants against First and Second Applicants at all. As pointed out by Mr Webster, it is significant that neither First Applicant nor his attorney, volunteer what the terms were upon which First Applicant would accept responsibility for the new charges. Contrary to this version of First Applicant and his attorney, Morrison maintains that it was agreed that Booth would revert to him before 24 April 2008, to indicate to what

extent First Applicant would accept responsibility on the new charges.

I realise that a court should normally be hesitant to attempt to
5 resolve disputes of fact on affidavit. However, I am of the
view that if a definite agreement had been reached on 4 April
2008, that both warrants would not be executed at all, as
alleged by and on behalf of First Applicant, it is strange that
First Applicant's attorney did not unequivocally state this as a
10 fact at the subsequent proceedings in the Magistrate's
Court. During those proceedings, it was put no higher than to
state that an "impression" was created that the warrants would
not be executed. When questioned by the preceding
magistrate, Fourth Respondent, as to whether the State had
15 furnished him with any undertakings in this regard, the
response of First Applicant's attorney was only that an
"impression was created so far as the defence is concerned."
This is a far cry from the statement in paragraph 43 of his
affidavit in these proceedings, which forms part of the founding
20 papers, where the following is said:

"When we left the meeting on 4 April 2008, all of us
clearly understood that the warrants would not be
executed at all."

25 To this should be added the following statement of Second

Applicant regarding the meeting of 4 April 2008, in her affidavit which forms part of the Applicants founding papers:

"It was at this meeting that it was inferred that my involvement in the alleged crime had been cleared up to the satisfaction of the DSO (Second Respondent). This was further enforced when:

- (a) no request was made from me to remain in the region or the country,
- (b) no request was made for my passport, and
- (c) I was never contacted by the DSO again."

This statement of Second Applicant clearly falls far short of the unequivocal agreement contended for in Mr Booth's affidavit in the present proceedings.

15 It appears to me that the probabilities favour the version put forward by Second Respondent, as to what was finally agreed at the meeting of 4 April 2008, but it is not necessary for me to make a definite finding in this regard. I agree with the submission of Mr Webster, that whatever agreement was reached by the parties on 4 April 2008, did not affect the legal status of the warrants which had been issued the previous day. Both warrants remained valid, notwithstanding the arrangement which was clearly made for the convenience of Applicants.

The question, however, remains whether the execution of the warrant in regard to First Applicant on 9 May 2008, constituted a lawful arrest. Put differently, is there merit in the contention of First Applicant that there was no need for Second Respondent to have had him arrested, as his attendance at court could have been secured by less intrusive measures, such as warning or summoning him to appear in court on these new charges? In this regard, I incline to the view that even if a warrant for the arrest of a suspect has been lawfully obtained in terms of Section 43 of the Criminal Procedure Act, this in itself does not necessarily justify an arrest to secure the attendance of the suspect in court. I agree with the view expressed by Bertelsmann, J in Louw vs Minister of Safety and Security, supra at 186 C, that any arrest being as drastic an invasion of personal liberty as it is, must still be justifiable according to the demands of our Bill of Rights. Put differently, the conduct of the person effecting an arrest should not constitute an abuse of the right given to such person to effect the arrest.

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Second Respondent contends that the conduct of Second Applicant in leaving South Africa on 25 April 2008, with the knowledge she had regarding the pending warrant for her possible arrest, was a clear indication that Applicants had negotiated in bad faith to have the warrant for her arrest held

in abeyance. This, Second Respondent contends, demonstrated the Applicants to be untrustworthy. Thus, it was submitted, once it had been confirmed on 9 May 2008 that Second Applicant had left the country with the two children of 5 Applicants, the assessment of the flight risk status of First Applicant changed significantly and justified his immediate arrest.

The manner in which Second Applicant left South Africa, raises 10 certain concerns. Firstly, it was established by Second Respondent that she had left South Africa on a cancelled passport. The air tickets had been purchased by a third party and she had obtained foreign currency by means of the intervention of yet another third party. The children were 15 removed from the school which they attended without any notification to the school. It may be, as First Applicant has attempted to explain in his replying affidavit, that there are plausible explanations for all of this. However, what I do find strange, is that the one person who would have been able to 20 provide this plausible explanation to the court, namely Second Applicant, has failed to do so. She did file an initial affidavit dated 11 May 2008, to which I have already referred, which forms part of Applicants' founding papers, but there is a deafening silence from her in response to the answering 25 affidavit of Second Respondent, in which the concerns about

the manner of her departure from South Africa, were raised. I should mention that in her affidavit of 11 May 2008, Second Applicant explained that she has arranged for regular telephonic and internet communication between the children and First Applicant. She accordingly has the necessary means of communication to have enabled her to file a replying affidavit.

I am of the opinion that in the prevailing circumstances Second Respondent, after discovering on 9 May 2008 that Second Applicant and the two children had left the country, was justified in concluding that the assessment of the flight risk status of First Applicant had changed significantly. The one compelling reason for First Applicant to remain in South Africa, namely, the presence of his wife and their children in the country, was no longer a factor which could be considered in his favour. To this should be added the fact that at the meeting of 4 April 2008, Applicants had failed to inform Second Respondent's representatives that they had agreed to separate and that Second Applicant and the children were planning to leave the country.

In the circumstances, I do not believe that the representatives of Second Respondent were unreasonable in concluding that the assessment of the flight risk status of First Applicant, had

significantly changed for the worse. It should be borne in mind that First Applicant has been sequestered and, on the face of it, has no material ties to this country. It should also be recognised, as was the case in State vs de Kock, 1995 (1) SACR 299 (T), that the fact that an accused's wife and children are outside the country, constitutes a significant inducement to him not to stand his trial, especially in a case such as the present, where he faces possible long term imprisonment.

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In my opinion, having regard to the peculiar circumstances of this case, Second Respondent was justified in arresting First Applicant to secure his future attendance in court on the new charges against him. Put differently, I am satisfied that in the prevailing circumstances the arrest of First Applicant did not amount to an abuse of the right to arrest him in terms of the warrant for his arrest granted by Third Respondent.

I accordingly find that the execution of the warrant was justifiable according to the demands of the Constitution and, therefore, lawful. It follows, in the light of my findings, that Second Respondent has shown on a balance of probabilities that the detention of First Applicant is lawful. The application accordingly falls to be dismissed.

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Although the alleged sexual assault upon First Applicant, while in custody, does not have a bearing on the lawfulness of his arrest or detention, it is necessary to comment thereon. I would urge the authorities in whose care First Applicant was at the relevant time, to investigate his complaint thoroughly and without delay. If it is found that First Applicant had been assaulted, the perpetrators should be identified and brought to book and steps should be taken to avoid further occurrences of this nature.

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Finally, I have to deal with the issue of costs. As mentioned at the outset, Applicants have been partially successful in obtaining the relief sought in paragraph 3 of the Notice of Motion. They launched this application on 16 May 2008, and on 19 May 2008, obtained the affidavit and documentation upon which Third Respondent had acted in issuing the relevant warrants of arrest. However, the lion's share of the legal costs, including all the time spent in court, was incurred in regard to the issue of the lawfulness of First Applicant's detention. In the circumstances, I believe it will be just and equitable to award costs against Applicants as set out in my order, which is to follow. I should add that the costs include the wasted costs occasioned by the postponement of the matter on 26 May 2008.

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In the result, the following order is made:

1. The application is refused.
2. First and Second Applicants are declared liable, jointly and severally, for payment of 80% of Second and Third Respondents' costs of suit.



FOURIE, J