IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 36375/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

E.M. KUBUSHI **DATE: 31 AUGUST 2022**

In the matter between:

VUSI REGINALD MATHIBELA	APPLICANT
and	
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	FIRST RESPONDENT
NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	SECOND RESPONDENT
THE AREA COMMISSIONER OF KGOSI MAMPURU II CORRECTIONAL CENTRE	THIRD RESPONDENT
THE WARDEN OF KGOSI MAMPURU II CORRECTIONAL CENTRE	FOURTH RESPONDENT

REASONS FOR JUDGMENT IN TERMS OF UNIFORM RULE 49(1)(C)

KUBUSHI J

INTRODUCTION

[1] This matter related to the detention of the Applicant, as an unsentenced offender, at the C-Max Centre of the Kgosi Mampuru II Correctional Centre ("the C-Max"), whereas, as was alleged by the Applicant he should be detained at the local remand detention facility.

[2] The Applicant was detained as such because he was, on 23 June 2022, together with three of his co-accused, convicted on charges of murder, attempted murder, unlawful possession of a firearm(s) and unlawful possession of ammunition. The criminal case was postponed to 4 August 2022 for sentencing. The matter appeared before this Court in the Urgent Court on 10 August 2022, when the date of 4 August 2022 had already passed. This Court was informed that the criminal case was postponed further to 20 to 21 September 2022 for sentencing.

[3] The application was opposed by the Second, Third and Fourth Respondents. For ease of reference, they shall be referred to herein, collectively as the Respondents, and individually as the Second, Third or Fourth Respondents.

[4] The Applicant's counsel insisted that the matter remained urgent as it involved the detention of a person. Counsel for the Respondents, on the other hand, contended that the matter was not urgent. This Court took a view that the application was inherently urgent because the Applicant's rights to freedom were at stake.

[5] When the matter was to be heard, the Court had not read the papers as they had not been uploaded on Caselines, only the heads of argument were uploaded. The Applicant's counsel informed this Court that the Applicant's attorneys had timeously uploaded the correct application on Caselines. For some odd reason, both counsel for the Applicant and the Respondents, were able to access the papers on Caselines whilst the Court was unable to do so.

[6] Since the application was to be decided urgently, the Applicant's counsel was allowed to move the application and to provide the papers at a later stage. The papers were later sent through by electronic mail to the Court's clerk.

[7] The matter was decided in favour of the Respondents and the Application was, as a result, dismissed with costs. Because this matter was on the urgent roll, a Court Order was granted without any reasons provided. The Applicant applied in terms of Uniform Rule 49 to be provided with the reasons for such Court Order. Below are the reasons.

BACKGROUND

[8] The Applicant, whilst awaiting the finalisation of his trial, instituted an application against the Respondents for an order to review and set aside the decision of the Second and/or Third and/or Fourth Respondents, dated the 26 June 2022 to transfer the Applicant from the local remand detention facility to the C-Max. That application served in the Urgent Court, on 19 July 2022, before Sardiwalla J, who granted an order in favour of the Applicant ("the Court Order"). The Respondents were, in that Court Order, directed to remove the Applicant from the C-Max and to place him with other remand detainees at the local remand detention facility.

[9] It, further, appeared that the Applicant was never transferred back to the local remand detention facility as directed in the Court Order. The Respondents' explanation not to act as ordered by the Court Order was that they were served with an incorrect Court Order. The Respondents contended that due to the said incorrect Court Order, which they had requested the Applicant's attorney to rectify, to no avail, they were not in a position to comply with it or implement it, before it could be rectified. The Applicant was, as such, aggrieved by this conduct of the Respondents, which he alleged was in contravention of the Court Order and that the Respondents were in contempt thereof. He, as a result, instituted these proceedings for relief.

[10] In the application before this Court, the Applicant sought an order to declare the Second and/or Third and/or Fourth Respondents to be in contempt of the Court Order, and for the Second and/or Third and/or Fourth Respondents to be sentenced to imprisonment for a period of thirty (30) days, which committal was to be suspended on condition that the Second and/or Third and/or Fourth Respondents complied with the Court Order. Such compliance was to commence from 10 August 2022. At the time of instituting these proceedings it was alleged that none of the Respondents had complied with the said Court Order.

ARGUMENTS

[11] The Respondents' counsel raised a point *in limine* on the ground that the Court Order upon which the Applicant relied for his relief was not authorised by the Judge (Sardiwalla J) who granted it, and therefore, was defective, invalid and not enforceable. The argument was that in the Court Order that was authorised by Sardiwalla J the cost order that was granted was based on a party and party scale, whereas, the cost order in the Court Order that was endorsed by the Registrar and upon which the Applicant relied for relief, was on a punitive scale. On the merits, the Respondents' counsel argued that the Applicant was not entitled to the relief he sought because he had not established that the Respondents have not complied with the Court Order, that is, the requirements of contempt of the Court Order had not been established.

[12] In response to the argument by the Respondents' counsel, the Applicant's counsel submitted that the Court Order was valid and enforceable, and that on the merits, the Applicant had succeeded to show that the Respondents had not complied with the Court Order, in that he was able to establish all the requirements of contempt of the Court Order.

[13] It became common cause between the parties that the issue that ought to be decided by this Court was whether the Respondents had complied with the Court Order or not.

ANALYSIS

[14] Based on the so-called Plascon - Evans rule, this application was decided by relying on the Respondents' version of events as well as those aspects of the Applicant's version that were admitted by the Respondents.[1] The rationale for this approach was founded in the principle that, in motion proceedings, the Court is not equipped to determine the probabilities or improbabilities of the opposing factual propositions expressed by the parties.[2]

Whether the Court Order should have been complied with

[15] The main contention of the Respondents' point *in limine* was that the Court Order that was granted by Sardiwalla J and that was endorsed by the Registrar were not the same. The difference was brought about by the cost order that was stated in the respective Court Orders. The Respondents submitted that the parties had agreed that the cost order be awarded on a party and party scale of costs, and that was what Sardiwalla J ordered, but the Court Order endorsed by the Registrar, stated a cost order awarded on a punitive scale of costs. It was in this regard that the Respondents argued that the Court Order endorsed by the Registrar was defective, in that it was not authorised by the Judge. Relying on the judgment in *Motala*[3] the Respondents' counsel argued that the unauthorised Court Order was defective, invalid and could, therefore, not be enforced unless corrected.

[16] It was the view of this Court that *Motala* was not apposite in the circumstances of this application. The facts in *Motala* are that the Judge had exercised the powers that ought to have been exercised by the Master of the High Court. In deciding that matter, the Supreme Court of Appeal made a

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[1] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E - 634C.
[2] National Director of Public Prosecutions v Zuma (Mbeki and Another intervening) 2009(2) All SA 243 (SCA) at para [26].
[3] Master of High Court v Motala 2012 (3) SA 325 (SCA) para11 -13.

finding that the Judge in usurping the powers of the Master of the High Court had no jurisdiction to do so and, consequently, declared his judgment a nullity.

[17] Furthermore, the facts in the matter before this Court were distinguishable, in that, whereas in *Motala* the Court Order in question was granted by a Judge, in this matter the Court Order in dispute was endorsed by the Registrar. Secondly, the principle enunciated in *Motala* was that a Court Order issued by a Judge without authority and jurisdiction was not binding. Thus, this Court found that *Motala* was no authority for the proposition that incorrectly granted orders of Court should not be obeyed.

[18] It is a trite principle of our law that all orders of Court whether correctly or incorrectly granted have to be obeyed until they are properly set aside. Following on this principle, it was this Court's view that up until the Court Order was set aside by a competent Court, the Respondents were bound to comply with it, even if, as according to the Respondents, it was faulty.

Whether the Applicant made out a case for Contempt of Court

[19] The Applicant's contention was that, even though he was convicted, he was still a remand detainee since his criminal trial had not been finalised. Based on his contention that he was a remand detainee, the Applicant alleged that the decision of the Respondents to retain and/or accommodate him at C-Max, was in violation of the Court Order and, as a result thereof, the Respondents were in contempt of the Court Order.

[20] The Respondents' contention was that following the Applicant's conviction, the Department of Correctional Services classified him as an unsentenced offender, in terms of section 1 of the Correctional Services Act ("the Act").[4] Having classified the Applicant as an unsentenced offender, a reappraisal of his security classification was done and a decision was taken to

[4] Act 111 of 1998.

accommodate him in a more secured part of the Correctional Centre, hence his continued stay at C-Max.[5]

[21] It was the Respondents' submission that when an inmate is admitted at the Correctional Facility, an assessment of his/her security classification is made. Such security classification, according to the Respondents, is in accordance with section 29 of the Act,[6] not a once-off activity, but is done as and when the circumstances of the inmate changes.

[22] It was not in dispute that, at the time the application served before this Court, the Applicant had been convicted, hence he was an unsentenced offender. His circumstances had changed from those that prevailed when he appeared before Sardiwalla J, because at that time, he was not yet convicted. These changed circumstances, entitled the Respondents to reassess his security classification, afresh. Therefore, the decision to retain and/or accommodate the Applicant at C-Max was a new decision that did not have any relevance, whatsoever, to the Court Order. This finding, however, should not be construed as a decision by this Court that the Respondents' decision to retain and/or accommodate the Applicant at C-Max, was correct.

[23] In addition, it was this court's view that the Applicant did not satisfy all the requirements for the relief he sought in this application.

[24] The requirements for contempt are trite. For the Applicant to be successful in his claim he must prove the following elements: (a) the existence of the order; (b) the order must be duly served on, or brought to the notice of, the alleged contemnor; (c) there must be non-compliance with the order; and (d) the non-compliance must be wilful and *mala fide*.[7]

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[5] This according to the Respondents was in terms of section 7 (d) of the Act.

[6] Section 29 of the Act provides as follows: "Security classification is determined by the extent to which the inmate presents a security risk and so as to determine the correctional centre or part of a correctional centre in which he or she is to be detained".

[7] Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Shadrack Shivumba Homu Mkhonto and Others v Compensation Solutions (Pty) Limited 2018 (1) SA 1 (CC) para 73.

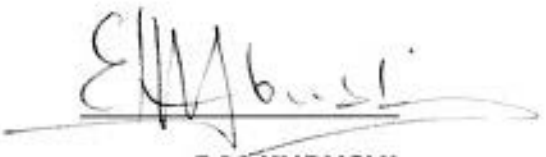
[25] It was common cause that a Court Order was granted in this matter. It was, also, not in dispute that the Respondents were aware of the Court Order and did not comply with it. However, it was this Court's view that the Applicant failed to establish that the Respondents wilfully failed to comply with the Court Order.

[26] It is trite that once it is shown that the order was granted and served or came to the notice of the Respondent, and that the Respondent disobeyed or neglected to comply with it, both wilfulness and *mala fides* will be inferred and the Applicant is *prima facie* entitled to a committal order. The Respondent, in turn, must advance evidence that establishes a reasonable doubt as to whether non-compliance was *mala fide* and wilful. Even though the Respondent may be wilful he/she may escape liability if he/she is *bona fide* – that, is, he/she genuinely, through mistake, believed that he/she was entitled to commit the act, or the omission.

[27] The evidence on record, that was not disputed, show that the Respondents genuinely, through mistake, failed to act on the Court Order because they believed that the Court Order was defective and that the Applicant ought to correct it first, before they could act on it. This Court, earlier in this judgment, dealt with the issue of the validity or otherwise of the Court Order which the Respondents failed to comply with. The Respondents, thus, acted under a genuine mistaken believe that they were correct in not complying with the Court Order. It could, therefore, not be said that they were not *bona fide* in their omission, nor could it be said that they deliberately defied the Court Order.

CONCLUSION

[28] It was on these reasons that this Court came to the conclusion it did, when it dismissed the Applicant's application with costs.



E.M KUBUSHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

APPLICANT'S COUNSEL:	ADV. M MPHAGA SC
APPLICANT'S ATTORNEYS:	MKHABELA ATTORNEYS
RESPONDENTS' COUNSEL:	ADV. E LEBEKO
RESPONDENTS' ATTORNEYS:	STATE ATTORNEY