THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable
Case No: 387/06

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**First Appellant**
THE MINISTER OF CORRECTIONAL SERVICES	**Second Appellant**
and	
JONATHAN ZEALAND	**Respondent**

Coram: HOWIE P, FARLAM, PONNAN, COMBRINCK JJA and SNYDERS AJA
Heard: 15 MAY 2007
Delivered: 20 JUNE 2007

Summary: Whether continued detention of previously sentenced prisoner after setting aside of his sentence is unlawful where he is awaiting trial in custody on another charge

Neutral Citation: The judgment may be referred to as *Minister of Justice & Constitutional Development v Zealand* [2007] SCA 92 (RSA)

J U D G M E N T

SNYDERS AJA/

SNYDERS AJA:

[1] The respondent sued the appellants in the Port Elizabeth High Court in an Aquilian action for damages arising out of his alleged unlawful detention. By agreement, the parties put one defined issue before the court in terms of rule 33(4) of the Uniform Rules of Court, namely whether the respondent's detention during the period 23 August 1999 to 30 June 2004, or any part thereof, was unlawful.

[2] The trial court concluded that the respondent was unlawfully detained for the entire period. The appeal against that decision is with the leave of the court a quo.

[3] For the most the facts were common cause and placed before the trial court by agreement. On 24 January 1997 the respondent was charged in the regional court on charges of rape, murder and assault (the first case). The case against him was postponed on several occasions and he was remanded in custody until 15 May 1997 when he escaped. Before he was re-arrested on 6 August 1997 he allegedly murdered Melvin Phillips. On 20 April 1998 he was convicted of escaping from custody and was sentenced to six months' imprisonment, wholly suspended. On 28 September 1998 he was convicted of the murder of Melvin Phillips and sentenced to 18 years' imprisonment (the second case). The respondent was granted leave to appeal to the full court against his conviction and sentence in the second case and he did so successfully. As a result his conviction and sentence were set aside on 23 August 1999. Despite his successful appeal the registrar of the high court negligently failed to issue a warrant for the plaintiff's liberation until 8 December 2004, pursuant to which he was released on 9 December 2004. In the interim the first case was postponed repeatedly in the regional court until the charges were withdrawn on 1 July 2004. At all relevant times the respondent was detained at the maximum security section of the St Albans Prison as a sentenced prisoner. The appellants conceded that for the period 1 July 2004 until 9 December 2004 the respondent was unlawfully detained.

[4] The right to freedom is entrenched in the Constitution.[1] When a person is arrested and detained public power is being exercised by the executive administration of the state which may not exercise any power or perform any function beyond what is conferred by law.[2] This is in accordance with the doctrine of constitutional legality, an incidence of the rule of law, which is a foundational value of the Constitution.[3] It goes without saying that the state has the burden to prove that the exercise of its power was lawful.

[5] The respondent was lawfully detained until his conviction and sentence were set aside in the second case on 23 August 1999. Any possible authority to detain him further had to derive from the first case.

[6] The appellants contended that, because of the provisions of s 39(3) of the Criminal Procedure Act 51 of 1977 (the Act) the detention of the respondent remained lawful until the charges in the first case were withdrawn:

'39(3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.'

[7] Insofar as this argument suggests that s 39(3) is the source of the continued lawful detention of an arrested person until his or her release, it is not only contrary to s 12(1)(b) of the Constitution, but also to the decision in *Nhlabathi v Adjunk Prokureur-Generaal, Transvaal* 1978 (3) SA 620 (W) at 630F-631A:

'. . . . letterlik gelees mag hierdie artikel daarop neerkom dat wanneer 'n persoon in hegtenis geneem is, hy in wettige bewaring bly (die bewoording is gebiedend) totdat hy 'ontslaan of vrygelaat word'. Daar is slegs die verdere kwalifikasie dat dit wettiglik moet wees. Dit kan myns insiens egter nie die uitwerking van hierdie sub-artikel ('n nuwe sub artikel) [Section 39(3) was not part of the then recently repealed Act 56 of 1955] wees dat dit die gevolg is nie. Dit sou inderdaad 'n streep trek deur die

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[1] The applicable part of s 12(1) of the Bill of Rights reads: 'Everyone has the right to freedom and security of the person, which includes the right –

(a) not to be deprived of freedom arbitrarily or without just cause;

not to be detained without trial;'

[2] *Tobani v Minister of Correctional Services NO* [2000] 2 All SA 318 (SE) at 321i-322b, 323b-c and 324j-325 which dicta were approved on appeal as reported in 2003 (5) SA 126 (E) at 135B-137E.

[3] See s 1(c) of the Constitution and *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) [17] and [20].

menigte bepalings van die Strafproseswet wat bereken is, afsonderlik en gesamentlik, om ‘n ordelike wyse van verhoor van die beskuldigdes te vermag en ‘n ordelike wyse waarop die vryheid van beskuldigdes ontneem mag word daar te stel. Dit kom my voor dat die enigste bedoeling van hierdie artikel bloot is om eintlik die algemene regsgevolge van inhegtenisneming, soos wat dit nog al die tyd bekend gewees het, daar te stel, naamlik dat die gearresteerde persoon in wettige bewaring is.
Die enigste verdere moontlike effek wat dit kan hê is soos aangetoon deur *Hiemstra* op 69 van sy werk. Hy sê dat dit vroeër nodig was om ‘n lasbrief vir verdere aanhouding te verkry van ‘n persoon wat sonder lasbrief gearresteer is (ingevolge die ou art 28) en hierdie sub-artikel maak daardie administratiewe daad onnodig. Met respek, stem ek met hom saam. Veral van belang vir my is die taal waarin hierdie bepaling ingeklee is, en die woord ‘uitwerking’ gebruik word om slegs aan te dui wat die algemene regsgevolge is.’

[8] An example that immediately springs to mind as an illustration why the interpretation advanced by the appellants could not be correct is that the detention of a person that was lawfully arrested but not brought to court within 48 hours in terms of s 50 of the Act could not possibly continue to be lawful because of s 39(3).

[9] *Nhlabathi* was decided when s 50 of the Act read quite differently from today in that it specifically provided that a person arrested is not to be detained for longer than 48 hours unless brought before a lower court ‘and his further detention, for the purposes of his trial, is ordered by the court’. Section 50 was amended on numerous occasions after its enactment in 1977. It has read materially as it currently does since 1997 and still provides that an arrested person be brought to court within 48 hours.[4] It no longer provides in the same words as before that an arrested person be brought before a lower court for the purpose of an order for further detention. It contains more elaborate provisions in subsec (6) including that an arrested person be informed by the court of the reason for the detention to continue[5] or be charged, in which case he or she is entitled to apply to be released on bail, failing which the person shall be entitled to be released. Detention contrary to those provisions would be unlawful.

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[4] Certain exceptions are provided for if 48 hours expire outside of court hours or not on a court day, but those are irrelevant for the present discussion.

[5] ‘50(6)(a) At his or her first appearance in court a person contemplated in subsection (1)(a) who–
(i) was arrested for allegedly committing an offence shall, subject to this subsection and section 60 –
(aa) be informed by the court of the reason for his or her further detention; or
(bb) be charged and be entitled to apply to be released on bail, and if the accused is not so charged or informed of the reason for his or her further detention, he or she shall be released;’

[10] Section 39(3) provides for lawful detention during the period between lawful arrest and the first court appearance. The *Nlabathi* interpretation was therefore correctly followed during 2000 in both the *Tobani*[6] decisions referred to in note 2 above.

[11] The appellants introduced into evidence the charge sheet and record of the appearances and remands in the first case. From that it is apparent that the first case continued to be postponed and the respondent continued to be remanded in custody. After the first appearance the court derives its authority from s 168[7] to postpone a pending matter and make appropriate orders.

[12] The record reveals that on 11 October 2001 an order was made that the respondent be released on warning. The appellants argued that this inscription was a mistake. It was submitted that the magistrate made an administrative error and had no intention to release the respondent on warning. The evidence relied upon for this contention is found in the self-same record of the very next appearance on 29 October 2001, when the respondent was, without further ado, remanded in custody. I presume this argument refers to the non-compliance with ss 72(4), 72A and 68 of the Act which determines that bail and release on warning may only be cancelled under certain circumstances. Those circumstances were not present in this case at the time.

[13] The inference of a mistake is not possible on the facts. By 11 October 2001 the first case had been continuously postponed and the respondent remanded in custody for almost four years without charges having been put to him. Although there was no formal objection raised against a further postponement, some issues about the case being dragged on were stated and the respondent's legal representative remarked that they were ready for trial. The magistrate then postponed the case and ordered the release on warning of the respondent. Not only was the respondent's release on warning noted on the record, the warrant for detention that is usually authorised by a presiding officer following a remand in custody, a J7 form, which is addressed to the

[6] [2000] 2 All SA 318 (SE) at 322f and 2003 (5) SA 126 (E) at 134B.

[7] '168 A court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it necessary or expedient, adjourn the proceedings to any date on the terms which to the court may seem proper and which are not inconsistent with any provisions of this Act.'

prison and contains an instruction to detain, was not issued. In addition the relevant G344 form, sent from prison to court with a detainee for the clerk of the court to record the result of the proceedings thereon, contains the inscription that the respondent was released on warning. These deliberate and conscious actions derogate from an inference that a mistake of any kind was made on that day. That the magistrate – a different one ─ did not follow the requirements of ss 22 72(4), 72A and 68 on 29 October 2001 is equally consistent with the inference that he simply did not notice that the respondent had been released on warning previously.

[14] The appellants introduced the record through the evidence of the clerk of the court into whose custody it was entrusted, who certified it in terms of s 235(1)[8] of the Act. Section 235 provides for prima facie proof of the accuracy of a record at criminal proceedings. Section 72(3)(b)[9] provides similar proof of a warning. In anticipation of the trial the parties agreed that documents would be evidence of what it purports to be. Section 18(1) of the Civil Proceedings Evidence Act 25 of 1965 provides for the admission into evidence of public documents on their mere production from proper custody by the officer to whose custody the originals are entrusted. The appellants did not lead any evidence of a mistake on the record and the respondent did not challenge the evidence. The appellants relied on the face value of the record and its correctness in all other respects. In the absence of evidence to the contrary the record is evidence that the respondent was released on warning on 11 October 2001.

[15] On 29 October 2001 the respondent was remanded in custody without compliance with ss 72(4), 72A and 68. Those sections, read together, provide, amongst

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[8] '235(1) It shall, at criminal proceedings, be sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or clerk of the court or other officer having the custody of the record of such judicial proceedings . . . as a true copy of such record, is produced in evidence at such criminal proceedings, and such copy shall be *prima facie* proof that any matter purporting to be recorded thereon was correctly recorded.'

[9] '72(3)(b) A court which releases an accused under subsection (1) shall, at the time of releasing the accused, record or cause the relevant proceedings to be recorded in full, and where such court is a magistrate's court, or a regional court, any document purporting to be an extract from the record of proceedings of that court and purporting to be certified as correct by the clerk of the court and which sets out the warning relating to the court before which, the time at which and the date on which the accused is to appear or the conditions on which he was released, shall, on its mere production in any court in which the relevant charge is pending, be *prima facie* proof of such warning.'

other things, that an accused person's release on warning may be cancelled by a magistrate upon receipt of information on oath. In the absence of compliance with the empowering provisions of those sections, the requirement of constitutional legality was not met and the respondent's release on warning was not lawfully cancelled.

[16] Therefore, from 11 October 2001 to 30 June 2004 the respondent was unlawfully detained.

[17] Following upon this conclusion it needs to be investigated whether any ground exists for finding that in the period between 23 August 1999 and 11 October 2001 the respondent was unlawfully detained. The record reveals that the respondent's continued detention was in terms of the order of the court remanding him in custody. A decision by a court to remand an accused person in custody results in lawful detention of that person. Such a decision needs to be set aside before lawful detention in terms thereof ceases.[10]

[18] The respondent attacked the decisions to remand him in custody as having been based, solely, on the incorrect information that he was a sentenced prisoner. It has to be assumed that if the warrant of release in the second case was issued the respondent would have been informed thereof, the prison would have released him in that case and he would have applied for bail in the first case. Section 60(4) to (10) lists many factors that are relevant to a decision to release an accused on bail or warning. None of these was canvassed at the trial. It is consequently unknown whether he faced charges included in schedule 5 or schedule 6 of the Act, what the strength of the State's case was at that stage, what the circumstances were of his escape, what his personal circumstances were, to name but a few of the unknown facts making it impossible to conclude that the respondent would probably have been released if the true facts about his successful appeal had been known. It is unrealistic to assume that knowledge of the true facts in this regard would, in and of itself, have resulted in the respondent's release

[10] The effect of such a decision is apparent from *Abrahams v Minister of Justice* 1963 (4) SA 542 (C). Although the facts of that case are materially different, it illustrates that the decision of a magistrate to detain is not affected by an unlawful arrest. The dictum at 545G-H was approved in *Isaacs v Minister van Wet en Orde* [1996] 1 All SA 343 (A) at 351f-j.

on bail or warning. In terms of s 60(11)(a) and (b)[11] the respondent would have had the onus to show facts that justified his release.

[19] For the entire period under consideration the respondent was detained as a sentenced prisoner. That fact is not insignificant. The Correctional Services Act 8 of 1959[12] (the CSA) makes a clear distinction between the status of a sentenced and an awaiting trial prisoner. To detain someone contrary to his or her status does not, however, affect the lawfulness of the detention, which arises from the court order and not from the place or manner of detention. The respondent pleaded that the unlawfulness of his detention arises from the setting aside of his conviction and sentence and not from his having been detained at the wrong facility. This does not mean that the respondent has no redress for the infringement of his rights contrary to the empowering provisions of the CSA. An enquiry in that regard should be had, but falls outside the ambit of what we have to decide.

[20] Consequently the respondent was unlawfully detained for the period 11 October 2001 until 30 June 2004. The trial court erred in finding that the respondent was unlawfully detained for the period 23 August 1999 until 10 October 2001.

[21] Having reached that conclusion it cannot be left unsaid that this case represents an extreme example of violation of the rights of the respondent and is a disgrace to the administration of justice. The limited issue placed before the trial court prevented a thorough probe into a much wider range of issues. In view of what happened the appellants should have been eager to make good to the respondent, rather than hold out and fight to the bitter end. Against that background the success achieved in this court is not substantial success entitling them to the costs of the appeal.

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[11] Section 60(11)(a) of the Act:
'Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –
(a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release'.

[12] The Correctional Services Act 111 of 1998 replaced Act 8 of 1959 in material respects, but only on 31 July 2004, thus, for the entire period under consideration the 1959 act is applicable.

[22] For these reasons it is ordered that:

1 The appeal is upheld in part.

2 The order of the court a quo is replaced by the following:

(a) The plaintiff was unlawfully detained during the period 11 October 2001 until 30 June 2004.

(b) The defendants, jointly and severally, are to pay the plaintiff's costs, including the costs of two counsel.

3 The appellants, jointly and severally, are ordered to pay the costs of the appeal, including the costs of two counsel.

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S SNYDERS
ACTING JUDGE OF APPEAL

CONCUR:

FARLAM JA
COMBRINCK JA

PONNAN JA

[23] I have had the benefit of reading the judgment of Snyders AJA but unlike my learned Colleague I believe that the appeal must fail in its entirety.

[24] The retention of an individual in custody is an exercise of public power. Any such exercise is of course constrained by the principle of legality. It may thus only occur in terms of lawful authority.

[25] What the respondent has attacked in this matter is his continued detention as a sentenced prisoner after the success of his appeal. The attempt at justification offered by the appellants is that he was in any event being held as an awaiting trial prisoner in connection with certain other pending charges. The attempt must fail.

[26] It is indeed so that his arrest and detention on the first set of charges for which he was awaiting trial in the Regional Court had caused his liberty to be legally curtailed. That, however, could not afford an excuse for the further encroachment upon it for which there was in law no basis after the success of his appeal on 23 August 1999. Once his appeal succeeded he was therefore entitled to claim immunity from any additional infringement on his liberty no longer warranted by his changed status.

[27] After the success of his appeal his changed status ought to have received appropriate recognition. It did not, simply because, as has been admitted by the appellants, the Registrar of the High Court had negligently failed to issue a warrant for the respondent's liberation from prison. Had that happened he would have been treated as any other awaiting-trial prisoner. He was not. He was thus subjected to more rigorous conditions than other prisoners of the class to which he actually belonged. Such differential treatment under which he was subjected to harsher or more severe treatment than the rest, amounted to punishment, and must be illegal (*Whittaker v Roos and Bateman*, *Morand v Roos and Bateman* 1912 AD 92 at 128).

[28] Any greater encroachment upon his liberty than was necessary to secure his attendance in court or as required by the prison rules for the disciplinary management of the prison vis-à-vis him as an awaiting trial prisoner constituted an infringement on his personal rights. Approached thus, the treatment of the respondent after 23 August 1999 was illegal. His liberty was curtailed in a manner significantly more excessive than is usual for awaiting-trial prisoners. The effect was to subject him to punishment and not merely to detain him pending trial. The illegality in his continuing confinement as a sentenced prisoner is undoubted. It follows that an action must lie against those who caused him to be subjected to that treatment. This is precisely the basis of his claim. It is not a claim for unlawful imprisonment, or deprivation of all liberty, within the context of the *actio iniuriarum*. One is not concerned with the validity of the remand orders and one is not concerned with whether the respondent should have awaited trial in the Regional Court case in custody, on bail or on warning. That question might arise were the claim to be amended. What is alleged, and is apparent from the agreed facts, is that negligence on the part of the Registrar of the High Court resulted in certain injurious consequences amounting, in sum, to his continued wrongful detention as a sentenced prisoner. It did not require a liberation warrant from the Registrar to terminate his detention as a convicted prisoner. That would merely have been an administrative measure reflecting the substantive position. The substantive position was simply that after the setting aside of his sentence there was no lawful basis for his continued detention as such a prisoner. It must follow that the answer to the question put to the trial court for decision is that the respondent's detention as a sentenced prisoner from 23 August 1999 to 30 June 2004 was unlawful.

[29] In the result I would accordingly dismiss the appeal.

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V M PONNAN

JUDGE OF APPEAL

CONCUR:

HOWIE P