

SOUTH AFRICA / JUDGMENT

Malachi v Cape Dance Academy Int (Pty) Ltd and Others (14830/09) [2010] ZAWCHC 1; 2010 (7) BCLR 678 (WCC) [2010] 3 All SA 86 (WCC) (7 January 2010) [2010] ZAWCHC 1

COURT

Western Cape High Court, Cape Town

BEFORE

Hlophe JP

CASE / FILE NUMBER

14830/09

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IN THE HIGH COURT OF SOUTH AFRICA REPORTABLE

WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 14830/09

In the matter between

TATIANA MALACHI APPLICANT

and

CAPE DANCE ACADEMY INT. (PTY) LTD FIRST RESPONDENT

HOUSE OF RASPUTIN PROPERTIES (PTY) LTD SECOND RESPONDENT

ADDITIONAL MAGISTRATE,

DISTRICT OF CAPE TOWN THIRD RESPONDENT

MINISTER OF JUSTICE FOURTH RESPONDENT

MINISTER OF HOME AFFAIRS FIFTH RESPONDENT

THE COMMANDING OFFICER,

POLLSMOOR PRISON SIXTH RESPONDENT

JUDGMENT

DELIVERED ON THIS 7TH DAY JANUARY 2010

Hlophe JP:

A.

Introduction

- [1] On 22 July 2009 the applicant brought an urgent application to this court pursuant to an order made by the third respondent for her arrest in case 19806/09 of 9 July 2009. The applicant sought to set aside the order of third respondent and to further order her immediate release from Pollsmoor Prison by the sixth respondent. The applicant also sought to declare section 30(3) of the Magistrates' Courts Act 32 of 1944 ("the Act") and the common law rule of arrest *tanquam suspectus de fuga* unconstitutional and invalid. By agreement between the parties, the first and second respondents secured the discharge of the arrest warrant by the third respondent and the applicant was released from custody of the sixth respondent on 24 July 2009.
- [2] Mr Katz appeared together with Mr Garland for the applicant in this matter. First, second and third respondents filed a notice of intention to abide by the decision of this court. Fourth respondent initially filed a notice of intention to abide by the decision of this court, but later filed its notice of intention to oppose. On 17 September 2009 the court ordered the fourth respondent to deliver its answering affidavit on or before 1 October 2009 and its heads of argument on 29 October 2009. The fourth respondent failed to timeously file its answering affidavit and sought condonation thereof. Mr Bezuidenhout appeared on behalf of fourth respondent. On 5 November 2009 this court condoned the late filing of the answering affidavit by fourth respondent. Fifth and sixth respondents were unrepresented and no opposing affidavits were filed. Fourth respondent in its heads of argument and during the hearing of this application conceded that it was not opposing the relief sought by the applicant in relation to the constitutional invalidity of section 30 of the Act. Fourth respondent opposed the relief sought by the applicant in respect of declaring the common law rule of arrest *tanquam suspectus de fuga* constitutionally invalid as it is argued that the issue has already been decided upon and therefore merely academic.

B. Factual Background

- [3] The facts giving rise to this application are by and large common cause.

Applicant is a citizen of the Republic of Moldova. She was employed as an exotic dancer at a nightclub managed by the first and second respondents. On her arrival in South Africa during March 2009, applicant handed her passport to the owner of second respondent.

Applicant was initially informed that her passport would be kept for 30 days in order to have it registered at the Police station. Second respondent subsequently kept applicant's passport during the entire period of her employment. The owner of second respondent informed applicant that he would not return her passport unless the applicant paid him \$2000 for her air ticket and R20 000 as a levy. The applicant was unable to pay either of these amounts, as she was not earning sufficient income during her employment with second respondent.

Applicant sought and received the assistance of the Consul General of Russia to facilitate her return to her home country Moldova. Prior to her departure from South Africa on 9 July 2009, applicant was arrested and taken into custody at Pollsmoor Prison. The arrest was made pursuant to a court order issued by the third respondent ex parte on 9 July 2009 and warrant of arrest *tanquam suspectus de fuga*. The applicant was to remain in custody pending the return date, which was to be 30 July 2009. If the applicant furnished adequate and satisfactory security for the total claim of R100 000 plus interest and costs, the applicant would be released from custody and the order for arrest discharged. The applicant had no assets of any tangible value in South Africa and therefore was unable to furnish adequate and satisfactory security. By agreement between the parties, the first and second respondents secured the discharge of the arrest warrant by the third respondent and the applicant was released from the custody of the sixth respondent on 24 July 2009.

C. The issues to be decided

[4] The applicant sought an order:

4.1 deleting the words “arrest *tanquam suspectus de fuga*” from section 30(1) of the Magistrates’ Courts Act;

1HJ Erasmus, Jones and Buckle: *The Civil Practice of the Magistrates’s Courts in South Africa*, Ninth edition Volume 1: The Act at p83. See further the case of *Elliot v Fourie* 1992 (2) SA 817 (C).

2Ibid at p83

3[1995] ZACC 7; 1995

(4) SA 631 (CC) at 644F

4[2009] ZAPG JHC 40.

5Para 30 where Mathopo J further states that “. . . the liability of the respondent has not been determined. To order his arrest particularly since he has a counter claim which on his version exceeds the applicant’s unliquidated claim would be contrary to the spirit of the Constitution

6See *Amrich Property Holdings* para 31 & *Bid Industrial Holdings* para 43.

7At page 643 D-G.

8Article 13(1) of the Universal Declaration of Human Rights; article 12 of the International Covenant on Civil and Political Rights; article 2 of the Fourth Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms; article 22 of the American Convention on Human Rights; and article 12 of the African Charter of Human and People's Rights make provision for it.

9Section 12 provides that (1) Every person shall have the right to freedom and security of the person, which includes the right not to be detained without trial.

(2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

10Lawyers for Human Rights and Another v Minister of Home Affairs and Another

[2004] ZACC 12; 2004 (4) SA 125 (C) where the Constitutional Court stated at para 36 “ The importance of the right to freedom and, in particular, not to be detained without trial can never be overstated. The right has particular significance in the light of our history during which illegitimate detentions without trial of many effective opponents of pre-1994 government policy of apartheid abounded. We must never again allow a situation in which that is countenanced” See also *De Lange v Smuts No and Others* [1998] ZACC 6; 1998

(3) SA 785 (C) at para 24; *Freedom of Expression Institute and Others v President Ordinary Court Martial, and Others* 1999 (2) SA 471 (C); *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others*

[1995] ZACC 7; 1995 (4) SA 631 (CC) at para 10.

11Section 36 provides that “ The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, (a) the nature of the right (b) the importance of the purpose of the limitation (c) the nature and extent of the limitation (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

12*Elliot v Fourie* 1992 (2) SA 817 (C) at 819G-J

13See *Jones & Buckle* above at p83

14The recognition and enforcement of foreign judgments is the subject of the South African Law Reform Commission Project 121 Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters Report December 2006. The proposed bill contained in Project 121 provides for the recognition and enforcement of foreign civil judgments in Magistrates courts and the High Courts in the Republic and for matters connected thereto.

15The South African law reform commission has found that the common-law method for recognizing and enforcing foreign judgments in South Africa is a vital adjunct to the accelerated statutory procedure available under the Enforcement of Foreign Civil Judgments Act 32 of

1988. An accelerated procedure for enforcing foreign judgments in South Africa and for assisting local litigants to enforce the judgments of South African courts abroad is available under the Enforcement of Foreign Civil Judgments Act 32 of

1988. undesignated countries will still have to rely on the common law. See para 4.3.1 of Project 121 December 2006.

16Sachs J in *Coetzee v Government of South Africa* at 659F.

17Section 3 of Act 34 of 2005 provides that “The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by-...”

18*ibid*

19*Bid Industrial Holdings* at paragraphs 30 & 45

20At para 62.

21Para 62-62

22*Zondi v MEC Traditional and Local Government Affairs and Others* 2006 (3) SA 1 (CC) para [47]

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