

**IN THE HIGH COURT OF SOUTH AFRICA  
(SOUTH GAUTENG, JOHANNESBURG)**

**CASE NO: SS40/06**

In the matter between:

**THE STATE**

and

**GARY PATRICK PORRITT**

Accused No. 1

**SUSAN HILARY BENNETT**

Accused No. 2

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**REASONS FOR RULING OF 15 FEBRUARY 2022**

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**SPILG, J**

**7 March 2022**

Despite being remanded in custody for a trial hearing on 9 February 2022, Mr Porritt failed to attend court. The information received was that Correctional Services failed to hand Porritt over to the South African Police Service. SAPS is responsible for transporting awaiting trial detainees between the detention centre and court.

The court issued an order directing that Porritt be brought to court on 10 February and that the acting head of the facility where Porritt is being detained, Deputy Director Jonas of Johannesburg Central Correctional Service facility, or her delegated officer, attend court to explain why Porritt was not available to be transported to court. It also directed the attendance of the Correctional Service officials responsible for the medical section, Lieutenant Colonel Sekonyela and Captain Mia, who the court understands are qualified charge nurses.

*Mr Coetzee* on behalf of the State referred the court to the powers available to the court under s 342A (3) of the Criminal Procedure Act in cases where it

finds undue delay and enquired whether the court wanted the witnesses to give evidence under oath.

The court considered that it was more appropriate at this stage to understand what happened and establish a way forward bearing in mind that it had no clear idea of the reason for Porritt's non-attendance or whether it was attributable to him at all. It decided that there would be no enquiry and that no one would give evidence under oath.

The first person to explain what occurred was Captain Matsibedi, He is the SAPS officer responsible for the drivers who transport detainees between Johannesburg Central and the High Court. He confirmed that Correctional Service officials failed to hand Porritt over to be transported to court on 9 February. The reason given was that Porritt said that he had a medical examination and refused to attend court.

The Captain was questioned by the court regarding the issue of overcrowded transportation vehicles, cigarette smoking in the trucks and detainees being obliged to stay in the trucks for over an hour and a half while the trucks and escort vehicles waited at Westgate for Johannesburg Magistrate Court detainees to be picked up. He was also asked by the court to comment about the facilities in the High Court cells.

Of importance is that the Captain stated that the wait at the Magistrates' Court should not be more than 45 minutes as there was communication between the officials responsible for placing the detainees in the transport at the High Court and their counterparts at the Magistrates' Court. He also indicated that the cells at the High Court could not accommodate more than 9 detainees whereas the number brought to court could be as high as 15 or 16.

A transcript will be provided to the Deputy Judge President for his consideration.

Porritt raised issues regarding the transportation. These will appear from the transcript and include cramped conditions. One of the issues was that the

vehicles now have three separate compartments and the non-smoking one is overcrowded. On Friday when the Captain returned to court he did not dispute that there were three sections and that there was not enough seating room. Those standing did not have any hand rail or hand grips. It was evident from his replies that the vehicles are designed only for seated occupants. He was unable to inform the court as to the standing orders or regulations regarding whether any occupants could be transported standing and if so why no provision was made for hand grips. This appears to be another issue which should be brought to the attention of the Inspecting Judge of the Judicial Inspectorate for Correctional Services.

With regard to smoking in the non-smoking section: Porritt could offer no solution as cigarettes is the medium of barter and exchange. This means that even those who do not smoke will receive cartons from family during their court appearances. It also means that allowing only those who do not have cigarettes in their possession to enter the non-smoking section of the truck is not feasible. On Friday the Captain said that awaiting trial detainees were not supposed to receive parcels at court. Whatever the regulations might be, the reality is that this was taking place.

The court suggested that it appeared to be up to the non-smokers as a group to name and shame so that the person claiming to be a non-smoker will be precluded from again being allowed into the non-smoking section. Porritt confirmed that the compartments do prevent smoke from wafting into the next section.

Deputy Director Jonas also claimed that Porritt said he was going to hospital and this was the reason he would not take the transport to Court. The Director-Generals contentions regarding waiting time and when awaiting trial detainees are provided breakfast appear from the transcript. They are disputed by Porritt. He said that D section detainees do not receive a meal in the morning before they go to court.

Capt. Mia told the court that Porritt claimed to have an appointment with Dr Mazibuko the neurologist on 9 February but that this did not appear in any

record he had. Porritt however insisted that he had an appointment and refused to go to court.

Porritt said that Capt. Mia was lying. However, Porritt confirmed that he did not have a written confirmed appointment<sup>1</sup>, that he did not go and see Dr Mazibuko on the 9<sup>th</sup> but believed from the person who had transported him previously that an appointment was being made for him with Dr Mazibuko. Porritt believed that he had to see Dr Mazibuko before Dr Tsitsi presented his report to court as stipulated in this court's previous order of 26 January 2022. The purpose of the order was to establish whether Porritt could continue being conveyed by truck to and from court by reason of any neurological condition which it may affect.

Cpt Mia claimed that Porritt was being transported by truck in the mornings and if he finished early, special transportation was made available for him. It turned out that the court would have to adjourn at 13.30 to enable Porritt to utilise this facility. Porritt requested that the court sit only until 13:00 so that the transport could be assured. The court was not prepared to do this as Cpt Matsibedi said on the Friday that special transport would be made available if Porritt finished court at 13.30.

While the court has gone out of its way to protect the fair trial rights of both accused, it is a two-way street which requires willingness on their part to have the trial proceed with the necessary degree of expedition particularly since we are already four years into the actual trial hearing. There has been little evidence of this on their part. In the closing stages of the hearing of 10 February both Porritt and Bennett accused the court of undermining their fair trial right by not holding a full scale hearing on whether the Correctional Services personnel are telling the truth about whether Porritt is actually being given preferential treatment (as alleged) or that he is being victimised by Lt Colonel Sekonyela in particular.

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<sup>1</sup> Para 5 of the order of 26 January requires the medical practitioner or Correctional Services official to explain in writing why any treatment, tests or examinations could not be organised so as not to interfere with the allocated court dates set out in the para 7 of the order

I add that Porritt stated that he was prepared to subject himself to cross examination. As both Porritt and Bennett ought to know, since they are both highly intelligent and Porritt, on his version, being CEO of the best performing listed company on the JSE at the time, such an enquiry would further delay the trial and may require the court to make credibility findings.

I believe that I have made it plain that there is a clear dispute as to the conditions under which Porritt is detained. If Porritt believes that this affects any of his rights then he must bring a substantive application to court which can be heard by another judge who can then direct that appropriate measures be taken. This is also informed by the continued attack on this court's alleged partiality.

This court has previously had occasion to comment on the position adopted by the accused of attempting to place the court in a "*damned if it does, damned if it does not*" position. Without further delaying the continuation of this trial I consider this approach and what I have done in the circumstances as much as is reasonably feasible- by enabling Porritt, Correctional Services and SAPS transport to provide their position and to forward the relevant transcripts when they become available to the Deputy Judge President. This is after already holding a meeting with the Deputy Judge President prior to 9 February to precognise him of Porritt's earlier assertions regarding the impact his conditions of detention are having on his fair trial rights.

Porritt gave a lengthy explanation of what occurred going back to the week before 9 February. The issue is however crisp: why did Porritt insist that he had an appointment on a pre-determined court date, which Correctional Services and the medical practitioners were obliged to work around and why did he insist on seeing Dr Mazibuko or insist on going for an MRI scan, which was solely for the purpose of enabling Dr Tsitsi to prepare a report for court, a report which in terms of the order of 26 January was dependent on Dr Mazibuko examining Porritt?

I am satisfied from Porritt's own explanation, which for present purposes I am prepared to accept (including that Capt. Mia had undertaken to prepare a

letter to fix an appointment for the 9<sup>th</sup> and that this was after Porritt had said he would contact Bennett to intercede), that he took upon himself to insist on being examined by Dr Mazibuko or at least have a new MRI before 14 February, despite the court order making it clear that Dr Tsitsi's report had to be submitted on 14 February *provided* Dr Mazibuko had examined him by then. Porritt should know by now that he cannot rely on the say so of a driver who takes and fetches him for any appointment that an appointment was being arranged for him on 9 February and then tell Capt. Mia that he had to go for the appointment. It turns out that no appointment had been made either with Dr Mazibuko or for an MRI.

Porritt claims that he had to go to his appointment on 9 February otherwise the cut off of 14 February in terms of the court order of 26 January could not be complied with.

Porritt's recourse was obvious. If he had any concerns that Dr Mazibuko or Dr Tsitsi would not be able to comply in time with the court order, it was for him to come to court on 9 February and the court could then have considered extending the times for Dr Mazibuko's examination and Dr Tsitsi's report.

Instead Porritt has abused the process which was initiated to determine whether he receives beneficial treatment in the way he is to be transported to and from court. He has now wasted two court days, being the 9<sup>th</sup>, the 10<sup>th</sup> and part of Friday 11<sup>th</sup> when Captain Matsibedi continued with his explanations and Porritt responded.

Porritt must appreciate that it is not at his discretion to act as judge, jury and sheriff. He is none of these. He is an accused who is obliged to attend court to deal with the charges against him. This is so even if it is clear that a court order directed at another party is unlikely to be complied with. His recourse is to approach the court. Mr Porritt should have had enough experience in the type of interlocutory applications he has brought and the various appeals he has launched to know this.

It is therefore necessary to make it abundantly clear that the accused have no discretionary power as to the operation of the court. They each are obliged to attend court; an obligation which only the court on application can relax- and not after the event.

Porritt is warned that going forward, this court will not hesitate to order that he be brought to appear forthwith to explain any refusal to co-operate with Correctional Services or SAPS transport officials responsible for securing his attendance at court. Going forward Porritt must show good or just cause for any further non-appearance unless the State concedes as much. The court will also consider investigating any delay which appears unreasonable and which could cause substantial prejudice as envisaged in terms of s 342A; this despite Porritt's protestations that the trial already is moving too fast.

On 15 February the court then amended the following parts of the order of 26 January:

1. Para 2 and 3; The date of Dr Tsitsi's Report was changed to 21 February 2022;
2. The date in para 7.2 was amended to exclude 16 February 2022
3. Para 7.4 was changed to read 14 to 16 March and the dates 18 July to 4 August were added.

For sake of completeness a copy of the order made on 26 January 2021 is attached.

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**SPILG, J**

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Date of Ruling:	15 February 2022
Date of Reasons:	7 March 2022
For Mr Porritt:	In person
For the State:	Adv EM Coetzee Adv JM Ferreira National Prosecuting Authority