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

REPORTABLE
Case number: 21791/2021

In the matter between:

RICCARDO PAOLO SPAGNI	Applicant
and	
THE DISTRICT MAGISTRATE, CAPE TOWN	First respondent
THE MINISTER OF POLICE	Second respondent
THE ACTING DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE	Third respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fourth respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fifth respondent
THE MINISTER IN THE DEPARTMENT OF INTERNATIONAL RELATIONS AND CO-OPERATION	Sixth respondent

REASONS DELIVERED ON 24 MARCH 2022

VAN ZYL AJ:

Introduction

1. On 22 March 2022 I granted an order in the following terms:

   1.1. The third and fourth respondents' application in terms of Rule 30(1) is dismissed.

   1.2. The third and fourth respondents jointly and severally, the one paying, the other to be absolved, shall pay the applicant's costs occasioned by the application in terms of Rule 30(1) on the scale as between party and party, such costs to include the costs of two counsel.

2. I indicated that the reasons for the order would follow. These are the reasons.

The applicant's pending criminal trial

3. The applicant is a dual South African and Italian citizen. He was arrested in South Africa on 13 September 2012, facing various charges relating to fraud, forgery and uttering.

4. The applicant's trial commenced in the Regional Magistrate's Court in Cape Town on 22 August 2019. It was thereafter postponed on a number of occasions and for a variety of reasons. It was finally postponed for further hearing on 24 March 2021. The applicant did not appear at court on that day, and his attorney advised the court that he had been unable to contact his client and did not know his whereabouts.

5. The trial was postponed to 19 April 2019 to enable the investigating officer to locate the applicant. This proved unsuccessful as, unbeknownst to the court, his attorney and the fourth respondent ("the NPA"), the applicant had travelled to the United States on 21 March 2021. The applicant and his wife travelled from South Africa to Bermuda, where they quarantined before entering the United States on 14 April 2021.

6. The applicant was subsequently arrested in Nashville, Tennessee, on 21 April 2021 pursuant to an application for provisional arrent transmitted by the South African office of Interpol to its counterparts in the United States, prior to the filing of a formal extradition request under the relevant legislation. He remains in Nashville, within the jurisdiction of the Nashville court, although he has since been released on bail subject to stringent bail conditions.

The warrant review

7. On 22 December 2021 the applicant instituted an application in this Court under the abovementioned case number, seeking orders that two warrants of arrest issued against him be declared invalid and unconstitutional, and that they be reviewed and set aside ("the warrant review").

8. The first warrant had been issued against the applicant by the first respondent ("the magistrate") on 19 April 2021, and the second, which was an "amplified" warrant, on 21 September 2021. These warrants were issued to secure the applicant's attendance at court so as to allow his trial to proceed.

9. The magistrate has not opposed the warrant review.

10. The warrant review was brought as one of urgency, and was to be heard on 23 February 2022. The applicant set it down on the urgent roll together with an application launched on 8 October 2021 (under case number 17224/2021) for the review and setting aside of an extradition request dated 21 September 2021 submitted by the third respondent ("the ADPP") to the Central Authority for Extradition and International Mutual Assistance in the United States of America ("the extradition review"). The reason for the urgency was that the extradition inquiry in the United States was to commence on 3 March 2022. The inquiry has since been postponed to 7 April 2022.

11. The extradition review was argued on 23 February 2022, but no judgment has yet been delivered. The Court did not hear the warrant review on that day.

The application in terms of Rule 30(1)

12. On 7 January 2022 the respondents caused a notice in terms of Rule 30(2)(b) to be served, notifying the applicant that the warrant review constituted an irregular step and calling upon him to remedy such irregularity within then days of service of the notice.

13. The applicant did not take any steps to withdraw the warrant review.

14. On 23 February 2022 the third and fourth respondents ("the respondents") delivered an application in terms of Rule 30(1) ("the irregular step application"), seeking the following relief:

> 14.1. Declaring that the applicant's warrant review constituted an irregular step and that it be set aside;
>
> 14.2. Directing that the applicant pay the respondents' costs on an attorney and client scale.

15. The irregular step application is aimed at, so the respondents submit, setting aside "*an ill-conceived attempt by the Applicant effectively to supplement an existing judicial review application under the guise of an 'independent, self-standing and separate' review application*".

16. As mentioned earlier, the warrant review was not argued together with the extradition review on 23 February 2022. It stood over to 25 February 2022 on the urgent roll. On that day, the parties indicated in chambers that they were in agreement that the Rule 30(1) application should be argued first so as to pave the way for the further conduct of the litigation if necessary. The application was eventually argued on 4 March 2022.

17. I shall deal with the parties' contentions in the course of the discussion below.

Does the warrant review constitute an irregular step?

The provisions of Rule 30

18. Rule 30(1) of the Uniform Rules of Court provides as follows:

> *(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.*
> *(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if—*
> > *(a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;*
> > *(b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;*
> > *(c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2).*
> *(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.*
> *(4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.*

19. Rule 30 applies only to irregularities of form and not to matters of substance (*Graham and another v Law Society, Northern Provinces and others* 2016 (1) SA 279 (GP) at par [40]).

20. In *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO* 1981 (4) SA 329 (O) at 333H the Court stated the object of Rule 30(1) as follows: "*I have no doubt that Rule 30(1) was intended as a procedure whereby a hindrance to the future conducting of the litigation, whether it is created by a non-observance of what*

the Rules of Court intended or otherwise, is removed."

21. Proof of prejudice is a prerequisite to success in an application in terms of Rule 30(1) (*Afrisun Mpumalanga (Pty) Ltd v Kunene NO and others* 1999 (2) SA 599 (T) at 611C-F).

22. Rule 30(3) gives a court very wide powers, *inter alia* to make any order it deems fit. The court has a discretion and it is not intended that an irregular step should necessarily be set aside. The discretion must be exercised judicially on a consideration of the circumstances and what is fair to both sides. The court is entitled to overlook in proper cases any irregularity which does not work any substantial prejudice to the other party (*Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 276F-H).

23. I agree with the respondents' submission that the provisions of Rule 30(1) are applicable to applications, depending on the circumstances of each case. This much is clear from the authorities to which I have been referred. I did not understand the applicant's counsel to submit differently (at least in oral argument), but they sought to differentiate the authorities cited by the respondents in support of their case from the present matter. I shall refer to these authorities later.

24. It is against this background that the respondents' irregular step application falls of be determined.

<u>The grounds upon which the respondents' irregular step application is based</u>

25. I fully understand that the respondents' case is not that an applicant may never launch an independent and self-standing review application based on information uncovered in the Rule 53 record of another review application. Such a stance would clearly be untenable. Their case is that, in the particular circumstances of this matter, the warrant review constitutes an abuse of process and an irregular step as it was brought solely to remedy the oversight that had occurred in the failure to supplement the founding papers in the extradition review with a challenge to the warrants.

26. The respondents submit that "*the irregularity and/or impropriety (as contemplated in Rule 30(2) and (30)) is illustrated clearly by the procedural background to this application*". They argue that, properly scrutinised and as a matter of form, the warrant review, despite being presented as a separate application, is in fact a belated attempt at supplementing the relief sought in the extradition review. The circumstances relied upon by the respondents are as follows.

26.1. The extradition review was instituted on 8 October 2021.

26.2. On 19 October 2021, the ADPP delivered the Rule 53 record in the extradition review. The record included the two warrants that form the subject of the warrant review.

26.3. The applicant delivered a supplementary founding affidavit on 22 October 2021, amplifying his case in light of the contents of the Rule 53 record, but did not raise the alleged defects in the warrants.

26.4. On 15 December 2021 the ADPP delivered an answering affidavit in the extradition review.

26.5. On 22 December 2021, despite having been aware since 19 October 2021 of the warrants and the facts upon he now relies, the applicant instituted the warrant review on an urgent basis.

26.6. As to urgency, the respondents point out that, although the applicant states that the warrant review was brought within four days of his becoming aware of the defects in the warrants, this cannot be true because the warrants were included in the Rule 53 record which had been at the applicant's disposal since 19 October 2021. The applicant's statement was thus not only aimed at misleading the court, but also shows that the warrant review was simply an attempt to supplement the extradition review – the alleged defects in the warrants having been previously overlooked by the applicant's legal team.

26.7. Had this not been the case, and had the applicant genuinely believed that a challenge to the warrants required a self-standing review application, one would have expected him to launch the warrant review at about the same time as supplementing his papers in the extradition review. Any alleged urgency in relation to the warrant review is thus self-created.

26.8. The true objective of the warrant review, brought on an urgent basis, is gleaned from the founding affidavit in that review, where the applicant states that he ADPP relies on the allegedly unlawful warrants for the purposes of the extradition request. The purpose of the warrant review is thus to impugn the extradition request – a purpose underscored by the fact that the warrant review was brought as a matter of urgency, to be heard together with the extradition request.

26.9. The applicant sought to have the warrant review and the extradition review heard simultaneously so as to remedy its remissness in supplementing the latter case in accordance with Rule 53(4).

27. The applicant denies that its application constitutes an irregular step, and argues that the respondents seek to set aside, as an irregular step, a notice of motion and founding affidavit displaying no formal defects and which raise a constitutional challenge to the lawfulness and validity of the two warrants. The basis for the irregular step relief, which would have the effect of nullifying the constitutional challenge, is that the applicant was entitled to and should have amended and supplemented his extradition review in terms of Rule 53(4) following receipt of the Rule 53 record in that application.

28. The applicant argues that the irregular step application is in itself an abuse of process and that, instead of providing an answer to the allegations levelled against the validity of the warrants, the respondents seek to delay and evade scrutiny of the warrants on the basis of a technical application.

<u>The warrant review does not constitute an irregular step</u>

29. Having considered the circumstances in which the warrant review was brought in context of the purpose of Rule 30, I am of the view that the warrant review does not for the reasons cited by the respondents constitute an irregular step.

30. As already stated, Rule 30 relates to irregularities of form and not to matters of substance. In support of its argument that Rule 30 should be applied in the present case, the respondents referred to various authorities. None of these are comparable to the present matter, particularly in relation to the issue of irregularities of form:

30.1. In *Eniram (Pty) Ltd v New Woodholme Hotel (Pty) Ltd* 1967 (2) SA 491 (E) the court found that Rule 30 was applicable where an application was brought as one of urgency, but no reasons of urgency were set out in the supporting affidavits. It is clear from a reading of that judgment that, in addition, the Rule was invoked because no formal notice of motion had been delivered at the time that the Rule 30 application was instituted. In the present matter there are allegations of urgency – whether they have merit falls to be determined at the hearing of the warrant review.

30.2. In *Bester NO and others v Target Brand Orchards (Pty) Ltd and others* (22593/2019) [2020] ZAWCHC 183 183 (21 December 2020) the Court considered a Rule 30 application in which one of five cited defendants in an action alleged that the combined summons was irregular in that the actions instituted against each of the defendants were not linked to each other. The application was dismissed, but there was no suggestion that Rule 30 could not be invoked in respect of a summons and particulars of claim. The same must, axiomatically, apply to a notice of motion and founding affidavit. This merely states a principle already accepted.

30.3. In *Sacerdote v Stromberg* (34218/18) [2019] ZAGPPHC 114 (27 February 2019) application was made to set aside a notice of motion and founding affidavit as an irregular step on the basis that there was no personal service of the application by the Sheriff. The application was

dismissed as there was no prejudice to the applicant as a result of the irregular service.

30.4. In *Van Deventer and another v Biggs and others* (3323/2013) [2014] ZAECPEHC 48 (7 August 2014) the Court set aside a summons on the basis, *inter alia*, that the plaintiff should have followed the provisions of Rule 53 given the nature and effect of the relief sought. The matter had its origins in an arbitration award or expert determination, and the Court was of the view that the relief subsequently sought in the summons should have been sought via Rule 53. The plaintiff had thus approached the court in an incorrect manner. This seems to me to be akin to a case where, for example, an applicant for the liquidation of a company approaches the court by way of action instead of application. There is a defect in the form in which the matter is brought to court, and the incorrect form of proceedings may be set aside under Rule 30.

30.5. In *Vlok NO and others v Sun International South Africa Ltd and others* 2014 (1) SA 487 (GSJ), a matter dealing with an exception to particulars of claim to the effect that the proceedings should have been brought on motion and not by way of action, the court noted at para [114] that "*the kind of objection is more appropriately raised by way of objecting to the regularity of the proceedings in terms of Rule 30 than by taking exception to the legal competence of the cause of action. 'You should have advanced this cause of action on motion, not by summons' is not a challenge to the legal competence of the cause of action; it is instead an objection to the procedural step taken by the opposing litigant*".

31. The warrant review does not suffer from a defect or defects of form such as those considered in these authorities, or any other defect that renders it an irregular step as contemplated by Rule 30, whatever the applicant's motives were as contended for by the respondents having regard to the relief sought and the timing of the application.

32. As the applicant points out, the warrant review was brought in relation to

different decisions (the warrants) taken by a different decision-maker than the one involved in the extradition review (the magistrate as opposed to the ADPP). The magistrate is not a party to the extradition review. The warrant review does not seek any relief in relation to the extradition request. As such, I cannot find that it constitutes an abuse of process as contended for by the respondents. If the launch of the warrant review did in fact amount to an attempt belatedly to bolster the extradition review, such attempt has failed now that the extradition review has been heard.

33. Rule 53(4) permits an applicant to amend their notice of motion and supplement their founding affidavit after having sight of the materials considered by a decision-maker. New grounds of review arising from the record, which the applicant was unaware of when launching the application, may be included in a supplementary founding affidavit and new relief may be sought by way of an amended notice of motion. As the applicant points out, this is a right, not an obligation (although, of course, the applicant may only rely on such new relief and new matter in that particular review application if incorporated in terms of Rule 53(4)).

34. The applicant's right to amend and supplement logically relates to the decision sought to be reviewed and set aside, taken by the relevant decision-maker. The applicant submits that Rule 53 does not make provision for a "supplemented" challenge to the decisions of other decision-makers who are not parties to the original litigation.

35. Whilst this is apparent from a reading of Rule 53, I am not sure that the applicant is correct in arguing that the decision of a different decision-maker can never be incorporated into an already instituted review application where the invalidity of another decision appears from the Rule 53 record, and where the facts and circumstances overlap to such a degree that such a course would be sensible. I think that a joinder application would be necessary, and that consequential amendments to the notice of motion would have to be made as a result of the joinder (and not because of Rule 53(4)). After the filing of the Rule 53 record in relation to the different decision the applicant would again be entitled to amend the notice of motion and supplement the founding papers in terms of Rule 53(4) as applied to the

new decision. This may be cumbersome but it is not wrong.

36. Clearly, an applicant may also simply institute a separate application for review in respect of the other decision, as the applicant did in the present case. What irked the respondents was the fact that the applicant wanted to have the warrant review determined as a matter of urgency together with the extradition review, giving rise to the suspicion and contention that the warrant review was not properly set down and was an abuse as it was an irregular and belated attempt at supplementing the extradition review. The circumstances upon which the respondents rely for this contention appear to me, however, effectively to constitute a dispute as regards the alleged urgency of the warrant review, and if the applicant was untruthful in relation to the reasons for urgency set out in his founding affidavit, this should be dealt with at the hearing of the warrant review itself.

37. That urgency is the real complaint is emphasised by the fact that the respondents have no objection to the warrant review being heard on the semi-urgent roll or on the normal opposed motion roll in due course. The respondents would also not take issue with a separate warrant review being brought on the example posed in their heads of argument: the applicant could be concerned that, on his return to South Africa, he may be arrested and detained pursuant to one or both of the warrants. In that case, his recourse would be to launch a warrant review, which would "*self-evidently not be urgent*" given that the applicant is in the United States, and these is no immediate risk of his arrest and detention in South Africa.

38. Another complaint levelled by the respondents against the warrant review on the basis that its true purpose is to bolster the extradition review is that, in the context of the extradition treaty, the warrant of arrest is not presented to the United States as a self-standing document that stands to be challenged on its own merit.

> 38.1. The respondents argue that Article 9 of the extradition treaty requires the extradition request to be supported by a copy of the warrant or order, "*if any*", issued by a judge or other competent authority. The issue of a warrant of arrest is thus not a prerequisite for the valid extradition request, but need only be included in support of such request if it has been issued.

38.2. Therefore, without an order setting aside the extradition request, there is no reason to believe that the United States authorities would not proceed with the extradition inquiry simply on the basis that the warrants have been set aside by a South African court. This is particularly the case where the warrants have not been executed because the applicant absconded.

39. The respondents' argument in this regard appears to me also to point to a dispute in relation to the alleged urgency of the warrant review rather than to a defect in the form thereof. It is an issue that can be addressed at the hearing of the warrant review. The applicant was entitled to launch an urgent application subject to him being able to make out a case for urgency. The respondents are entitled to challenge the urgency of the application in opposition to such application. Insofar as the respondents allege that the attack on the warrants should have been incorporated into the extradition review, they may deliver a notice in terms of Rule 6(5)(d)(iii) in opposition to the warrant review on that basis.

40. The fact that the warrant review does not seek relief consequent to the setting aside of the warrants does not take the matter further. If it does confirm the respondents' allegation that the warrant review was simply brought to bolster the applicant's case against the extradition request, then so be it. The warrants did not feature in the extradition review, which has been heard and which will be determined on its own facts. As the respondents point out, an order declaring the warrants invalid will not and cannot alter the effect of a judgment in the extradition review. The absence of consequential relief is a matter that can be raised in opposition to the warrant review, and what the applicant does with the result in that review in due course will have to be considered at the hand of the circumstances then prevailing.

Prejudice

41. As to prejudice, the applicant is correct in stating that nothing is stated as regards prejudice in the respondents' founding affidavit in the irregular step application.

42. In the replying affidavit, and also in argument, the respondents describe their prejudice as having to deal with two applications (even though the alleged defects in the warrants could be gleaned from the Rule 53 record in the extradition review) and having to file two sets of Rule 53 records. I do not think that this constitutes prejudice. Had the warrant review been brought either by way of an amendment and supplementation of the extradition review or as a separate application just after receipt of the Rule 53 record, the magistrate as decision-maker would in any event have had to deliver another Rule 53 record dealing specifically with the issue of the warrants. Having to deal with both applications would simply have been the result of the litigation, whichever form it took.

43. The respondents allege further prejudice to the effect that, apart from additional costs, the respondents would be distracted and hampered in the effective presentation of their case in the extradition review. They would not have the opportunity of addressing the alleged defects in the warrants in the course of the extradition review. The hearing of the warrant review would also be prejudicial to the Court's proper and orderly determination of the extradition review. I think that any prejudice in this respect has fallen away as a result of the extradition review having been heard in the absence of a challenge to the warrants. The applicant and the respondents presented their respective cases against the extradition review as it stood, without reference to the warrants, and it is unclear what prejudice the separate hearing of the warrant review would give rise to as regards the case to be determined in relation to the extradition review.

44. As mentioned earlier, too, a finding in favour of the applicant in the warrant review cannot alter any judgment given in the extradition review. There can thus be no prejudice to the respondents in dealing with the warrant review as a separate application for review insofar as their involvement in the extradition review is concerned.

Conclusion

45. There may well be issues in relation to the urgency upon which the warrant review application was brought, apart from the merits thereof and the respondents'

complaint as regards the motive with which it was brought.

46. These issues are not currently before me. I agree with the applicant's counsel that they are best raised in opposition to the warrant review, and left for the Court determining the fate of that application.

Costs

47. The parties have each labelled the other's case an abuse of the process of Court, and have sought costs on the scale as between attorney and client. I do not regard either of the applications as constituting an abuse.

48. Punitive costs orders should generally be reserved for litigants who are guilty of dishonesty or fraud or some other conduct which is to be frowned upon by the Court. In the present case, the parties have been assisted by their legal representatives in the conduct of their respective cases, and they were no doubt advised that each such case was arguable. The applications raised matters of importance to the parties and I do not think that either side acted maliciously.

49. In the circumstances, I declined to grant an order of costs on the scale as between attorney and client when I granted the order on 22 March 2022.

P. S. VAN ZYL
Acting Judge of the High Court

HEARING DATES: 25 February 2022, 4 May 2022 & 9 May 2022.

Appearances:

For the applicant: J. de Waal SC, M. Bishop, G. Kerr-Philips and S. Webb, instructed by Hanekom Attorneys

For the third and fourth respondents: I. Jamie SC, A. Christians and L. Stansfield, instructed by the State Attorney