REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

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

Case No: 3866/2015

Before the Hon. Mr Justice Bozalek

Hearing: 18 May 2016
Judgment Delivered: 24 June 2016

In the matter between:

HENOCH ARENDSE **Applicant**

And

MRS H ALMAN,
THE MAGISTRATE WYNBERG **1st Respondent**
THE DIRECTOR OF PUBLIC PROSECUTIONS,
CAPE TOWN **2nd Respondent**
THE MINISTER OF JUSTICE &
CONSTITUTIONAL DEVELOPMENT **3rd Respondent**

JUDGMENT

BOZALEK J

[1] In this application the applicant seeks an order that he is deemed to have served a sentence of imprisonment imposed upon him by the Magistrate of Wynberg, which sentence he has in fact not served, alternatively, any other order that this Court considers just and equitable.

[2] The first and third respondents, the Wynberg Magistrate and the Minister of Justice and Constitutional Development, abide the decision of the Court but the second respondent, the Director of Public Prosecutions, Cape Town, opposes the relief sought.

[3] In an amended notice of motion the applicant bases his relief on the delay in putting the sentence into operation and on the basis that his constitutional rights to a fair trial, to dignity, freedom and the security of his person and not to be punished or treated in a cruel and inhuman or degrading way, will be unjustifiably infringed should the relief not be granted. The sentence was initially imposed upon him by the first respondent on 11 March 2003, and was confirmed by the Supreme Court of Appeal on 11 September 2006

BACKGROUND

[4] Before dealing with the issues which this application raises a brief background and history is necessary. Unless otherwise indicated these facts and dates are common cause between the parties.

[5] The applicant is a 51 year old correctional officer in the employ of the Department of Correctional Services with approximately 31 years of service to his name.

[6] On 9 July 1998 he was arrested by members of the South African Police Services when he was found in a vehicle in possession of a bag containing 2,109kg of cannabis packed into approximately 40 separate plastic bags. At the time of his arrest the applicant had just left the Pollsmoor prison premises where he worked and, on his own version, his intent was to return to the Pollsmoor premises after picking up the bag in question.

[7] The applicant, with two co-accused, was tried in the District Magistrates Court at Wynberg and on 18 April 2000 he was convicted of contravening sec 5(b) of the Drugs and Drug Trafficking Act, 140 of 1992 i.e. dealing in cannabis. He was eventually sentenced to five (5) years imprisonment of which two (2) years were suspended conditionally for four (4) years.

[8] Between conviction and sentence, the applicant spent 14 months in custody pending the outcome of a review to determine whether he should be sentenced by the district magistrate or in the regional court. This is the only period he has ever spent in custody in relation to this matter.

[9] On 3 June 2005 the applicant and his co-accused appealed to the Western Cape High Court against both convictions and sentences. The applicant's appeal was dismissed and his conviction and sentence confirmed.

[10] On 15 September 2005, after hearing an application for leave to appeal against both conviction and sentence, the applicant was granted leave to appeal to the Supreme Court of Appeal against sentence only, his bail being extended pending the appeal.

[11] On 11 September 2006, the Supreme Court of Appeal dismissed the applicant's appeal against his sentence and confirmed the conviction and sentence. Thereafter, and to date, no further notice or any application for leave to appeal or to approach the Constitutional Court has been filed. The applicant has yet to serve one day of his effective sentence of three (3) years' imprisonment.

[12] A Notice to Surrender was issued by the appeals clerk at the Wynberg Magistrates Court and served on the applicant on 21 January 2015 in which he was instructed to surrender himself on 12 February 2015 to commence serving his sentence.

The applicant failed to surrender himself on the appointed day and the matter was placed before the first respondent, the magistrate who initially convicted and sentenced the applicant, in terms of the provisions of sec 299 of the Criminal Procedure Act, 51 of 1977 ('the Act') with an application for a warrant for his arrest to be authorised and issued. The applicant was initially represented in the application by the same firm of attorneys, William Booth Inc, who represented him in his trial and appeals. The first respondent was informed that the applicant was unable to surrender himself due to his ill-health and a stay of any warrant was sought.

[13] For medical reasons relating to the applicant, the application was postponed to 26 February 2015 on which day it transpired that the applicant's legal representative's mandate had been ended and a new legal representative was appointed. Once again the application for the issuing of a warrant of arrest was postponed, until 6 March 2015, this time to afford the applicant an opportunity to supply a comprehensive medical report. A further postponement followed until the proceedings eventually concluded on 23 April 2015. By this stage the applicant had abandoned his medical ground for opposing the issuing of a warrant, rather basing his opposition on the ground that he intended approaching this Court for the relief that he presently seeks, namely, an order that he must be deemed to have served his sentence of imprisonment.

[14] The first respondent heard the evidence of three witnesses in the aforesaid application as well as argument from the prosecutor and the applicant's legal representative. She ruled that she was satisfied that good cause had been shown for the suspension of the warrant which was duly suspended until 27 May 2015 pending the outcome of this application.

[15] In this Court the matter was first called on 18 August 2015 but it was postponed on five occasions before finally being set down for hearing before myself on 4 May 2016

i.e. a year after the first respondent suspended the warrant for little more than a month. When it was first called before me, the applicant's counsel applied for a postponement of several months in order to effect certain amendments to his notice of motion. These were, in my view, merely formal amendments which could have been dealt with on the turn. Be that as it may the applicant persisted in his application for a postponement and one was granted for a period of two weeks.

THE APPLICANT'S CASE

[16] The applicant's case is that after he was informed of the outcome of his appeal to the Supreme Court of Appeal by his attorney, Mr William Booth ('Booth'), the latter insisted that the matter be taken to the Constitutional Court. To this end the applicant paid a deposit to Booth's firm of R25 000.00. He remained in regular contact with Booth and was told by him that these matters take time and that he need not worry. Whenever he was asked for funds he paid his account for services rendered. He continued to abide by the conditions of the bail initially granted by the Wynberg Magistrates Court and which required him to report twice weekly to the South African Police in Worcester. When he received the Notice to Surrender in order to serve his sentence in January 2015, nearly eight and a half years after his appeal to the Supreme Court of Appeal was dismissed, he contacted Booth who told him for the first time that he had never *'listed'* his case with the Constitutional Court. Booth told him further that he had to pay a further R14 000.00 and that he, Booth, would then *'list the case'* with the Constitutional Court.

[17] The applicant contends that the delay in the matter was not because of any inertia on his part but was caused by the *'organs of state'* responsible for the proper administration of justice. He states that his health had deteriorated over the years, that he had suffered a heart attack in February 2015 and that because of the *'undue and negligent delay'* caused by the state, his personal circumstances have changed so drastically that it warrants this Court *'interfering'* with the sentence he faced. He stated

further that his trial dragged on for 17 years of which the last nine years could be attributed to the negligence of the state. He adds that he was diagnosed with major depression during 2012, is on medication for this condition and is also suffering from diabetes. He states that he suffered a stroke on 11 February 2015 and another stroke on 24 February 2015.

[18] The applicant expresses the view that the treatment he received during the trial and the fact that he had spent 14 months in prison, and reported for nine years at the Worcester police station, combine to render the sentence imposed upon him cruel, inhuman and degrading. He submits that he has paid his debt to society and that his short term imprisonment would serve no purpose. Finally, he contends that should he be required to serve his sentence this will amount to an infringement of his right to a fair trial; his right to dignity and his right to freedom of person including the right not to be punished in a cruel, inhuman or degrading way. Although in his founding affidavit the applicant appears to rely on the delay between his conviction in April 2000 and finally being called upon to serve his sentence in January 2015, in argument, however, his counsel made it clear that he relied only on the delay between the dismissal of the appeal by the Supreme Court of Appeal and the issuing of the Notice to Surrender.

[19] On behalf of the second respondent, the Deputy Director of Public Prosecutions, Western Cape, Mr W Tarantaal, deposed to an affidavit opposing the relief sought. Amongst the submissions he made were that this Court had no jurisdiction to entertain the application, it being in effect a belated appeal by the applicant to the incorrect court. He denied that the delay in the matter was not due to any inertia on the part of the applicant, pointing out that there was no affidavit from his former attorney regarding what was done to pursue any appeal to the Constitutional Court nor was there any proof that the said attorney had been given the required financial instructions to pursue the appeal.

[20] Mr Tarantaal further denied that the state was to blame for the lapse of time since the finalisation of the appeal in the Supreme Court of Appeal and pointed out that, other than the inquiries he allegedly made of his attorney, the applicant did not follow up on the matter with any state office. He denied that any of the applicant's constitutional rights were infringed.

THE ISSUES

[21] The first issue to be considered is whether the Court has the jurisdiction to entertain the application. Assuming this to be the case the remaining issues are whether the delay between the dismissal of the applicant's appeal to the Supreme Court of Appeal, and his being served with a Notice to Surrender is such as to constitute an infringement of his right to a fair trial, his right to dignity and his right to personal freedom and not to be treated in a cruel, inhuman or degrading way. Finally, assuming that one or more of his constitutional rights have been infringed, the question is whether the applicant is entitled to the relief which he seeks, namely, that he be deemed to have served his sentence or some lesser relief.

JURISDICTION

[22] On behalf of the applicant it was contended that this Court had the jurisdiction to entertain the application in terms of sec 169(1)(a) of the Constitution, Act 108 of 1996 ('the Constitution) read with sec 172(1)(b). The former section provides that a High Court may decide:

> *'any constitutional matter, except a matter that –*
>
> *(i) the Constitutional Court has agreed to hear directly in terms of section 167(6)(a); or*
>
> *(ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; …'*

[23] Section 172(1)(b) provides that when deciding a constitutional matter within its power, a court *'may make any order that is just and equitable'*. Section 167(4) of the Constitution sets out those matters which only the Constitutional Court may determine, none of which encompass a matter such as the present application.

[24] On behalf of the second respondent it was contended that although the applicant claimed that the application was neither an appeal against nor a review of the sentence imposed on him, in substance it was indeed an appeal against sentence since the relief sought would necessarily imply an interference with the sentence already confirmed by the Supreme Court of Appeal. In any event, it was further submitted, any interference with the sentence would amount to an impermissible incursion into the functions of the executive and would constitute a misdirection since the Court would effectively be determining an early release of the applicant from imprisonment. There may well be force in these arguments but the real question is does this Court have jurisdiction to entertain the application?

[25] If sec 299 of the Criminal Procedure Act confers on a judicial officer (in this case the first respondent) a discretion to withhold the issuing of a warrant of arrest in circumstances which justify that, then the applicant can advance those circumstances before the first respondent. It would not be for this Court to intervene before those proceedings are complete. Nor should I be understood as suggesting that the circumstances relied on by the applicant would necessarily justify a decision by the magistrate not to issue a warrant of arrest. Be this as it may, I must deal with the application in the form it has been presented to this Court.

[26] In my view this Court does have jurisdiction to consider this application for two main reasons. Firstly, sec 169(1)(a), read with the provisions of sec 172(1)(b) bestows wide powers on the High Court to determine constitutional matters which are not in the

sole province of the Constitutional Court and this application appears to fall within the parameters of a constitutional matter which can be determined by the High Court. Secondly, the applicant expressly disavows any direct challenge, whether by way of appeal or review, against the sentence which he seeks to avoid serving. That sentence was imposed by the Wynberg Magistrates Court and not by the High Court or the Supreme Court of Appeal. Those courts did no more than entertain an appeal against the applicant's conviction and sentence and dismiss them. In the circumstances this Court appears to be the appropriate court to at least entertain a challenge, based on constitutional grounds external to the merits of the conviction and sentence, in which the applicant seeks to avoid serving the sentence the Wynberg Magistrates Court imposed upon him.

[27] In this latter regard it must also be taken into account that the applicant does not seek to set aside the sentence or have it declared null and void. In terms of the relief sought the sentence will stand, but will be deemed to have been served by the applicant. It is also relevant that the main basis for relief sought are alleged infringements of the applicant's constitutional rights, there being no serious or sustained attempt to challenge the merits or the procedural fairness of either the conviction or the sentence in any of the three Courts through which the matter has passed.

HAVE THE APPLICANT'S CONSTITUTIONAL RIGHTS BEEN INFRINGED?

[28] The primary issue is whether any delay between the dismissal of the applicant's appeal by the Supreme Court of Appeal and his being called upon to surrender himself involved an infringement of the applicant's constitutional rights.

[29] The first such right which the applicant relies upon is his right to a fair trial. In *Sanderson v Attorney General, Eastern Cape* 1998 (2) SA 38, the Constitutional Court was faced with an application for a stay of prosecution resulting from a delay in the prosecution and was required to consider what factors had to be taken into account in assessing whether a lapse of time was reasonable. It considered that three of the most important factors bearing on the enquiry were the nature of the prejudice suffered by the accused, the nature of the case and the systemic delay. Writing for the Court, Kriegler J at para 33, stated as follows regarding the question of which party might be responsible for the delay:

> *'On a related issue, I would suggest that if an accused has been the primary agent of delay, he should not be able to rely on it in vindicating his rights under s 25(3)(a). The accused should not be allowed to complain about periods of time for which he has sought a postponement or delayed the prosecution in ways that are less formal.'*

[30] Regarding the remedy sought, a stay in prosecution, Kriegler J at para 38 stated as follows:

> *'Even if the evidence he had placed before the Court had been more damning, the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins - and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case - is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused.'*

[31] In my view these dicta are applicable to the present matter, two important considerations being the extent to which the applicant has been responsible for any delay suffered and the radical nature of the relief which he seeks, namely, that his sentence be deemed to have been served.

[32] Before considering these factors, however, closer regard must be had to the applicant's reliance on his right to a fair trial and, in particular, as is set out in sec

35(3)(d) of the Constitution, an accused's right *'to have their trial begin and conclude without unreasonable delay'*. In my view a fair trial would also encompass any appeal procedures consequent upon the trial. However, after the applicant's appeal to the Supreme Court of Appeal was dismissed, by any definition his trial had concluded since it is common cause that thereafter, notwithstanding what his intentions may have been, no further step was taken by or on behalf of the applicant to pursue any further appeal. In the circumstances it is doubtful whether he can found any claim to relief based on an infringement of his right to a speedy and expeditious trial after 11 September 2006.

[33] The delay of slightly more than eight years between the applicant's arrest and the dismissal of his appeal by the Supreme Court of Appeal cannot be taken into account at this stage for at least two reasons. Firstly, any delay would or could have been taken into account by the Supreme Court of Appeal when it confirmed his sentence in September 2006. Secondly, apart from the 14 month delay taken up by the review proceedings, the history of the trial indicates that much of the delay was attributable to the applicant himself, in particular as a result of the two appeals he pursued.

[34] The applicant's real complaint lies in the delay between the dismissal of his appeal by the Supreme Court of Appeal and his being formally called upon to serve his sentence, an extraordinary period of some eight years and three months. How is this delay to be treated? The applicant approaches it on the simple basis that he gave his attorney adequate instructions to pursue an appeal to the Constitutional Court, made regular enquiries as to its progress and was satisfied with his attorney's explanations to the effect that such appeals are inherently a slow process. As to his belated discovery that not one step had been taken to pursue the appeal, he lays the blame solely at the door of his attorney. In the result, he attributes most of the blame for the delay to the state for failing to notify him at a much earlier stage that he was required to surrender

himself and serve his sentence. I regard the applicant's approach as highly problematic, both conceptually and from a factual point of view.

[35] Firstly, the applicant's bald assertions that he properly instructed his attorney and that the latter was solely to blame for taking no steps in a further appeal is not only disputed by the second respondent but was the primary subject of the enquiry which was conducted by the first respondent in the Wynberg Magistrates Court in terms of sec 299 of the Act. The full transcript of that inquiry was filed in this application by the second respondent without objection from the applicant. From it emerges that the magistrate noted that a great deal had been said about the applicant's attorney, Booth, and his role in the matter and decided that the only way to arrive at a proper decision was to hear him. Unfortunately Booth was unavailable but his assistant, an attorney, Mr Mia ('Mia'), was called. He testified that he was an associate in William Booth Inc and had been in its employment for the past 15 years. He and Booth worked together on all matters so that each was available to stand in for the other if necessary. Using the file and his own recollection of events, Mia testified that the applicant had been immediately advised of the dismissal of this appeal by the Supreme Court of Appeal and informed that he would have to surrender himself to serve his sentence. He read a file note indicating that at that consultation it was the applicant and his family who wanted to take the matter further to the Constitutional Court. It had been explained to them that any prospects of success in such an appeal were very slim. Nonetheless the instruction to approach the Constitutional Court was accepted and the applicant was asked to furnish a deposit of R25 000.00.

[36] Mia testified regarding numerous telephonic attendances between 2006 and November 2008 wherein the applicant was telephoned, or messages were left for him to contact his legal representative or his office, with a view to him paying the deposit required. The applicant had, however, either not responded or had made promises

which he had failed to keep. By January 2015 the deposit had still not been paid. It was as that stage that the applicant had been galvanised into action by the serving upon him of the Notice to Surrender, and he then brought that notice into the office. Mia summed up his own evidence by stating that his firm had not received full financial instructions notwithstanding numerous undertakings. He quoted directly from a letter dated 13 November 2006 to the applicant addressed to him at No 25 Daffodil Street, Florient Park, Worcester (the address which the applicant furnished in his founding affidavit in this matter):

> *'We refer to the above and our previous letters to you as well as our account. I wish to record that you have not yet financially instructed me to continue with the appeal to the Constitutional Court. I must stress that if I do not receive these instructions, which you had promised to give me some time ago, I will not be responsible for not proceeding further with your Appeal. I must advise you that the Clerk of the Court could issue a warrant for your arrest if you have not done anything to further prosecute your Appeal. Please contact this office urgently within 24 (twenty four) hours to give us your further instructions in this matter'.*

[37] Mia testified that there was no response to that letter and quoted from another dated 30 January 2007 which again stated in terms:

> *'I must advise you that the Clerk of the Court could issue a warrant for your arrest if you have not done anything to further prosecute your appeal'.*

He also quoted from a letter dated 25 September 2008 to the applicant stating that the monies paid to date had covered only some of the costs incurred and that they *'urgently await your further instructions and please contact our office on or before 6 October 2008'*. A final paragraph in that letter, in bold letters, states *'(l)astly we cannot be held responsible if the Clerk of the Court requests that you commence with your sentence immediately'*. Mia testified that the response from the applicant and his family had been in the nature of promises that the matter would be sorted out or the monies would be obtained but these never eventuated. Under cross-examination by the applicant's new legal representative, Mia conceded that an amount of R12 500.00 of the initial required

deposit of R25 000.00 had been paid. He denied, however, that the balance had been paid either directly by the applicant or, as was claimed by the applicant's sister, through a transfer of surplus funds that Booth was holding on her behalf. He stated further in cross-examination that he had just referred to about 15 to 20 letters written over a space of nine years referring to the applicant's obligation to report and serve his sentence. He added that, even if his firm had failed in its duty in that regard, which he did not concede, the applicant was an officer in the Department of Correctional Services and was familiar with the procedures which apply when appeals against conviction or sentence had been exhausted.

[38] The applicant did not give evidence but his wife, Mrs Arendse, and his sister, Mrs R Goliath, were called to testify. Mrs Arendse testified that R12 500.00 had been paid by herself and the applicant in November 2006 for the appeal and the balance by her sister in law, Mrs Goliath, in February 2007. She could not produce evidence of either payment and denied ever receiving any letters or phone calls calling for payment as testified by Mia. Mrs Goliath testified that at the beginning of 2007 she had been owed some R12 500.00 by Booth, being the balance of a deposit which she had paid him to represent her son. Those charges had eventually been withdrawn against him and Booth had charged a fee of R7 500.00. She had arranged with one of Booth's staff members for the balance of these funds to be transferred to the applicant's account with Booth. She too could not produce any proof of these transactions i.e. the payment of R20 000.00 or the transfer of funds to the applicant's account. She did add, however, that Booth had telephonically confirmed to her that the transfer of R12 500.00 had been effected as per her instructions.

[39] At the end of the inquiry the magistrate noted that Mia could only testify about what he saw in the file and was not able to testify directly about any payments made. Be that as it may when the applicant launched the present application he furnished no proof

of payment to Booth of the full deposit of R25 000.00. Nor did he furnish any affidavit from his former attorney dealing with the question of what financial instructions had been received and why the appeal to the Constitutional Court had not been initiated.

[40] There is no explanation on the papers as to why the notice calling upon the applicant to surrender himself was only issued in January 2015. The second respondent says no more than that he was informed that, due to the lapse of time, none of the personnel involved with the matter at all relevant times were still in the employ of the Department of Justice. Nor apparently is there any record of any notes or entries in the prescribed registers which might explain the delay.

[41] This Court does not have the benefit of a description of what procedures are followed by the appeals clerk in the appeal courts to advise officials in the lower court of the outcome of an appeal and so trigger a process of notification to an accused who has been released on bail to surrender him/herself in order to serve their sentence. Clearly, such procedures must exist, at some level, but were not properly applied in the present case. Certainly, to this extent some blame for the delay must attach to the state for the omissions of one or more its officials.

[42] Pending his appeal to the High Court the applicant's bail was extended. One of its conditions was that upon service of a written order upon him, in the manner prescribed by the Rules of Court, he was to surrender himself in order that effect be given to any sentence imposed upon him.

[43] In the present hearing it was agreed between counsel that following the successful application for leave to appeal to the Supreme Court of Appeal, the applicant's bail and the attached conditions had been extended subject to two further conditions, namely, that a notice of appeal was to be filed within 30 days and the Rules

of Court relating to the appeal were to be complied with. The applicant's bail conditions also drew his attention to sec 307(3A)(a) and (b) of the Act which deal with the situation where an order calling on a person to surrender himself and serve his sentence cannot be served because that person cannot be found at the address given by him or her. This indirectly refers the person released on bail to the most relevant statutory provision relating to the situation in question, which is sec 307(3). It prescribes that it shall be a condition of release of the person convicted that he shall at a time and place specified by the court and upon service, in the manner prescribed by the rules of court, of a written order upon him or at a place specified by the court, surrender himself in order that effect may be given to any sentence in respect of the proceedings in question.

[44] In my view, however, a person in the position of the applicant who for some reason does not receive a notice calling upon him to serve his sentence cannot simply close his or her eyes to this omission and proceed to blithely ignore the sentence hanging over his or her head as if it did not exist. At some point, depending upon the circumstances, such a person is under an obligation to make reasonable inquiries as to what has transpired in his or her appeal. At the very least, in the absence of making such an inquiry/ies such a person cannot lay claim to some advantage or some relief at a later stage and thereby seek to benefit from his or her own wilful neglect or passivity.

[45] This much has been recognised in judgments of both the Constitutional Court and the Supreme Court of Appeal. In the matter of *S v Mthembu*[1] the Constitutional Court dealt with an application for leave to appeal against convictions and sentences confirmed on appeal to the High Court. The applicant had unsuccessfully petitioned the Supreme Court of Appeal for leave to appeal in February 2003 whilst he was out on bail and, as the judgment notes, should have reported to the Clerk of the Court in Vereeniging to serve his sentence when leave to appeal was refused. Instead, he did

[1] Case CCT 115/09 [2010] ZACC 8

not do so and only started serving his sentence when he was apprehended at his home in April 2009 more than six years after the refusal of his petition to the Supreme Court of Appeal. In refusing his application for leave to appeal to the Constitutional Court, that Court stated as follows:

> *'Convicted persons out on bail pending appeal or application for leave to appeal are under an obligation to ascertain the outcome of their appeal processes and to present themselves to serve their sentences if the appeal processes fail. This obligation in fact formed part of the applicant's bail conditions. The applicant was legally represented throughout those processes. He is an educated person who held a senior position as a director of a prominent football club. His allegation that for six years he was unaware of the outcome of the application for leave to appeal despite repeated efforts to ascertain the outcome cannot be accepted.'*

[46] The Court dealt with the failure of administrative officials to issue a warrant of arrest and effect the arrest of the convicted person in order for him to be committed to prison in the following terms:

> *'…it is clear that the dismissal of the application to the Supreme Court of Appeal was known to the relevant administrative officials and that a copy of the order was forwarded to the Clerk of the Court at the Vereeniging Magistrates' Court soon after the application for leave to appeal was dismissed. This means there is no reasonable excuse for the applicant not to have ascertained for himself the true position regarding the outcome of the application for leave to appeal. Different considerations may conceivably apply when a person is not legally represented, indigent and uneducated; this is certainly not such a case.'*

[47] These passages signify that a convicted person cannot adopt a supine attitude in regard to the outcome of his appeal proceedings and simply lie low until such time as a notice is served upon him or he is arrested in order to serve his sentence. The Court went on to express concern at the unsatisfactory situation in which it took more than six years to arrest the applicant and made the following remarks which are relevant to the present matter:

> *'A delay in the execution of a sentence not only affects the accused but also affects the victims of the crimes and undermines the credibility of the criminal justice system.*

It is imperative that once a sentence is imposed it must be executed as soon as reasonably possible and the court order must be complied with promptly.'

[48] The remarks of Willis AJA in *S v Malgas and others* 2013 (2) SACR 343 (SCA) ZASCA 63 (8 May 2015) are also on point. There the court had occasion to deal with a further appeal against sentence where there had been a delay of almost nine years after leave to appeal had been granted by the trial court to the High Court. Throughout this period the appellant had been on bail pending appeal. The Court stated at para 20 as follows:

'There can be no automatic alleviation of sentence merely because of the long interval of time between the imposition of sentence and the hearing of the appeal for those persons fortunate enough to have been granted bail pending the appeal. The phenomenon whereby inertia descends upon an appeal, like a cloud from the heavens, once bail has been granted to an accused after conviction and sentence, has been recurring with increasing frequency, especially in certain parts of the land… . Although from time to time the long delay between the passing of a custodial sentence and the hearing of an appeal may justify interference with that sentence, it is only in truly exceptional circumstances that this should occur. Each case must be decided on its own facts.

The appellants have adopted a supine attitude to the hearing of their appeal. Their attitude to this case throughout has been to adopt the attitude of a nightjar in the veld: do as little as possible, hope that nobody will notice and expect that the problem will go away. Fortunately for the administration of justice, the appellants do not enjoy a nightjar's camouflage. They may have hidden but they have not been invisible.

58 There can thus be no infringement of applicant's right to a fair (speedy) trial as he created and condoned the delay in finalising the matter.'

[49] It is thus quite clear that an accused or convicted person may not on the one hand either actively or passively unreasonably delay his trial in one or other way and, on the other hand, seek to claim a benefit from that delay be it in the form of a decreased sentence, a stay in prosecution or some other unjustified advantage.

[50] I have no difficulty with the proposition that this principle extends to someone who studiously ignores the fact that service upon him of a notice calling upon him to surrender himself and serve his sentence is long overdue. In such a situation the circumstances would have to be quite exceptional before such a person could validly claim, when the wheels of justice finally catch up with him, that his constitutional rights will be infringed by having to serve his sentence.

[51] The applicant relies on alleged infringements to his right to a fair trial, most notably a speedy trial, his right to dignity and his right not to be treated in a cruel, inhuman or degrading way. It is of course inherent in any sentence imposed by a criminal court, that the convicted person's right to dignity and even his or her right to freedom may be compromised by the imposition of a sentence. There is a tension between the interests of the individual and the interests of the community in seeing that a system of criminal justice is maintained and that criminal conduct is appropriately prosecuted, denounced and penalised. Thus, when considering an appropriate sentence a court is required to practice a nuanced weighing up of all the interlinked factors in the sentencing process. See *S v M (Centre for Child Law as amicus curiae)* 2008 (3) 232 (CC) at page 254 para [40].

[52] The applicant has mustered a range of personal circumstances in an attempt to justify him not serving his sentence. These include health considerations, both physical and psychological and the effect it would have upon his family including the fact that he would lose his employment with adverse financial consequences for all.

[53] Some of these factors would have been taken into account by the sentencing magistrate and on appeal, whilst others are simply a consequence of his changed personal circumstances between the time when he was convicted at the age of 38 years and his present age of 51 years. But again, someone in the position of the applicant can

hardly delay serving his sentence for an extended period and then, without more, seek to rely on his changed personal circumstances to avoid serving his sentence. In any event, upon closer analysis, none of these factors carry a great deal of weight. The applicant's physical health problems are by no means fully borne out by the medical documentation which he annexed to substantiate them and appear to have been exaggerated by him. As far as his psychological difficulties are concerned, they certainly do not appear to come close to disqualifying him from serving a term of imprisonment. It is noteworthy that whatever disabilities the applicant claims in this regard he remains in fulltime employment. Furthermore, to the extent that serving his sentence at this stage of his life after a lengthy delay will be especially onerous for the applicant, he is not without remedy. All the factors which the applicant lists in his founding affidavit in this regard can be raised in an application for parole.

[54] The applicant makes much of the fact that his right to freedom was infringed for the lengthy period during which he reported twice weekly to the Worcester Police station in accordance with his bail conditions and had to seek permission to travel outside the Worcester area. No further details of how this impacted upon him were presented by the applicant. I accept that these conditions impaired his freedom to a limited extent but the fact that these restrictions dragged on for nine years was a simple consequence of the delays caused by the two appeals which the applicant prosecuted, seemingly at a leisurely pace and, in the main, by the period of eight years and two months during which his legal representative took no steps to prosecute an appeal to the Constitutional Court.

[55] It is a truism that constitutional rights are not absolute and that those rights which every citizen possesses may be limited by law giving effect to social interests, as articulated by the Legislature. Section 36 of the Constitution explicitly articulates a limitation of rights in the following terms:

> *'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, including –*
>
> *(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 in its purpose; and*
>
> *(e) less restrictive means to achieve the purpose.'*

Section 36(2) provides that '*except as provided in subsection 1 or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights'*.

[56] The question of whether a constitutional right may justifiably be limited gives rise to a two-stage inquiry in which it must first be determined whether the right in question is infringed whilst the second stage involves the determination of whether that infringement can be justified as a reasonable limitation of the right[2].

[57] I am prepared to assume for present purposes that to require someone to serve a custodial sentence more than 16 years after they were convicted may, in certain circumstances, breach that person's rights to dignity, freedom and not to be treated in a cruel, inhuman or degrading way. If account is taken of the fact that the bulk of the delay was caused by the applicant exercising his right of appeal then the conclusion must, in my view, be that the boundaries of those rights have not been crossed and there has been no infringement.

[58] If I am wrong in this conclusion, the second stage of the inquiry is triggered and the question arises, whether applying the provisions of sec 36(1), there is the

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[2] *S v Zuma and Others* 1995 (4) BCLR 401 (CC) at 414

justification for the limitation of the applicant's constitutional rights. The provisions of the Criminal Procedure Act which authorise and empower the courts to try persons on criminal charges, to convict and to sentence them is clearly a law of general application which, on a daily basis, sees convicted persons being deprived of their liberty through custodial sentences. The real inquiry, however, is whether the state's action, in seeking to enforce the sentence after so many years, is reasonable and justifiable taking into account all relevant factors.

[59] In this determination I take into account firstly that, for reasons which have not been explained, the state was extremely tardy in issuing the notice to the applicant calling upon him to serve his sentence. However, as the extracts of the various cases cited above illustrate, where the person who seeks to avoid or reduce the impact of a sentence by reason of delay, has himself caused or materially contributed to that delay then, ordinarily speaking, he or she cannot expect to benefit from the delay. The applicant's attempts to ascertain what progress was being made with his *'appeal'* to the Constitutional Court were at best limited to enquiries made to his attorney from time to time in response to which he had received only the vaguest of answers. The applicant is a Correctional Services officer with nearly three decades of experience during which he would frequently have been exposed to the workings of the criminal justice system insofar as it relates to the processing of appeals and the serving of custodial sentences. It is simply not credible that he could have honestly believed that his appeal was pending before the Constitutional Court for a period in excess of seven or eight years.

[60] The most telling evidence against the applicant in this regard is that on the last occasion when he and his wife made enquiries with the applicant's attorney, in 2012, they were told by him that they should *'let sleeping dogs lie'*. The clear implication of this advice was that whilst the applicant continued to enjoy his freedom nothing should be done to alert the authorities to the inordinate delay in whatever processes were taking

place. This evidence, it bears emphasis, was given by the applicant's wife in the inquiry where, strangely, the applicant did not testify.

[61] If one goes outside the applicant's version and has regard to the evidence of attorney Mia in that inquiry, the case against the applicant becomes even stronger. Mia's evidence was that the applicant did not furnish proper financial instructions to his attorney to pursue the appeal, ignored letters and phone calls and was a wholly uncooperative client. The applicant was warned, furthermore, on many occasions, that his not furnishing financial instructions to his attorney could place him in jeopardy of having a warrant of arrest issued requiring him to serve his sentence. Although the allegation that the applicant failed to give adequate financial instructions and failed to respond to calls and letters from his attorney were disputed on his behalf in the inquiry, it is noteworthy that the applicant did not testify and neither he, his wife nor Mrs Goliath could back these denials with any documentary proof of payment.

[62] It goes without saying that the criminal justice system, already the subject of much criticism from various quarters, is brought into disrepute when delays of the order seen in this case occur. Where, in such circumstances, convicted person who have caused or materially contributed to such delays are able to benefit from that delay by avoiding serving a sentence of imprisonment, or by having it reduced, that disrepute can only be exacerbated.

[63] Taking all these factors into account, I consider that to the extent that the applicant's constitutional rights to dignity, freedom and not to be treated in a cruel, inhuman or degrading way might have been infringed by the state's action in requiring him to serve his sentence at this stage, any such limitation of his rights is comprehensively justified and meets the requirements of the test envisaged in sec 36 of the Constitution. For the reasons furnished earlier, the applicant has failed to prove any

infringement of his right to a fair trial, more specifically to a speedy trial. Insofar as I might be wrong in reaching this conclusion, once again any such infringement of his right is fully justified taking into account all the circumstances of this matter.

[64] The applicant having failed to establish any actionable infringement of his constitutional rights, the relief which he seeks, an order declaring that his sentence must be deemed to have been served, assuming for present purposes that such an order could ever be competent, cannot be granted. It follows that the Court is also not at large to consider any other lesser relief.

[65] In the result, for all these reasons the application must fail. No costs are sought by the second respondent whose representative, Ms Galloway, is a member of its staff.

[66] The question arises as to what course must be followed to ensure that the applicant serves his sentence without further delay. The first respondent followed the correct procedure when she commenced an inquiry in terms of sec 299 of the Criminal Procedure Act into whether a warrant committing the applicant to prison for the execution of the sentence should be issued. Into that inquiry was folded an application by the applicant for the stay of any warrant of arrest in terms of sec 62(3) of the Magistrates Court Act, the proceedings culminating in an order that the warrant would be suspended until 27 May 2015. I presume that, by necessary implication, that order has been extended pending the outcome of this present application. In the circumstances, the appropriate order would be to direct that the inquiry in terms of sec 299 of the Criminal Procedure Act be referred back to the first respondent for determination by her in the light of this judgment.

[67] Finally, this matter has thrown up two areas of concern which should enjoy the attention of certain authorities. The first is the lapse on the part of the administrative

officials in apparently failing to monitor the appeal/s initiated by the applicant with the eventual result that more than eight years passed between the conclusion of the appellant's appeal in the Supreme Court of Appeal and the issuing of a notice to him to surrender himself to serve his sentence. It is obvious that there should be protocols and procedures to ensure that occurrences of this nature are avoided. For these reasons I direct that a copy of this judgment be sent to the Regional Head of the Department of Justice and Constitutional Development in order that he may be made aware of this problem and ensure that it does not recur.

[68] The second area of concern is that a firm of attorneys apparently took an instruction to launch an appeal to the Constitutional Court and, despite apparently receiving at least a partial deposit from the applicant, took no step in furtherance of any appeal yet continued to represent the applicant in the *'appeal'*. At this stage, however, all the facts in regard to this aspect of the matter have not been established. In the result a copy of this judgment will be sent to the Cape Law Society for its consideration and any action which it may consider appropriate.

ORDER

[69] For these reasons the following order is made:

1. The application is dismissed;
2. The postponed inquiry in terms of sec 299 of Act 51 of 1977 relating to the applicant is referred back to the second respondent for her determination in the light of this judgment, as soon as possible, and in any event within not less than 14 days hereof. To this end the second respondent is directed to furnish a copy of this judgment and the record in this matter to the first respondent within three (3) days of the date of this order.

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BOZALEK J

APPEARANCES

For the Applicant:	Mr H Schölzel Instructed by:
For the 2nd Respondent:	Ms S Galloway Instructed by: The Director of Public Prosecutions