CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 45/04

WILLY AARON SIBIYA	First Applicant
PURPOSE KHUMALO	Second Applicant
JACOBUS PETRUS GELDENHUYS	Third Applicant
DAVID NKUNA	Fourth Applicant
versus	
THE DIRECTOR OF PUBLIC PROSECUTIONS: JOHANNESBURG HIGH COURT	First Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
THE MINISTER OF CORRECTIONAL SERVICES	Fourth Respondent

Heard on : 18 August 2005

Decided on : 7 October 2005

JUDGMENT

YACOOB J:

[1] The first judgment in this case[1] was given in an application concerned mainly with the constitutionality of certain provisions of an Act of Parliament[2] that provided a mechanism to replace all death sentences that had been imposed before the judgment in *Makwanyane*[3] declared the execution of the death penalty to be inconsistent with the Constitution. This Court held the challenged provisions of the Act of Parliament to be consistent with the Constitution.

[2] The judgment, in addition to considering the constitutionality of the legislation in issue, found it necessary to express concern that the substitution of appropriate alternative punishments for the death penalty had taken far too long. The Court expressed particular concern about the fact that, by the date on which argument was heard in this Court concerning the constitutionality of the relevant law, of about 400 people who were estimated to have been on death row at the time of the judgment in *Makwanyane*, the death sentences of 62 people had not been replaced. In the circumstances, this Court, on 25 May 2005 in addition to dismissing the constitutional challenge, made an order in the following terms:

> "(2) The respondents are directed to take all the steps that are necessary to ensure that all sentences of death imposed before 5 June 1995 are set aside and replaced by an appropriate alternative sentence in terms of section 1 of the Act as soon as possible.

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[1] *Sibiya and Others v DPP: Johannesburg High Court and Others* 2005 (8) BCLR 812 (CC).

[2] Section 1(1)-(5) of the Criminal Law Amendment Act 105 of 1997.

[3] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

(3) The respondents are required to report to this Court concerning all the steps taken to comply with paragraph (2) of this order by not later than 15 August 2005.

(4) The report must include the following information:

(a) the name of every person who was being detained under a sentence of death as at 5 June 1995;

(b) the name of every person in respect of whom the death sentence has been set aside and replaced by an appropriate alternative sentence, particulars as to whether the alternative sentence was determined and imposed in terms of subsections (1) to (5) or subsections (7) to (10) of section 1 of the Act, particulars of the judge who advised the President, or the court of appeal that imposed the new sentence as the case may be, the date on which the new sentence was imposed and particulars of the sentence; and

(c) the names of all people who are still being detained pursuant to the sentences of death imposed upon them together with particulars as to the date on which the sentence of death was imposed, the case number and the court that imposed the death sentence, whether a record of the proceedings before that court is available, all the steps that have been taken to ensure the setting aside of the death sentence and the imposition of a new sentence in each case.

(5) The respondents are directed to ensure that an appropriate affidavit or affidavits are filed with the Registrar of this Court not later than 15 August 2005:

(a) setting out in full the reasons why each death sentence has not yet been set aside, the steps that will be taken to ensure that the death sentence will be set aside and replaced by an appropriate alternative sentence; and

(b) motivating fully any order that might be required of this Court to facilitate the setting aside of the death sentence concerned and replacing it with an appropriate alternative punishment.

(6) This Court will issue further directions in relation to supervision of the execution of paragraph (2) of this order as circumstances may require."

[3] The order in the main judgment (the order) required the respondents, by not later than 15 August 2005, to furnish a report containing detailed information to this Court concerning the process of the replacement of the sentence of death with another

appropriate sentence in respect of each person who was on death row at the time.[4] The respondents were also required, by the same date, to file an affidavit containing certain information and explanations in relation to the death sentences that had not yet been replaced by other alternative punishments.[5] Neither the report nor the affidavit was timeously filed.

[4] Instead, on 12 August 2005, the second and third respondents caused to be filed in this Court an application for an extension of time until 15 September 2005 to enable them to comply with paragraphs 3, 4 and 5 of the order. Oral argument in relation to this application was heard on 18 August 2005. The relevant part of the order made by this Court after hearing argument on that day reads:

> "2) Prayer 2 is granted in the following terms:
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> 'The date in paragraph 3 of the order of this Court dated 25 May 2005 for the respondents to file the reports and an affidavit referred to in that order is extended until 15 September 2005.'
>
> The reasons for this order will follow in due course."

[5] On 15 September 2005 the second and third respondents caused to be filed a report and an affidavit in their effort to comply with paragraphs 3, 4 and 5 of the order of this Court made on 25 May 2005 read with the order described in the previous paragraph. The purpose of this judgment is two-fold. First, reasons will be given for the decision to grant the extension of time requested by the second and third

[4] *Sibiya*, above n 1, paras 3 and 4 of the order.

[5] Id, para 5 of the order.

respondents. Second, the report and affidavit filed on behalf of the second and third respondents will be evaluated in order to give any further directions that might turn out to be necessary.

Reasons for the extension of time order

[6] It is necessary first to determine how applications for extension of time are to be approached by this Court. Is there any test that may be usefully applied to the facts and circumstances of a particular application so as to achieve a fair result? The Constitution, in effect, requires this Court to hear cases when it is in the interests of justice to do so.[6] This Court has held that it will grant applications for leave to appeal,

[6] Section 167 of the Constitution provides:

> "(1) The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges.
> (2) A matter before the Constitutional Court must be heard by at least eight judges.
> (3) The Constitutional Court–
> (a) is the highest court in all constitutional matters;
> (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
> (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.
> (4) Only the Constitutional Court may–
> (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
> (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
> (c) decide applications envisaged in section 80 or 122;
> (d) decide on the constitutionality of any amendment to the Constitution;
> (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
> (f) certify a provincial constitution in terms of section 144.
> (5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.
> (6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court–
> (a) to bring a matter directly to the Constitutional Court; or
> (b) to appeal directly to the Constitutional Court from any other court.
> (7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution."

applications for postponements[7] and applications for condonation[8] when it is in the interests of justice to do so. It must be borne in mind that the interests of justice would always depend on the context, as well as the nature of the application and the nature of the order in respect of which an extension is sought.

[7] It is entirely appropriate that the same measure ought to serve in cases in which it is necessary for a court to decide whether to grant an extension of time to enable the person applying for that extension to comply with any order of that court. Applications for extension of time must be granted if that course is considered by the court to be in the interests of justice.

[8] It is necessary to have regard to the nature of the order with which we are here concerned in a consideration of how the interests of justice evaluation is to be made. It is apparent that the order requires that a large amount of information be furnished and that certain explanations be given in relation to those cases in which the death sentence had not yet been set aside and replaced. It must be borne in mind that, in this sense, the order in this case is fundamentally different from the order in *Ntuli*[9] in which the declaration of invalidity of a provision of an Act of Parliament[10] was

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[7] See, for example, *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) para 22; and *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) para 3.

[8] *National Police Service Union and Others v Minister of Safety and Security and Others* 2000 (4) SA 1110 (CC); 2001 (8) BCLR 775 (CC) para 4.

[9] *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC).

[10] Section 309(4)(a) of the Criminal Procedure Act 51 of 1977.

suspended for a time to enable the defect to be cured. The defect was not cured timeously and the government made what was referred to as an application for an extension of time. The application in *Ntuli* was really an application for the extension of the period of suspension of an invalid law to enable the defect to be cured. Another point of difference is that an application for extension of time in the *Ntuli* situation must of necessity be made before the expiry of the period of suspension. A more cogent case will ordinarily be required for an application to extend an order to suspend constitutional invalidity to succeed than for an application like this one requiring an extension of time to furnish information required by a court. Nevertheless the importance of court orders being complied with timeously cannot be over-emphasised and applications for extension of time cannot be granted merely for the asking or lightly.

[9] The process of determining whether it is in the interests of justice to grant an extension of time essentially requires balancing the cogency of the explanation for the delay and the reason for the extension of time, against the prejudice that will be suffered consequent upon the extension of time being granted, in the context of all the material circumstances. These circumstances would include the complexity of the information required and how difficult it would be to obtain it, whether an applicant had undertaken to furnish the information by the date determined by the Court, efforts that have already been made to comply with the order and whether it is probable that the order will be complied with if the extension of time is granted. Parties who require an extension of time must take care to ensure that it will be possible to comply

with the court order within the extended time sought. In a sense, a court enquiring into this question will be attempting to assess the balance of convenience by weighing the consequences of not granting the order with the consequences of granting it. It is appropriate, against this background, to set out the Court's reasoning which led to the conclusion that the extension of time should be granted.

[10] The explanation proffered by the respondents for not complying with the order timeously must now be evaluated. The affidavit filed on behalf of the second and third respondents is to the effect that personnel within the Department of Justice and Constitutional Development (the Department of Justice) began to obtain and collate information only after the oral argument was heard in this Court. The reason given for the failure to comply timeously with the order is, in short, that the magnitude of the task combined with the absence of co-operation from court officials made this impossible. One gains the impression from reading the affidavit that the respondents under-estimated the magnitude and complexity of the task that lay ahead until counsel had been consulted. Significantly, it is pleaded on behalf of the second and third respondents that the Department of Justice had no control over the process of the substitution of sentences. Indeed, the affidavit says:

> "As regards those cases in which sentence had not been converted as at that stage, strictly speaking, the matter was out of the Department's hands."

[11] A number of factors pointed to the application being granted. The terms of the order show that the information required is detailed, extensive and potentially difficult

to obtain. The information is not necessarily in the possession of the respondents. The second and third respondents had not undertaken to provide the information by the date stipulated. Considerable progress has been made in obtaining the necessary information. At least 400 files, one in respect of each person sentenced to death, have already been collated. This demonstrates that the respondents have every intention of complying with the order. And counsel assured us of this. The period of one month requested is not unreasonable and it seems probable that the undertaking to furnish the information by 15 September would be met.

[12] Finally, the balance of convenience too, favours the grant of the application. The only possible prejudice is to those people whose sentences have not yet been set aside. But the grant of the extension will not necessarily lead to a further delay in the process of the substitution of their sentences. It is in the public interest that the process of the substitution of sentence is completed as soon as is possible and that the public is informed of the process. This cannot be done unless the information is provided. The Court's inability to supervise the process will probably be of greater prejudice to those people whose death sentences have not yet been set aside than would be the case if the order were to be granted and supervision were to continue.

[13] There is however a potential difficulty with the explanation. Counsel for the second and third respondents informed this Court during argument on 10 March 2005 that 62 death sentences still needed to be replaced and that, according to his clients, each of these death sentences will be replaced by an appropriate alternative sentence

by the end of June 2005. It seemed reasonable to infer from his statements that the assurances given to the Court were based on complete information. It was therefore fair to infer that the relevant division of the Department of Justice possessed the necessary information to assure this Court of the number of death sentences that needed to be replaced with other punishment and that the Department perceived that its personnel had enough control over the process to be able to assure this Court that all the outstanding death sentences would in fact be substituted by the end of June. I have already pointed out that the affidavit in support of the extension of time was to the effect that the process of substitution of the sentences was not under the control of the Department of Justice.

[14] This difficulty does not however detract from the fact that the explanation is, as a whole, satisfactory. It is important for parties before this Court to ensure always that information given by counsel orally during argument is fully verified and that undertakings given can be fulfilled. The fact that this was apparently not done in the circumstances of this case, is in itself not enough to tilt the balance against the second and third respondents in the interests of justice enquiry. The grant of the extension of time is in the interests of justice.

[15] It is for these reasons that this Court granted paragraph 2 of the order made on 18 August 2005.

Evaluation of the report and affidavit

[16] The report read with the annexures does set out in reasonable detail all the steps that have been taken in order to ensure the substitution of the death sentence with other appropriate punishments. Paragraph 3 of the order has therefore been complied with. Subject to two exceptions to be mentioned later, the report does encompass the information envisaged in paragraph 4 of the order. The detail is contained in four tables which may be described as follows:

(a) Table 1 contains the names of all the people who were on death row when *Makwanyane* was decided.

(b) Table 2 has the names together with details in most cases of all people whose death sentences have been substituted in terms of section 1(1) to 1(5) of the Act.[11]

(c) Tables 3A to 3C give the names with details in most cases of people whose death sentences were substituted in terms of section 1(7) to 1(10) of the Act.[12] Table 3D furnishes particulars of sentences substituted by the Supreme Court of Appeal in terms of section 322 of the Criminal Procedure Act. Table 3 also has a section "E" which details the names of the people who were deceased before their sentences could be substituted.

(d) Table 4 gives us the names with some details of those people whose sentences have not yet been substituted.

[11] The process prescribed in these provisions is discussed in *Sibiya*, above n 1, paras 18-22.

[12] Id, para 23.

[17] The affidavit is filed as part of the effort to comply with paragraph 5 of the order. The affidavit deals in more detail with those people whose death sentences have not yet been substituted, sets out in broad terms why the substitution has not yet taken place and, more importantly, details the steps to be taken to ensure substitution and gives us some idea of when the substitution is likely to take place. There is therefore substantial compliance with paragraph 4(a) of the order. I may mention for the sake of completeness that no order of the kind foreshadowed in paragraph 4(b) of this Court's order dated 25 May 2005 is required.

[18] The schedule below conveniently summarises the position in relation to all people whose death sentences have not yet been substituted as reflected in the affidavit. The detail below shows that the affidavit is not accurate in two respects. The schedule indicates that of the total of 40 people whose death sentences have not yet been substituted the cases of 16 people have not yet been considered by a judge. It is of concern that half this number falls within the jurisdiction of the Mmabatho High Court. There are 24 people whose cases have already been considered by a judge and who await the President's decision. It is anticipated that 7 of the outstanding 40 cases will be determined by the end of September and the remaining 33 after that.

Schedule

Division of the High Court	**Not yet substituted**	**Not yet considered by a judge**	**Considered by a judge**	**Process to be completed before the end of September**	**Process to be completed after the end of September**
Umthatha High Court	9	2	7	0	9

Pietermaritzburg High Court	3	0	3	3	0
Durban High Court	7	1	6	0	7
Cape Town High Court	4	0	4	4	0
Johannesburg High Court	7	3	4	0	7
Pretoria High Court	2	2	0	0	2
Mmabatho High Court	8	8	0	0	8
Total	**40**	**16**	**24**	**7**	**33**

[19] There are two problems with these tables:

(a) Mr B W Pule is cited in Table 3A as a person whose death sentence has been substituted in terms of section 1(7) to 1(10) of the Act. However there is no information given as to when the sentence was substituted, the judge that substituted the sentence or what the new sentence is. The report says that Mr Pule's file has gone to the National Archives. In my view, it is necessary for this information to be obtained from the National Archives and furnished to this Court.

(b) Mr D N Bezuidenhout is listed as a person sentenced to death in Table 1 but his name does not appear in Tables 2, 3 or 4. However, annexures "NPD 2" and "NPD 6" to the affidavit show that the matter was to have been heard by Booysen J on 14 March 2005. We have no idea from the schedule whether the matter was heard, and whether the sentence has been substituted. If the sentence has been substituted the name should have appeared in Table 2A. If not the name should have been in Table 4 as that of someone whose sentence

has not yet been substituted. The provisions of paragraph 3 of the order have not been complied with in relation to Mr Bezuidenhout.

[20] There are also two difficulties with the affidavit:

(a) The first relates to Mr Bezuidenhout. His sentence has not yet been substituted on the face of "NPD2" to the affidavit; his name does not appear in either paragraph 23 of the affidavit dealing with prisoners in the Durban High Court or in paragraph 43 which lists the names of those to be considered in the Pietermaritzburg High Court. As already pointed out, if his sentence had already been substituted one would have expected his name to appear in Table 2A. This difficulty underlines non-compliance with paragraph 3 of the order.

(b) The next problem in the affidavit is concerned with Mr P L Kadiege who is mentioned in paragraph 34 of the affidavit as someone whose death sentence needs still to be substituted. The affidavit does not say that this person is deceased. However, his name appears in Table 3E as one of the seven people who are deceased and this is confirmed by an entry in the letter annexure "WLD 6" to the affidavit. The affidavit does not in this respect comply with paragraph 5 of the order.

[21] It is appropriate, in the circumstances:

(a) for this Court to continue to supervise the execution of its own order until the process of substitution of death sentences is complete;

(b) that the second and third respondents be ordered to report to this Court on the progress made on the substitution process by 31 October 2005;

(c) that the non-compliance with this Court's order in relation to Mr D N Bezuidenhout, Mr P L Kadiege and Mr B W Pule be cured in that report; and

(d) that this report be filed on or before 7 November 2005.

[22] Further directions will be issued in this matter if this is considered appropriate. These directions might, if necessary, be concerned with any outstanding matters arising out of the report and affidavit that have been evaluated in this judgment.

Order

[23] The following order is made:

The second and third respondents are ordered to ensure that a report is filed in this Court on or before 7 November 2005:

(a) on the progress made in the substitution process by 31 October 2005; and

(b) complying with the terms of this Court's order dated 25 May 2005 in relation to Mr D N Bezuidenhout, Mr P L Kadiege and Mr B W Pule.

Langa CJ, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J and Van der Westhuizen J concur in the judgment of Yacoob J.

For the applicants:	F Snyckers
For the second and third respondents:	V Soni SC and T Machaba instructed by the State Attorney, Johannesburg