

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

Case number: 21348/2019

In the matter between:

NAFIZ MODACK

Applicant

and

THE MINISTER OF POLICE

First respondent

**THE NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE**

Second respondent

**THE PROVINCIAL COMMISSIONER OF THE SOUTH
AFRICAN POLICE SERVICE (WESTERN CAPE)**

Third respondent

MAJOR GEN ANDRE LINCOLN

Fourth respondent

MAJOR GEN JEREMY VEARRY

Fifth respondent

LT COL CHARL KINNEAR

Sixth respondent

CAPT SHARON JAPTHA

Seventh respondent

SGT DE VRIES

Eighth respondent

JUDGMENT DELIVERED ON 4 MAY 2023

VAN ZYL AJ:**Introduction**

1. The applicant seeks final interdictory relief against the respondents, to restrain the respondents from:

1.1 arresting the applicant without a warrant of arrest issued by an authorised judicial officer, alternatively, unless in specific circumstances set out in section 40(1) of the Criminal Procedure Act 51 of 1977 ("the CPA");

1.2 assaulting the applicant or causing him any physical harm or injury of any nature;

1.3 confronting, intimidating or harassing the applicant and his family members related to him by birth or by marriage; and

1.4 entering the applicant's home or that of his family members related to him by birth or by marriage, unless (i) authorised by a warrant duly issued by an authorised judicial officer; or (ii) there exists a due cause for such entry.

2. The factual basis for the relief sought by the applicant is premised, very broadly, on the following averments detailed in the founding papers:

2.1 Several members of the South African Police Service ("SAPS"), including high-ranking officers, attached to different units of SAPS, have been harassing the applicant whilst he has lawfully been acting as a consultant to certain security businesses, and whilst he has been in lawful possession of firearms.

2.2 The applicant has been liaising and co-operating with other members of SAPS, including high-ranking officers in Cape Town, Johannesburg and the Northern Cape. In his interaction with those members

of SAPS it has become clear that some of the respondents are biased, and that others are corrupt.

3. In seeking final interdictory relief, the duty is on the applicant to show (i) that he has a clear right; (ii) an injury actually committed or reasonably apprehended; and (iii) the absence of an alternative remedy.¹

4. The ordinary rules relating to the discharge of the duty on affidavit apply. Consequently, the version set up by the respondents must be accepted unless their allegations do not raise a real, genuine or *bona fide* dispute of fact, or are so far-fetched or clearly untenable that it will be justified to reject them merely on the papers.

² The test in determining whether a respondent's version may be rejected merely on the papers, is "a *stringent one not easily satisfied*".³

5. This application has taken years to wend its way towards a hearing. Before dealing with the merits of the application, the question that needs to be discussed is whether the grant of the relief sought will, at this stage, serve any purpose.

The mootness of the relief sought

6. The doctrine of mootness, as it is now known, did not find application in the South African law before the advent of the Interim Constitution of 1993.⁴ However, as early as 1963 our Courts have declined to decide cases where the issues had no more than academic significance and as such would not have a binding effect on the parties.⁵ Since 1994 there has been a number of cases in which the Constitutional Court has applied the doctrine.

¹ *Setlogelo v Setlogelo* 1914 AD 221 at 227.

² *Plascon -Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 E-635 C.

³ *National Scrap Metal (Cape Town) v Murray & Roberts* 2012 (5) SA 300 (SCA) at para [22].

⁴ Loots C "Standing, Ripeness and Mootness" in Woolman S *et al* (eds) *Constitutional Law of South Africa* (Juta, 2012) at p20.

⁵ Loots *op cit* at p20, citing *Masuku v State President* 1994 (4) SA 374 (T) 380I which refers to *Ex parte Nell* 1963 (1) SA 754 (A) 760B-C.

7. In *JT Publishing (Pty) Ltd v Minister of Safety and Security*,⁶ for example, the Court stated that Courts are governed by a judicial policy which vests in them a discretion, and that it is a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical.⁷

8. In *JT Publishing* the legislation complained of by the applicants had been replaced by new legislation by the time the Court delivered judgment. The Court declined to make a decision on the merits of the case on the basis that:⁸

"[T]here can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but a historic one, than those on which our ruling is wanted have now become. The repeal of the Publications Act has disposed altogether of the questions pertaining to that. And any aspect of the one about the Indecent or Obscene Photographic Matter Act which our previous decision on it did not answer fully has been foreclosed by its repeal in turn. I therefore conclude that we should decline at this stage to grant a declaratory order on either topic." [Emphasis added.]

9. In *South African Transport and Allied Workers Union v ADT Security (Pty) Ltd*,⁹ the Labour Appeal Court stated the following:

"[4] The principles relating to mootness have been well established in National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others [1999] ZACC 17; 2000 (1) BCLR 39 (CC) in which the Constitutional Court said:

"A case is moot and therefore not justiciable, if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."...

⁶ 1996 (12) BCLR 1599 (CC).

⁷ At para [15].

⁸ At para [17].

⁹ [2011]9 BLLR 869 (LAC) at paras [4][5].

[5] In Independent Electoral Commission v Langeberg Municipality [2001] ZACC 23; 2001 (9) BCLR 883 (CC), the Constitutional Court held that, where there was no live controversy between the parties, and, in the absence of any suggestion that any order might have an impact on the parties, the disputes between the parties were moot especially since future cases inevitably presented different factual matrixes and hence no purpose would be served in resolving the dispute. See also Radio Pretoria v Chairman of the Independent Communication Authority of South Africa and Another ... 2005 (3) BCLR 231 (CC)." [Emphasis added.]

10. In *Sebola and another v Standard Bank of South Africa Ltd and another*, the Constitutional Court stated that "mootness is not an absolute bar to deciding an issue. That is axiomatic: the question is whether the interests of justice require that it to be decided. One consideration whether the Court's order will have any practical effect on either the parties or others." [Emphasis added.]
11. It is by now a matter of public record that the applicant in the present matter was arrested in April 2021 (this application had been instituted in 2019) and charged with various serious offences, including the murder of the sixth respondent in this matter.
12. In the circumstances, I agree with the submission made on the respondents' behalf that there is no longer a live dispute between (i) the applicant and the sixth respondent; and (ii) the applicant and the remaining respondents. The applicant has been arrested and is being detained, awaiting his criminal trial.
13. The issues raised by the applicant and the relief sought in the notice of motion are now, at best, purely academic. The relief sought will have no practical effect on any of the parties.
14. I am of the view that the application falls to be dismissed on this issue.

15. In case I am wrong, however, the merits of the applicant's case are nevertheless scrutinised.

Has there been an infringement of a clear right, and an injury?

16. The respondents set out in their answering affidavits that, far from being singled out as alleged, the applicant was, and is, just one of several parties involved in, or suspected to be involved in, the extortion and intimidation of businesses, particularly restaurants, pubs and nightclubs. This state of affairs has given rise to a spate of violence, including murders. The applicant was also one of thousands of suspects nationwide involved in fraud on a grand scale relating to the unlawful issuing of firearms licences.

17. SAPS's interactions with the applicant, upon which the applicant relies for the relief sought, were in connection with the endemic extortion and fraud relating to firearms licences. The respondents contend that SAPS did not infringe any of the applicant's rights. On the respondents' version, no injury was committed, and none is reasonably apprehended. Those interactions will be dealt with below.

18. I pause to mention that the applicant has failed to divulge in the founding affidavit that, in an unsuccessful application previously launched by him in the High Court of South Africa (Gauteng Division, Pretoria) during November 2018 under case number 82048/2018, for the return of his firearms seized during December 2017 and February 2018, a substantial part of the allegations in his founding affidavit in the present matter (including allegations of bias and victimisation) was raised by him and was addressed extensively in SAPS's answering affidavit. The Court dismissed the applicant's application and, on 6 December 2019, dismissed his application for leave to appeal.

The arrest of the applicant, and the seizure of firearms on 15 December 2017

19. In any event, one of the events relied on by the applicant for the relief sought against the respondents is his arrest and the seizure of some of his

firearms during December 2017.

20. The respondents explain that, during an investigation into the extortion and intimidation of businesses in the hospitality industry, the sixth respondent received a statement taken by the seventh respondent from an owner of a business in Cape Town about complaints of extortion levelled against the applicant. A police docket was registered at the Table Bay Harbour police station. The relevant statement forms part of the police docket.

21. The sixth respondent also obtained evidence from SAPS sources linking certain security guards, who were apparently harassing businesses in Long Street, to businesses allegedly operated by the applicant. The relevant evidence forms part of the evidence in the police docket in the criminal proceedings pending against the applicant and his co-accused in the Cape Town Regional Court. They are being prosecuted on various charges, including extortion and the rendering of security services without being registered as a security service provider, in contravention of the provisions of section 20(1) of the Private Security Industry Regulation Act 56 of 2001.

22. In early December 2017, prior to the commencement of the prosecution of the applicant referred to in the previous paragraph, the sixth respondent approached the Cape Town Magistrate's Court and obtained a warrant for the arrest of the applicant and his co-accused on charges of extortion and intimidation. The warrant of arrest authorised the SAPS members to enter the applicant's premises.

23. On 15 December 2017 the sixth respondent led a team of SAPS members who arrived at the applicant's premises to arrest the applicant pursuant to the warrant of arrest. The size of the team was based on experiences that SAPS had had when they dealt with the applicant in the past. The applicant was accompanied by armed men who introduced themselves as his body guards.

24. Upon entering the premises, the sixth respondent showed the applicant the warrant of arrest and explained it to him. The applicant was thereafter arrested on

the charges mentioned in the warrant. The seventh respondent noticed that the applicant had a handgun in his possession.

25. After the arrest, the sixth respondent asked the applicant if there were any other firearms and ammunition kept at the premises in addition to the firearm in his possession. The applicant confirmed that there were more firearms and ammunition on the premises, and took SAPS to his study where he showed them a safe, which he opened. He informed SAPS that there was also cash in the safe. After he had opened the safe, the applicant kept the key. SAPS member Sergeant Davids took the cash from the safe, placed it in a bag and gave it to the applicant for safekeeping. Sergeant Davids then removed the firearms and ammunition from the safe, sealed them in forensic bags in the presence of the applicant, and formally seized them. The applicant put the bag containing the cash into the safe, locked it, and kept the key.

26. The applicant also took the seventh respondent to his bathroom where there was another safe, but which did not contain any firearms or ammunition. The sixth and seventh respondents asked the applicant whether there were any other firearms at the premises. He informed them that his other firearms were kept at a "*gunshop*" in Johannesburg. He was unable to disclose the name and location of the shop in Johannesburg.

27. In terms of the provisions of the Firearms Control Act 60 of 2000 ("the FCA"), only an authorised licence holder has the right to possess the firearms to which the licence relates. The exception to this general rule is that the licence holder may give permission to another person who is fit and proper to possess or store the lawful firearms in the circumstances permitted under the provisions of the FCA.

28. The respondents explain that SAPS seized the firearms and ammunition found at the premises for safety reasons, as they could not arrest the applicant and leave his firearms and ammunition without anyone to take responsibility as required by the provisions of the FCA. Those firearms and ammunition could, moreover, have been used to cause bodily harm to others. The applicant was not permitted to keep

the key to the safe with him after his arrest, and left it at the house. If, therefore, the firearms had been left in the safe, anybody could have used the key to open the safe.

29. In these circumstances, the applicant's arrest and the seizure of the firearms were lawful.

30. After the operation at the applicant's house, SAPS immediately went to the premises of other suspects in respect of whom SAPS had warrants of arrest, and those persons arrested. They are the applicant's co-accused in the pending prosecution in the Cape Town Regional Court referred earlier.

The seizure of firearms in February 2018

31. The second incident upon which the applicant relies is the seizure of firearms during February 2018.

32. The respondents explain that, before SAPS visited the applicant's premises on 15 December 2017, SAPS established that the applicant held licences for nine firearms. After SAPS could not find all of the firearms registered in the applicant's name, and he failed to furnish SAPS with satisfactory answers as to the whereabouts of five other firearms that were not at the premises on 15 December 2017, the sixth respondent was concerned about the safekeeping of those firearms. He advised the applicant that the issue of the missing firearms would be relevant for purposes of the applicant's bail application, and requested him to co-operate with SAPS in relation thereto.

33. In the meantime, SAPS's Hawks branch had commenced with an investigation against the applicant, as he was suspected of being involved in organised crime which involved firearms. The firearms to which this application relates may be relevant to that investigation and the prosecution of the applicant on the charges he faces in that matter. The Hawks too, therefore, requested the applicant to produce the missing firearms.

34. Subsequently, during the hearing of the applicant's bail application, the issue of the missing firearms was raised with the applicant's attorneys. As a result, the applicant instructed his attorneys that the firearms were at his premises, and that SAPS could go there and seize those firearms that could not be found during the operation conducted on 15 December 2017.

35. The applicant's attorney arranged with the applicant's cousin to be at the premises to assist SAPS with the seizure of the firearms. During February 2018 members of SAPS visited the premises to seize the rest of the firearms as agreed with the applicant, through his legal representatives. On arrival, SAPS were met by the applicant's cousin, Mr Ikeram Modack ("Ikeram") outside the premises. Ikeram let the SAPS members into the house and then to a safe in the linen room, which he opened. SAPS seized the five firearms found in the safe and took them to the Table Bay Harbour police station for safekeeping.

36. The operation in February 2018 was accordingly lawful, as it was conducted with the applicant's consent.

The events of 31 October 2019

37. This is the third incident upon the applicant relies in support of the relief sought.

38. In the process of the investigation relating to the firearms licences obtained by the applicant, SAPS discovered that his spouse had also unlawfully obtained a licence for her firearm in collaboration with a member of SAPS in Olifantsfontein, and a firearms dealer in Kempton Park.

39. The sixth respondent duly applied for, and obtained, a warrant for the arrest of the applicant's spouse from the Germiston Magistrate's Court. There were also warrants of arrest issued against persons close, or related, to the applicant and his wife.

40. On 31 October 2019, members of the Anti-Gang Unit visited the Plattekloof residence of the applicant and his spouse to execute the warrant for the arrest of the applicant's spouse. The members of SAPS entered the residence for that purpose but the applicant and his spouse were not there.

41. SAPS were informed by employees of the applicant, a Mr Visser and a Ms Lottering, that the applicant and his wife had not been at their premises for two days prior to that SAPS visit. SAPS therefore did not search the applicant's premises during the visit of 31 October 2019. The respondents aver that the allegations of unlawful conduct on the part of SAPS on that day made by the applicant and the deponents to confirmatory affidavits on behalf of the applicant are thus not correct.

42. On the same day, 31 October 2019, SAPS visited the residences of family members of the applicant and his spouse to arrest her collaborators and co-suspects. The applicant's spouse was arrested in terms of the warrant at her place of business at 1[...] T[...] Street in Monte Vista, after members of SAPS initially looked for her at 1[...] T[...] Street where the applicant's mother-in-law resides. She appeared in court, was released on bail, and the matter was postponed. The criminal proceedings against her and her co-accused will continue in due course.

Conclusion in respect of these interactions with the applicant and his spouse

43. The answering affidavits set out, in detail, the facts relating to the applicant's alleged involvement in various unlawful activities, and the fact that he deliberately withheld relevant information from this Court, knowing that some of the information has already been tested – and rejected - in the Gauteng application to which reference has been made.

44. The applicant's founding papers are replete with hearsay allegations (including reports of "rumours") and with allegations of foul play (including bribery and assault) against the respondents, in a wide and unsubstantiated

fashion. The allegations raise numerous material disputes of fact. I agree with the submission made by the respondents' counsel that it appears that the applicant seeks, by way of this application, to stifle the SAPS investigation into his and his spouse's allegedly unlawful activities.

45. The relief sought also involves the interests of a wide-ranging network of family and friends, none of whom has been joined to this application. The applicant's *locus standi* in relation to the relief sought on behalf of those third parties has not been established.

46. The respondents have answered the applicant's allegations in detail, insofar as they were able to do so given the vague nature of vast portions of the applicant's narrative. In the circumstances, and with regard to the *Plascon Evans* rule, I am not persuaded that the respondents' version is far-fetched or untenable so as to justify rejection on the papers.

47. In relation to the interdictory relief sought in the notice of motion, the following is clear from a holistic consideration of the papers:

47.1 “...arresting the applicant without a warrant of arrest issued by an authorised judicial officer, alternatively, unless in specific circumstances set out in section 40(1) of the [CPA]”: there is no evidence that the applicant is under threat of being arrested unlawfully. When he was arrested on 15 December 2017, it was in terms of a warrant of arrest which has not subsequently been impugned by the applicant.

47.2 “...assaulting the applicant or causing him any physical harm or injury of any nature”: there is no evidence that the applicant is under threat of being assaulted or being caused physical harm or injury by any of the respondents. There was no assault on him in the course of his arrest in December 2017.

47.3 “...confronting, intimidating or harassing the applicant and his family

members related to him by birth or by marriage”: there is no evidence that the applicant or his family are under threat of being confronted unlawfully, or of being harassed or intimidated. When his spouse was arrested on 31 October 2019, it was in terms of a warrant of arrest which has not subsequently been impugned by her.

47.4 “... *entering the applicant's home or that of his family members related to him by birth or by marriage, unless (i) authorised by a warrant duly issued by an authorised judicial officer; or (ii) there exists a due cause for such entry*”: there is no evidence that the homes of the applicant or his family have been, or will be, entered without a warrant, duly issued. When the applicant's home was entered on 15 December 2017 and on 31 October 2019, it was in terms of warrants to arrest the applicant and his spouse respectively. SAPS merely visited the applicant's in-laws in the search for the applicant's spouse who could not be found at her ordinary place of residence on 31 October 2019.

An alternative remedy?

48. The applicant did have alternative remedies at his disposal, but those horses have bolted by now. The applicant must have been aware that the nature of his allegations would cause serious disputes of fact, which cannot be resolved in an application. As such, he should have proceeded by way of action instead of application.

49. Neither the applicant nor his spouse, moreover, have sought to impugn the warrants of arrest issued in respect of each of them.

Conclusion

50. In all of these circumstances, I am of the view that the applicant has failed to make out a case for the relief sought, not only because the application is moot, but also because the requirements for the grant of final interdictory relief have not been

satisfied.

51. Given this finding, it is not necessary to determine the respondents' application for the striking out of portions of the founding affidavit for being hearsay evidence or being vague and embarrassing.

Costs

52. There is no reason to deviate from the general rule that costs follow the event.

Order

53. In the premises, it is ordered as follows:

The application is dismissed, with costs, including the costs of two counsel.

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

Appearances:

For the applicant: L. Guma, Guma Attorneys

For the respondents: P. Botha SC (with him M. Titus),
Instructed by the State Attorney