IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

27/9/2016

CASE N0:73576/16

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~

(3) REVISED **YES**

27/9/2016 [signature]

DATE SIGNATURE

In the matter between:

EDWIN MANYAKA RAPHOLO	Applicant
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE HEAD OF CORRECTIONAL SERVICES	Third Respondent
THE HEAD OF THE KGOSI MAMPURU 11 CORRECTIONAL CENTRE	Fourth Respondent
THE MINISTER OF POLICE	Fifth Respondent
ADDITIONAL MAGISTRATE MNCUBE N.O	Sixth Respondent

JUDGEMENT

NEUKIRCHER AJ

1. It is the most basic and fundamental principle of law that all orders of court must be complied with properly until they are set aside[1] and that the most obvious reason for this would be that the integrity of the court system relies upon the upholding of and compliance with the judgments of our courts. Implicit in this too is that there is respect for a judicial system which has, at its roots, certain rules and regulations.

2. In the present matter we are dealing with issues directly related to the criminal justice system. If the present facts were not so appalling one might be constrained to believe that they formed the script of a play of a new television series or a movie, but helas no.

3. On 2 December 2008 the applicant was convicted and found guilty of culpable homicide and sentence was passed. His appealed his conviction and sentence and on 8 March 2010, Southwood J and Goodley AJ upheld the conviction but upheld the appeal on sentence and instead sentenced the applicant on counts 1 and 2 (taken together for purposes of sentence) to 4 year's imprisonment of which 1 year was suspended for a period of 5 years on certain conditions. The court

[1] *Culverwell v Beira 1992 (4) SA 490 (w) @ 4948; Bezuidenhout v Patensie Sitrus Behend Bpk 2001 (2)SA 224(E) @ 229 B-0*

furthermore issued a directive that the applicant was to hand himself over at Voortrekker prison, also known as Atteridgeville Men's prison within 48 hours of that order.

4. In compliance with this order, the applicant, accompanied by this brother in law, then handed himself over only to be told by the prison warder authorities that they were not in possession of his records and that as a result, they could not detain him. He was instructed to return home and was told that once the authorities had received the records from the High Court, they would send their officials to collect him so that he could start serving his sentence.

5. The applicant states that he then provided the prison officials with an address at which they could find him and he went home and waited.

6. Since then:

   6.1. the applicant married on 29/ May 2012;

   6.2. his first child was born on [.....] 2010;

   6.3. his second child was born on [.....] 2013;

   6.4. his wife is expecting the couple's third child;

   6.5. he obtained employment at Cell C.

7. It appears that in the six and half years that have passed since the

order of 10 March 2010 the applicant has turned his life around. He has a family he supports, he is gainfully employed and he is a contributing member of society (there is nothing on these papers to suggest otherwise)

8. Out of the blue on 29 August 2016 the applicant was informed by the clerk of the Pretoria Magistrate Court that he was to present himself at the Voortrekker Prison to start serving his sentence.

9. Of course there was a flurry of activity that followed this notice- the applicant sought urgent legal advice, his attorney addressed correspondence to the clerk of the magistrate court, *inter alia,* asking that the warrant for the applicant's arrest be stayed pending an application for reconsideration of the order given the lapse of time but this was met with a stony refusal and hence this application was launched.

10. <u>The order sought</u>

The thrust of the relief is twofold:

10.1 to stay the implementation of the warrant issued on 7 September 2016 pending finalisation of an application for the reconsideration of the appeal under case no A 576/2009, and

10.2. preventing the arrest and detention of the applicant pursuant the warrant, pending finalisation of the reconsideration of the appeal under case no A576/2009.

11. Although the Respondents oppose the matter, they have chosen not to file any papers. Mr Mashuga acts for the NDPP (1st respondent) and Mr Mothibi for the Minister of Justice and Correctional Services (3rd respondent) and the other 4 Respondents.

12. In brief the argument presented by Mr Mntshweni for the applicant is the following:

12.1. that such a considerable period of time has lapsed since sentence was handed down on 8 March 2010 that should applicant have to serve his sentence now, given his substantial change in circumstances, this would impair his dignity and freedom;

12.2. that he now has a wife and 2 children he is responsible for and if he is incarcerated, their right to social security, right to livelihood and right to education will be impaired as there will be no-one to provide for them and they will be left without a roof over their heads;

12.3. that to insist that the applicant start serving this sentence and then launch this novel application for reconsideration would

defeat its purpose, he would lose his job, his family would suffer and it would cause substantial injustice.

12.4. the court must take into account that serving a sentence also has a Constitutional implication for the applicant – his civil liberties are taken away, he must wear a prison uniform and receives a prison number.

13. Mr Mntshweni also submitted that, given the Constitutional implications of the relief sought in this matter, I was at liberty to grant relief under the provisions of s172 of the Constitution.

14. Mr Mashuga submitted that:

14.1 this application could never have laboured under the impression that he would not be required to serve his sentence;

14.2. that it is in the interests of justice and the interests of the family of the deceased that the applicant now serves the sentence handed down;

14.3. that if he had intended to appeal further the applicant could have utilised the avenues open to him at the time, but he chose not to do so, instead 6 years later he intends to follow a path for which there is no provision in any prevailing legislation;

15. Mr Mothibi took task with the issue of urgency as well as the merits of the application and submitted that:

15.1. 6 years ago the applicant was ready to serve his sentence and now, because his circumstances have changed, he wants his case reconsidered. He likened his matter to the recent case of Bob Hewett who, after more than 40 years was charged and convicted of rape and sexual assault and sentenced to 6 years imprisonment;

15.2. the applicant asks this court to interfere with an order made in 2010. To accede to this request will bring the administration of justice into disrepute;

15.3. the Applicant has had 6 years to approach a court to petition or appeal his sentence but he never did. Suddenly on the eve of him having to actually serve his sentence, now he wants his warrant stayed;

15.4. that this matter is not urgent. The matter should be struck from the roll and the applicant ordered to present himself to commence serving his sentence.

16. On the issue of costs, it was submitted that each party should bear their own costs because of the conduct of the Respondent in waiting 6 years to execute the warrant.

17. In reply Mr Mnthsweni submitted that it was important to strike a balance below the interest of justice and the interest of the applicant. He submitted that the Hewitt matter is not comparable as Hewitt was only recently charged and brought to trial.

18. What is appalling in this matter is the fact that the Third and Fourth Respondents were seemingly unconcerned about the fact that the applicant presented himself to start serving his sentence and they had not received any documents from the court as yet. Instead of contacting the court to obtain the necessary documents to process the applicant so that he could start serving his sentence, the prison officials sent him home and said that they would send officials to fetch him.

19. Inasmuch as the Respondents have elected not to file any affidavit in this matter, nor have they asked for a postponement to do so, I must accept the applicant's version of events.[2]

20. It would this appear that from 10 March 2010 until 29 August 2016 the Third and Fourth Respondents did absolutely nothing.

21. This is, to say the least, not only reprehensible, but also immensely concerning: if they have left the applicant free on the streets how many other convicted criminals are similarly turned away from the prisons because officials have not "received their papers"? How many of those simply take advantage of that situation and disappear never to be found to actually serve their sentences? In this matter at least the appellant remained at the address he furnished to the prison authorities in 2010 which says much about his character in my view.

[2] Plascon-Evans Paints Ltd v Van Riebeck Paints PIL 1984 (3) SA 623 (A).

22. But it is now 6 years later. Had applicant served his sentence in 2010 he would probably have been released on parole during late 2010 or 2013 and it goes without saying that, by now, he would have continued with his life. Instead, thanks to the shoddy manner in which his case has been handled, his life has been turned upside down. This is certainly something which merits consideration.

23. As Mr Mntsweni put it, the sentence of incarceration is supposed to have a rehabilitative effect on a prisoner. In this matter, this rehabilitation occurred without the incarceration.

24. Whilst I agree with that submission I must be mindful of the fact that I must not lose sight of the public interests which are weighed so carefully in criminal matters. It is also in the interest of public policy and the proper administration of justice that sentences handed down should be carried out efficiently.

25. But what we have here is anything but a swift and efficient meeting out of justice and the question now is whether, as has been said by our courts in many contexts, "justice delayed is justice denied".[3]

26. In S v Cunha (2012 JDR 2234 GNP) the appeal came before the full

[3] see for example S v Myaka 2012 JDR 1745 (GSJ) and many others

bench nearly 20 years after the incident. The 2 accused were convicted on 27 September1999 and leave to appeal was granted to the accused on petition on 13 January 2006. The accused was incarcerated on 27 September 1999 and released on bail on 16 March 2006 pending his appeal which was eventually heard on 6 November 2012.

"[10] In the light of the paucity of information pertaining to the delay, I am *of the view that although the appellant should have taken steps to pursue the appeal, the DPP is primarily obliged to ensure that matters are finalised within* a *reasonable period of time, In my view the DPP should have proceeded to enrol the matter when appellant failed to take the necessary steps to pursue the appeal. The DPP in my view has* a *duty to society to ensure that the administration of justice runs smoothly and in accordance with the spirit and ethos enshrined in the Constitution. They would fail in their duty to uphold the Constitution if they leave the finalisation of matter in the hands of appellants who may abuse the system by their inaction.*

[11] The appellant is in terms of the Constitution entitled to have a *matter finalised within* a *reasonable time, this must also include appeal procedures. Especially* a *6 years delay which occurred before the matter came before us cannot by any stretch of the imagination be regarded as reasonable. It is virtually impossible to ensure that justice is done when* a *delay like this occur…"*

Also

"14] .....the appellant has a *constitutionally enshrined right to* a *finalisation of proceedings against him without unreasonable delay...."*

27. Mr Mntsweni also argued that given the novel approach such an application for reconsideration would be an extension of his clients constitutional rights to freedom.

28. If he is correct in his submission then it is open to this court to apply the provisions of section 8(3) of the Constitution, 1996 to develop the common law to the extent that legislation does not give effect to that right.

29. Perhaps the argument may be taken further on the basis that, given the lapse of 6 years since sentence was handed down, the clear rehabilitation of the applicant and the respondents failure to comply properly with their duty to *"ensure that the administration of justice runs smoothly and in accordance with the spirit and ethos enshrined in the Constitution"* and the alleged prejudice that applicant would suffer were he to serve his sentence now versus the interest of the public that all sentences be carried out, that there is a case to be made for the relief sought by applicant.

30. This matter, and the relief I grant, however, must not be seen to be a *carte blanche* in all matters of this nature. Each case is unique and must be carefully weighed on its own merits. Perhaps had the Respondents elected to file answering papers the outcome may have been very different.

31. I also make no comment on the process to be followed in the so-called "application for reconsideration" or its merits-I leave that to the person or court hearing the matter.

32. As to costs: Mr Mashuga argued that given the Respondents conduct he could not insist on costs if successful but that no order should be made either way. Mr Mntsweni argued that either way the appeal should be granted costs of the application.

33. No order will be made as to costs. Although applicant will be successful, he is not without blame in this matter as in the 6 years since he initially reported to Voortrekker prison, he has done nothing to see to the serving of his sentence. All that, to an extent, redeems him are the words of my esteemed colleagues set out in par 26 *supra.*

34. Thus that order I make is the following:

34.1. the applicant is to deliver his application for reconsideration of the appeal under case no A576/2009 (or whatever process he be so advised) within 15 days of date hereof to whoever person or court he is so advised;

34.2. pending finalisation of the proceedings set out in 34.1 (supra) the warrant of arrest issued out by Magistrate Mncube on 7/9/2016 authorising the arrest of the applicant is stayed;

34.3. pending finalisation of the proceedings set out in 34.1 (supra) the Respondents are hereby interdicted and restrained from arresting the applicant and handing him over for the purpose of serving his sentence;

34.4. should the provisions of paragraph 34.1 (supra) not be carried out within 15 days of date hereof, this order will lapse immediately;

34.5. each party shall pay their own costs of this application.

B NEUKIRCHER
Acting Judge of the High Court
27 September 2016