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

CASE NO: 12197/21

In the matter between

ELIZABETH MARIA MAGARITA HANCOCK	APPLICANT

and

THE MINISTER OF POLICE	FIRST RESPONDENT
SERGEANT BAARDMAN	SECOND RESPONDENT
LIEUTENANT COLONEL PRATT	THIRD RESPONDENT
MS SHENNAZ NORDIEN, DISTRICT CONTROL PROSECUTOR, BELLVILLE MAGISTRATES' COURTS	FOURTH RESPONDENT
ADDITIONAL MAGISTRATE MS PALEKER	FIFTH RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS, CAPE TOWN	SIXTH RESPONDENT

JUDGMENT

THULARE, AJ

[1] This is an urgent application wherein the applicant seeks the court to order the first, second and third respondent to take the applicant, together with the police docket or a copy thereof to the Bellville Magistrates' Courts to enable the fourth respondent, her

deputy or anyone with authority of the like, to consider the applicant's release on bail or warning to appear in the Pretoria North Magistrates' Court on a date to be determined by this Court or in the alternative that the matter against the applicant be withdrawn unconditionally.

[2] In the alternative, should the sixth respondent refuse the order as mentioned, it is prayed that this court consider the merits of the application to be released on bail or warning on the terms and conditions which the court may deem fit and order the first to sixth respondent to release the applicant forthwith from the Bellville Police Station cells unconditionally alternatively in the bail amount set by the court and on conditions that the court may deem fit. The application is opposed by all the respondents (the SAPS and their functionaries as well as the Director of Public Prosecutions and their functionaries) except the magistrate who appears to abide by the decision of the court.

[3] The facts of the alternative as referred to in para 2 above did not arise. Urgency was not placed in issue. The only issue is whether the applicant has made out a case for the relief sought in para 1 above. This court made the order on 21 July 2021 and indicated that the written reasons will follow. These are the reasons for the order.

[4] On Tuesday 13 July 2021 a public prosecutor in Tshwane North District signed and dated an application under section 43 of the Criminal Procedure Act, 51 of 1977 (the Act) for the issue of the warrant of arrest of the complainant on a charge of fraud allegedly committed on or about 19 October 2017 in that district. On Thursday 15 July 2021 a magistrate in that district directed the arrest of the applicant through the issue of a warrant commonly referred to as a J50. The magistrate, in the warrant, directed the arrest and that the applicant should be brought before the lower court, Court A, Pretoria North Magistrates' Courts in accordance with the provisions of section 43 of the Act.

[5] On 16 July 2021 the third respondent, who is the Section Commander of the Detective Unit in Sinoville SAPS in Pretoria had both a telephonic and email communication with Colonel Appolus (Appolus), the Bellville SAPS Detective Commander. The issue was the arrest of the applicant. In the email third respondent attached a copy of the J50 warrant, and provided another address of the applicant

other than the one appearing on the J50 as an alternative address where she may be staying. Third respondent requested that Appolus cause the arrest of the applicant and to let him know as soon as she has been arrested.

[6] On the email copy attached to the papers, the message of the third respondent to Appolus is typed. There is however a handwritten message at the bottom of that page which is clearly marked for the attention of Warrant Officer Wessels which reads:
"Please try to execute the W/A over the weekend. Court 19/7".
It has a stamp of Appolus.

[7] In accordance with the dictates of the warrant, the applicant was arrested by members of the Bellville SAPS Detective Unit on Saturday 17 July 2021 and detained at Bellville SAPS. For inexplicable reasons, the applicant was not, in accordance with the directives of the warrant, taken by the SAPS to Pretoria in order to appear in court A of the Magistrate Court Pretoria. Instead, she was kept in detention in Bellville SAPS. My understanding of the handwritten part, is that Appolus directed Wessels that the applicant be arrested over the weekend and be brought before court on Monday the 19th July 2021.

[8] On Monday 19 July 2021 the public prosecutors in Bellville placed the matter on the roll before a magistrate. Due to covid-19, a pandemic which has caused the country to be placed under lockdown level 4 in terms of the Disaster Management Act, 2002 (Act No. 57 of 2002) the courthouse had to be decontaminated. Except for essential personnel in limited numbers, only few people were admitted into the courthouse under such circumstances primarily to attend only to necessary and urgent matters.

[9] Amongst others, the applicant, although legally represented, was not brought to court for health and safety reasons on the 19th. Her attorney already indicated to the prosecutors and the magistrate her desire to apply for bail and the prosecutors indicated their opposition to bail. The charge sheet used also indicated to all that the intention of the State was to transfer the matter to Pretoria. The magistrate postponed the matter for the applicant to be brought before court and ordered her further detention at Bellville SAPS until the next day, Tuesday 20 July 2021.

[10] On 20 July 2021 the public prosecutor addressed the court on the transfer of the matter to Pretoria North Magistrates' Courts. She had communicated with the investigating officer who had confirmed that the Sinoville SAPS were on their way and would arrive in Cape Town that night. They were going to transport the applicant to Pretoria for her to appear in that court on Friday 23 July 2021 for her bail application. The State opposed her being granted to bail.

[11] On the other hand, the applicant's view was that the arrest and detention were unlawful. From the first day, the applicant's position was that the Bellville court had jurisdiction to hear her bail application and she opposed the transfer of the matter to Pretoria North. The magistrate postponed the matter to Friday 23 July 2021 at 8H30 for a formal bail application to be made at Pretoria North Magistrates' Courts. She ordered the further detention of the applicant at SAPS Bellville cells and for the State to transport her to that court for that appearance. It is this order of the magistrate that caused the applicant to approach this court.

[12] The supreme law of the Republic [section 2], the Constitution of the Republic of South Africa, 1996 [Act No. 108 of 1996] [the Constitution] provides as follows in section 35(1)(d) (e) and (f):

"Arrested, detained and accused persons

35 (1) Everyone who is arrested for allegedly committing an offence has the right –

(d) to be brought before a court as soon as reasonably possible, but not later than –

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;

(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

(f) to be released from detention if the interests of justice permit, subject to reasonable conditions."

[13] Section 50(1)(a) of the Act provides as follows:

"Procedure after arrest

50(1)(a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in

the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant."

From the handwritten notes of Appolus on the email and the conduct of the SAPS thereafter, it is clear that the SAPS never intended to fulfil the provisions of the order as set out in the J50 warrant, which expressly directed all peace officers authorized to execute the warrant of arrest "***to arrest her and bring her before a lower court, PRETORIA NORTH at "A" Magisterial Court ...".***

[14] It is clear from the papers that the arrest of the applicant was planned. There was both a telephonic as well as email communication between the Commanders of the Detective Units of Sinoville in Pretoria and Bellville in Cape Town. The time periods of the arrest, travel and court appearance of the applicant were clearly a calculated, synchronized and detailed operation of the SAPS. The SAPS was aware that the arrest was destined to happen outside the territorial jurisdiction of the Pretoria North Magistrates' Courts.

[15] This planned operation did not, by design, ensure that the applicant was taken to Pretoria as directed by the order of the court. This is so even when the operation was led, at both police stations, by senior commissioned officers of the SAPS who are also commanders of the Detective Units. These SAPS units are the most strategic on the interaction with the courts and especially in relation to upholding the rights of arrested, detained and accused persons. The SAPS did not intend to comply with the provisions of section 50(1)(a) of the Act in that they did not, after arresting the applicant on the strength of the J50 warrant, ensure that she was brought to the court expressly mentioned in the warrant as soon as possible.

[16] The SAPS should have, after the arrest of the applicant, driven her to Pretoria. It is a matter of public policy that the State should obey the directives made by the court at the State's instance. The State should not apply for definitive authorizations and, without more than allow its functionaries to simply disregard the obligations imposed by such authority. Such conduct amounts to a threat to the rule of law [*Magidimisi v Premier of the Eastern Cape and Others* 2006 JDR 0346 (B) para 1].

Furthermore, section 50(1)(c)(ii) read with sub-section (d)(iii) provides:

"" Procedure after arrest

50(1) ...

(c) Subject to paragraph (d), if such an arrested person is not released by reason that –

...

(ii) bail is not granted to him or her in terms of section 59 or 59A, he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.

(d) If the period of 48 hours expires –

...

(iii) at a time when the arrested person is outside the area of jurisdiction of the lower court to which he or she is being brought for the purpose of further detention and he or she is at such time in transit from a police station or other place of detention to such court, the said period shall be deemed to expire at the end of the court day next succeeding the day on which such arrested person is brought within the area of jurisdiction of such court."

[17] The applicant was arrested on Saturday the 17th. The papers do not indicate at what time she was arrested. Provided there were cogent reasons not to bring her before court first thing on Monday morning, if she was arrested at any time before 16H00, the SAPS would have been obliged, ordinarily, to bring her before court before 16H00 on Monday [section 50(1)(c)(ii) of the Act]. If she was arrested after 16H00 on the Saturday, the SAPS would have been obliged, ordinarily, to bring her before court before 16H00 on Tuesday [section 50(1)(c)(ii) read with subsection (d)(i) and section 50(2) of the Act]. If the SAPS had acted in terms of the directions of the J50 warrant, and upon her arrest taken her in transit to Pretoria, they would have been obliged, most probably, to bring her before the Pretoria North Magistrates' court before the close of business on Monday, or the latest by Tuesday, depending on the manner of transport and what investigations still needed to be done in preparation for the first appearance and possible bail application, if any.

[18] Section 50(6)(a) provides as follows:

"50 (6)(a) At his or her first appearance in court a person contemplated in subsection (1)(a) who –

(i) Was arrested for allegedly committing an offence shall, subject to this subsection and section 60 –

(aa) be informed by the court of the reason for his or her further detention; or

> (bb) be charged and be entitled to apply to be released on bail, and if the accused is not so charged or informed of the reason for his or her further detention, he or she shall be released; ..."

For reasons better known to the National Prosecuting Authority (the NPA), the State caused the first appearance of the accused to be in Bellville, and not Pretoria as it should have been. Bellville is not the place which is expressly mentioned in the warrant as envisaged in section 50(1)(a) of the Act.

[19] The State has a discretion, as regards the warrant authorized and issued as envisaged in section 43 of the Act, on the decision of the execution of the warrant and the circumstances under which such warrant may be executed, as the circumstances and the information at its disposal may dictate [*Minister van die Suid- Afrikaanse Polisie and n' Ander v Kraatz en n' Ander* 1973 (3) SA 490 (A) at 510C-D]. What the State has to guard against, is that in the exercise of its discretion, the execution is lawful and the arrested person's rights to fair pre-trial procedures are not infringed [*Brown and Another v Director of Public Prosecutions and Others* 2009 (1) SACR 219 (CPD) at 225e]. What is clear to me, is that the State did not act in accordance with the peremptory terms of the warrant [section 44 of the Act; *Theobald v Minister of Safety and Security & Others* 2011 (1) SACR 379 (GJS) at para 310].

[20] Under the circumstances, the applicant's right to be released if the interests of justice permit, at his first court appearance after being arrested, entrenched in section 35(1)(e) and (f) of the Constitution, cannot be limited by a reading of section 50(6)(a) of the Act. Such an interpretation of that provision would seek to exclude judicial scrutiny on an urgent basis to which the deprivation of personal freedom is constitutionally entrenched. It would simply be inconsistent with the Constitution and invalid. Section 35(1)(f) of the Constitution has been referred to as the principal template against which Chapter 9 of the Act must be measured [*S v Dlamini, S v Dladla and Others; S v Joubert, S v Schietekat* 1999 (4) SA 623 (CC) at para 5]. Chapter 9 of the Act has section 58 to 71 and in essence deals with bail.

[21] The jurisdiction permitted under section 35(1)(d) - (f) of the Constitution command that the release of the arrested person from detention if the interests of justice permit, subject to reasonable conditions be determined at the first appearance within 48 hours

as defined; and cannot be interpreted to found jurisdiction simply to transfer to another court. The provisions of section 50(1) of the Act seeks to ensure that an arrested person is brought before a court within a short period of time, and that first appearance enables the arrested person to question in public the manner and circumstances of their arrest and provides them with an opportunity to apply for their release on bail or otherwise [*Minister of Law and Order v Kader* 1991 (1) SA 41 (AD) at 49F-G].

[22] A deliberate court appearance designed to be at a different court than the one mentioned in a warrant of arrest can never be allowed to be a strategy to prevent a bail application by an arrested person, at the instance of the State. The wounds of the majority of South Africans in the long history of abusive police and prosecutor procedures of apartheid South Africa may have closed, but are not yet healed. The thinking of the State functionaries requires serious re-alignment to our new jurisprudence. The police are obliged to co-operate to make an application for bail to take place [*Novick v Minister of Law and Order and Another* 1993 (1) SACR 194 (W) at 196i]. This obligation also rests on the NPA. The main thrust of our jurisprudence is that an arrested person need not be in custody for any period longer than is necessary [*Novick, supra* 197a].

[23] Expedition relative to circumstances is what is dictated by the provisions of the Act and the Constitution [*Mashilo and Another v Prinsloo* 2013 (2) SACR 648 (SCA) at para 16]. An arrest being a drastic invasion of personal liberty as it is, must still be justifiable according to the demands of our Bill of Rights. The conduct of the person effecting the arrest should not constitute an abuse of the right given to such person to effect the arrest [*Brown, supra,* at 227b-c]

[24] The reasonable conditions under which a person in the position of the applicant may be released, include, in my view, the determination of an amount to be paid as bail. Where the State brought an arrested person before a court other than the one which the warrant of arrest direct, and the arrested person makes his or her first appearance after being arrested at that other court, the arrested person may apply to be released, including on bail, at that other court. It is a risk which is inherent in the decision of the State, which is *dominus litis,* for which it cannot be heard to complain. The decision by the State to enroll the matter at another court, militates against the

court before whom the warrant directed the arrestee to be brought, having exclusive jurisdiction to deal with the bail application. Once the State take a binding decision to enroll, however erroneous, the decision may well continue to have lawful consequences [*Merafong City Local Municipality v Anglo Gold Ashanti Limited* [2016] ZACC 35 2017 (2) SA 211 (CC) at para 42].

[25] Any suggestion that the magistrate at that other court does not have the jurisdiction to make a determination on the question whether the accused may be released, stands to be rejected. Our courts, at every level and jurisdiction, have a duty to protect the subjects of the State against abuse of power by functionaries of the State, and where the issue is the freedom of the person, the stakes are even higher. In this matter, as a result of the operational plan of the SAPS, blessed by the NPA decision to enroll the matter in Bellville, the end result was that the applicant was before a magistrate's court which, in the absence of an explanation, she ought not to have been in the first place. These strategic and tactical delays deserve prompt judicial scrutiny, and not a pliable bench that is too eager to postpone and defer. It requires a Judiciary that embraced the concepts of substantive fairness and justice.

[26] The applicant did not place the identity of the person described in the warrant, as herself, in dispute. In fact, she knew the complainant, who according to her is the husband of a director of an entity in Pretoria where she is herself the Chief Executive Officer. It follows that there can be no confusion on her identity. In an affidavit prepared for the bail application and filed before this court, she mentions an offer to purchase that entity and allegations of breach of contract.

[27] Fraud in my view is one of the offences committed by persons ordinarily with above average cognitive capacity and functionality skills beyond basics. It is often a complex, systematic and methodical plan. Experience taught that it is not every legally trained mind that can formulate such a charge, because every case is unique. A magistrate in Pretoria North was satisfied on the basis of information given under oath that the Public Prosecutor in that court had a reasonable suspicion that the applicant committed the alleged schedule 5 offence [*Prinsloo and Another v Newman* 1975 (1) SA 481 (A) at 500C], and authorized the issue of a warrant. It was not open for magistrate Paleker to adjudicate on that discretion [*Groenewald v Minister van Justisie*

1973 (3) SA 877 (A) at 883H] save in very exceptional circumstances [*Prinsloo, supra* at 505C].

[28] I understand the written record of the proceedings constructed whilst magistrate Paleker was presiding on 20 July 2021 to have sufficiently informed the applicant of the reason for her detention. Against the background of the nature of the allegations against the applicant, the manner in which both the NPA and the magistrate in Pretoria North decided was appropriate as one to bring the applicant before that court, the fact that the offence was allegedly not committed within magistrate Paleker's area of jurisdiction and that the matter was postponed to a date in this week to enable the applicant to apply for bail, I am unable to conclude that the decision to postpone and transfer the matter to Pretoria was not a discretion judicially exercised. It should also be borne in mind that this is an urgent application where this court did not enjoy the benefit of the affidavits in opposition of the matter as well as the record of proceedings before the Magistrate.

[29] It is the court in Pretoria North that should have been seized with the matter. This was clear from the terms of the authority conferred by the J50 warrant. This was peremptory once the arrest was effected. The order sought by the applicant is not that I should revisit the decision of the magistrate and consider to order the magistrate to hear the application to be released. The motion is somewhat special, if not strange. I am asked to order the return of the applicant to Bellville court and to order the prosecutor to reverse a decision made by a Judicial Officer during court proceedings. In other words, I am asked to order the return of the applicant back to courthouse for the State to reverse an order of court.

[30] For these reasons, I made the following order:
The application is dismissed with costs.

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DM THULARE

ACTING JUDGE OF THE HIGH COURT