

SOUTH AFRICA / JUDGMENT

Nel v Head, SAPS Criminal Record Centre (51583/2011) [2016] ZAGPPHC 288 (15 March 2016) [2016] ZAGPPHC 288

COURT

North Gauteng High Court, Pretoria

BEFORE

Janse Van Nieuwenhuizen

CASE / FILE NUMBER

51583/2011

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

REPUBLIC

OF SOUTH AFRICA

Case

Number: 51583/2011

DATE:

15 MARCH 2016

In the matter

between:

DR RICHARD

NEL.....Applicant

And

THE HEAD, SAPS

CRIMINIAL RECORD

CENTRE.....Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The applicant seeks an order that “any inscription or record on the electronic record system of Respondent contradictory to RN1 be removed and/or deleted

APPLICANT’S VERSION

- [2] The applicant is Richard Nel, a major male business man. The applicant states that he was arrested at Oliver Tambo Airport on 8 October 2010, for reasons unknown to him. During the investigation into the arrest it came to the applicants’ knowledge that a conditional warrant for his arrest was unlawfully circulated by "a Police Officer", who stated under oath that the applicant has a criminal record.
- [3] During February 2011 the applicant requested his attorney of record to address a letter to the respondent and the department of Home Affairs to rectify the particulars in respect of his criminal record. To this end and on 25 February 2011, the applicant’s attorney of record addressed a letter to the respondent and the department of Home Affairs. The following extracts from the letter is instructive:

“3. Ons klient ontken dat by ’n kriminele rekord het soos op u stelsel aangetoon en versoek gesertifiseerde afskrifte van die dokumente waarop die rekord saamgestel is.

4. Ons ontvang graag die dokumente of ’n bevestiging dat ons klient se rekord reggestel is binne 30 dae hiervan by gebreke waarvan ons die nodige geregtelike stappe teen u sal neem namens ons klient
5. Ons ontvang graag UITERS DRINGEND u bevestiging dat die dokument soos deur uself uitgereik inderdaad eg is en korrek is.
6. Sou ons nie u sodanige bevestiging ontvang nie ontvang ons graag uiters dringend ’n aanduiding wat die korrekte situasie is en as u inderdaad aantoon dat daar kriminele rekord teen ons klient se naam gelys is, ontvang ons graag daarmee saam die brondokumente wat

sodanige kriminele rekord onderie. ”

- [4] On 3 March 2011 and in response to the aforesaid letter, the applicant was informed by the respondent that his fingerprints must be taken at Pretoria Central Police Station and that same should be submitted to the offices of the respondent. Subsequent to the submission of his fingerprints, the applicant received a clearance certificate dated 11 March 2011 issued by Captain White, which certificate is attached to the founding affidavit as Annexure RN1.

[5] Notwithstanding the aforesaid and on 27 July 2011, it once again came to the applicant's attention that it is alleged that he has a criminal record. Further correspondence was addressed to the respondent and Home Affairs without any success.

[6] The respondent's failure to respond culminated in launching of the present application.

RESPONDENT'S VERSION

[7] The respondent opposes the relief claimed by the applicant on three grounds, to wit:

i. Annexure RN1 does not reflect the true position;

ii. Annexure RN1 was never issued by the SAPS Criminal Record Centre;

iii. The applicant has previous convictions which convictions are reflected in the records of SAPS Criminal Record Centre.

[8] Captain Louw, the Section Commander, Criminal Information / Wanteds deposed to an affidavit which inter alia gave a brief background in respect of the information kept by the SAPS Criminal Record Centre ("CRC").

[9] Captain Louw explains that the information relating to a person's previous convictions is linked to such person's fingerprints and not to the person's identity number. This measure is taken to safeguard against identity theft.

[10] He, furthermore, explained that a person's fingerprints are taken upon his/her arrest and should such person be convicted of an offence, the information relating to the conviction is captured on the electronic systems of CRC.

[11] In investigating the allegation by the applicant, Captain Louw established that the applicant applied for a clearance certificate on 2 March 2011 and to this end provided a set of his fingerprints. According to Captain Louw, it takes approximately 6 to 8 weeks from the date of the application for a clearance certificate until the actual certificate is available.

[12] He examined annexure RN1 and found that the document was not issued to the applicant on 11 March 2011. A certificate setting out the applicant's criminal record was, however, issued to the applicant on 1 April 2011.

[13] Annexure RN1 was then presented to Captain White who advised that the signature that appears on RN1 is not his signature and that the datestamp used on Annexure RN1 has not been used by him since February 2007. Captain Louw furthermore attached various court documents to his affidavit in confirmation of the applicant's criminal record.

APPLICANT'S RESPONSE

[14] The applicant, in his replying affidavit, stated that again attended at the offices of the respondent to verify his record against his fingerprints. According to the applicant his fingerprints were taken and he once again received a clearance certificate on 4 December 2014 signed by a certain Major Makgoba. Thereafter on 8 April 2015, the applicant alleges

that he approached the respondent's offices once again this time only with his identity number, once his identity number was run through the system he received a certificate to confirm a list of previous convictions alluded to by Captain Louw in his answering affidavit.

ISSUE IN DISPUTE

[15] In essence the dispute between the parties is whether the applicant has a criminal record or not.

REQUIREMENTS FOR A FINAL INTERDICT

[16] In order to succeed with the relief claimed, the applicant needs to allege and proof:

- i. a clear right;
- ii. an injury actually committed or reasonable apprehended; and
- iii. the absence of any other satisfactory remedy.

EVALUATION Clear right

[17] A factual dispute exists on the papers in respect of the applicant's right to the relief claimed. The dispute should have become apparent to the applicant upon receipt of the respondent's answering affidavit.

[18] Notwithstanding the aforesaid, the applicant filed a replying affidavit and persisted with the application.

[19] In view of the contents of the applicant's attorney's letter, *supra*, one would have expected the applicant to exhaust the remedies provided in the Promotion of Access to Information Act, 2 of 2000, ("the Act") prior to the launching of the present application. The documents might have indicated another cause of action to be pursued.

[20] Be that as it may and after argument was addressed at the hearing of the application, the applicant apparently realised the difficulty he is facing on the papers as they stand. I reserved judgment in the matter and prior to judgment being delivered, the applicant brought an application to amend the Notice of Motion by inserting the following prayer:

"1A In the event of the Electronic Criminal Record System of the Respondent reflecting any convictions on the fingerprints and/or identity number of the Applicant and the Respondent be ordered to furnish the Applicant with reasons and the source documentation and/or SAP 69 instruction documentation including fingerprints from which the record of the convictions was compiled."

[21] The respondent opposed the granting of the amendment.

APPLICATION TO AMENDMENT

- [22] There is not a single allegation contained in the founding affidavit to support the alternative relief the applicant sought to introduce. Ms Arroyo counsel for the applicant, was invited during the hearing of the application to draw the court's attention to any such allegation/s. She could, understandably, not do so.
- [23] Ms Naude, counsel for the respondent, indicated that save for the aforesaid difficulty, the respondent will be severely prejudiced if the amendment is granted. She submitted that the respondent has not had an opportunity to answer to the relief sought to be introduced by the amendment.
- [24] I agree. It might well be that the respondent would have raised failure to comply with the provisions of the Act as a point in limine.
- [25] It is, however, not necessary to speculate in this regard. The relief sought to be introduced by the amendment has no factual basis and was not ventilated in the papers or during argument.
- [26] In the premises, the application stands to be dismissed with costs.

FINDING

- [27] Due to the factual dispute alluded to supra, the applicant has failed to proof or a preponderance of probabilities that he has a clear right to the relief claimed. In view of the aforesaid finding, it is not necessary to consider the remaining requirements for a final interdict.

ORDER

1. The application to amend is dismissed with costs.
2. The application is dismissed with costs.

H JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

QAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the Applicant Advocate Monique Arroyo

Instructed by Walter Niedinger & Associates

Counsel for the Respondent: Advocate Naude

Instructed by The State Attorney

Date Heard 29 January 2016

Date of hearing of application to amend: 11 March 2016

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