

SOUTH AFRICA / JUDGMENT

Kgatlhe v Minister of Justice And Correctional Services and Others (41072/2016) [2016] ZAGPPHC 515 (25 May 2016)

[2016] ZAGPPHC 515

COURT

North Gauteng High Court, Pretoria

BEFORE

Baqwa

CASE / FILE NUMBER

41072/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 41072/2016

DATE:

25 MAY 2016

In

the matter between:

DINEO

KGATLE.....Applicant

And

MINISTER

OF JUSTICE

AND.....1st

Respondent

CORRECTIONAL

SERVICES

COMMISSIONER

OF

CORRECTIONAL.....2nd

Respondent

SERVICES

CHIEF

WARDER OF

BAVIAANSPOORT.....3rd

Respondent

MEDIUM
SECURITY PRISON
AREA

COMMISSIONER: BAVIAANSPOORT.....4th
Respondent

JUDGMENT

Baqwa J

[1] There is a reason why the practice manual of the Gauteng High Court (Pretoria) is formulated in the manner it is, it is formulated as follows:

“ 13.24 URGENT APPLICA TIONS

1. A judge is designated for the hearing of urgent applications for each week of the year. For this purpose the week commences on Friday at 16:00 and terminates on the Friday of the next week at 16:00.
2. The normal time for the bringing of an urgent application is at 10:00 on Tuesday of the motion court week.

3.

2.1 If the urgent application cannot be brought at 10:00 on the Tuesday of the motion court week, it may be brought on any other day of the motion court week at 10:00. The applicant in the founding affidavit must set out facts which justify the bringing of the application at a time other than 10:00 on the Tuesday.

2.2 If the urgent application cannot be brought at 10:00 on any day during the motion court week, it may be brought at 11:30 or 14:00 on any day during the motion court week. The applicant in the founding affidavit must set out facts which justify the bringing of the application at a time other than 10:00 on the Tuesday and other than 10:00 of the relevant court day.

2.3 If the application cannot be brought at 10:00 on the Tuesday or at 10:00 on any other court day or at 11:30 or 14:00 on any court day it may be brought at any time during the court day. The applicant in the founding affidavit must set out facts which justify the bringing of the application at a time other than 10:00 on the Tuesday and other than at 10:00, 11:30 or 14:00 on any other court day.

2.4 The aforementioned requirements are in addition to the applicant's obligation to set out explicitly the circumstances which render the matter urgent. In this regard it is emphasised that while an application may be urgent, it may not be sufficiently urgent to be heard at the time selected by the applicant.

3.2 The aforementioned practices will be strictly enforced by the presiding judge. If an application is enrolled on a day or at a time that is not justified, the application will not be enrolled and an appropriate punitive cost order may be made.

3. The first paragraph of relief sought in the applicant's notice of motion must be for the enrolment of the application as an urgent application and for dispensing with the forms and service provided for in the rules of court, to the extent necessary.

5.

3.1 Unless the circumstances are such that no notice of the application is given to the respondent, or unless the urgency is so great that it is impossible to comply therewith, the notice of motion must follow the format of form 2(a) of the First Schedule to the Rules of Court and therefore must provide a reasonable time, place and method for the respondent to give notice of intention to oppose the application and must further provide a reasonable time within which the respondent may file an answering affidavit. The date and time selected by the applicant for the enrolment of the application must enable the applicant to file a replying affidavit if necessary.

3.2 Deviation from the time periods prescribed by the Rules of Court must be strictly commensurate with the urgency of the matter as set out in the founding papers.

3.3 In cases of extreme urgency, the reasonable time afforded to the respondent to give notice of intention to oppose, is usually not less than 2 hours, excluding the hour between 13:00 and 14:00.

6.

6.1 If the facts and circumstances set out in the applicant's affidavits do not:

6.1.1 constitute sufficient urgency for the application to be brought as an urgent application and/or

6.1.2 justify the abrogation or curtailment of the time periods referred to in rule 6(5) and/or

6.1.3 justify the failure to serve the application as required in rule 4, the court will decline to grant an order for the enrolment of the application as an urgent application and/or for the dispensing of the forms and services provided for in the rule. Save for a possible adverse cost order against the applicant the court will make no order on the application.

6.2 The aforementioned requirements will be strictly enforced by the presiding judge.

1.1 For the purposes of urgent applications ordinary court hours are 10:00 to 11:15, 11:30 to 13:00 and 14:00 to 16:00 of a court day. If a party wishes to bring an urgent application out of ordinary court hours the presiding judge's clerk must be telephoned at his/her office or on cell number: 083 677 0522.

The following information must be conveyed to the judge's clerk:

7.1.1 the identity of the parties;

7.1.2 whether or not service has been or will be effected;

7.1.3 whether or not the application is or is anticipated to be opposed;

7.1.4 the type of application;

7.1.5 the nature of the relief sought;

7.1.6 why it is not possible for the application to be heard during ordinary court hours; and

7.1.7 when it is anticipated the application will be ripe for hearing.

7.2 The judge's clerk will communicate with the judge and thereafter advise the party when and where the application will be heard or what directions the judge has given in regard to the application.

7.3 When an urgent application is brought out of ordinary court hours, the applicant must ensure that the order of the court can be typed so that it can be signed by the presiding judge's clerk.

7.4 The judge designated for the hearing of urgent applications is not to be contacted directly.

7.5 If the judge designated for the hearing of urgent applications directs that the application be heard in court after ordinary court hours the judge's clerk shall telephone —

7.5.1 the court stenographer on urgent application duty to arrange the stenographer's attendance in court at the

arranged time. The stenographer's telephone number is obtained from iAFRICA on the Friday before 16:00.

7.5.2 the security officer on duty at the main entrance of the High Court at telephone number 012 315 7460 to arrange for the admission of the parties to the court and for the parties to be directed to the court in which the court dealing with urgent matters is sitting.

8.

8.1 When an urgent application is brought for the Tuesday at 10:00 the applicant must ensure that the relevant papers are filed with the registrar by the preceding Thursday at 12:00.

8.2 The registrar's office must ensure that the court files of all urgent applications set down for the Tuesday at 10:00 are brought to the clerk of the judge hearing the urgent applications by 16:00 on the preceding Thursday.

8.3 The clerk of the judge hearing urgent applications will prepare a roll in respect of the urgent applications to be heard on the Tuesday at 10:00. The clerk will publish the roll in the foyer of the High Court by no later than 10:00 on the Tuesday.

8.4 Where an urgent application is brought for any other time than Tuesday at 10:00, the registrar's office shall ensure that the court file is brought to the clerk of the judge hearing urgent applications as soon as possible. The judge's clerk shall prepare a roll in respect of the urgent applications to be heard on the other days of the week. The clerk will publish the roll in the foyer of the High Court by no later than 09:00 on the day of the hearing.

9. Save in exceptional circumstances the applicant should not frame the relief sought in the form of a rule nisi which has in whole or in part interim effect. Where applicable, the urgent relief should be sought pending the determination of the application.

10.

9.1 On the Friday of each week at 16:00 the registrar shall send to the clerk of the judge designated for the hearing of urgent applications for the week commencing at 16:00 on the Friday

9.1.1 the cellular phone provided for the judge's clerk;

9.1.2 fifteen consecutively numbered court files (these files are to be utilised in the event of an urgent application being brought without a court file having been opened by the registrar of the court);

9.1.3 an official stamp of the registrar of the High Court.

10.3 On Friday of each week, before 16:00, the clerk of the judge who is to take over the urgent court must obtain from i AFRICA the telephone number of the stenographer on urgent court duty for the urgent court week.

10.4 On the Friday morning at the conclusion of the week during which the designated judge heard the urgent applications, the judge's

clerk must return the cellular telephone, the unused numbered files and the aforesaid stamp to the registrar.

10. The memorandum to practitioners titled:

'Procedure in the Pretoria urgent motion court' dated 12 February 2007, annexed hereto as annexure 'A is applicable and of full force and effect and must be complied with together with the foregoing.'

[2] The Practice Manual is intended to give the parties who are cited as respondents the opportunity to formulate their response and serve same on the applicants and the court. Urgency is not a license for one party to trample over the right of reply which the respondent party is entitled to.

- [3] The applicant herein has not complied with the provisions of the practice manual and claims that she could have brought the application ex parte but has nevertheless given notice to the respondents. The respondents are State entities situated in places not in close proximity to each other. It has to be borne in mind that, their turn around times cannot be equated with those of private individuals.
- [4] The fallacy upon which the applicant has operated is the conclusion that his detention is “unlawful” without hearing the side of the respondents and attempts to suggest to this court that it must accept such unlawfulness as a fact not only without hearing the respondents but also on the basis of hearsay evidence deposed to in the affidavit of the sister of the applicant Katlego Leso.
- [5] The applicant is a convicted prisoner who had been sentenced to 28 years in 2002 on a charge of armed robbery.
- [6] After having served 12 years of his term and following a decision of the Parole Board, he was released on parole from Kgosi Mampuru Correctional Centre on 29 August 2013.
- [7] The applicant’s conditions of parole included a ‘tagging’ with an electronic monitoring device commonly referred to as “EMD” which comprises of two instruments, namely an anklet permanently attached to the applicant’s ankle and a Global Positioning Systems receiver or GPS receiver.
- [8] The applicant was made to understand that the anklet must not be tampered with, and that the GPS receiver should be charged daily and that the two should be kept within a reasonable proximity of each other at all times failing which an alert would be triggered to the Department of Correctional Services.
- [9] On 29 July 2014 under conditions which I need not detail here, the applicant appears to have lost the GPS receiver after which he was taken back into custody at Baviaanspoort Medium Security Prison.
- [10] It would appear that from that time in 2014 no steps were taken for the release of the applicant until about February 2016 when an urgent application was brought before this court. The application was struck off the roll for lack of urgency.
- [11] Today, about two months later the matter has been brought back to the urgent court as a habeas corpus application and with less than 24 hours’ notice to the respondents.
- [12] It bears noting that even though the applicant is a convicted prisoner who was paroled subsequent to a recommendation of the Parole Board, the Parole Board has not been cited as a party to this application.
- [13] The applicant has been in the custody of Correctional Services since 2014 without any action being taken and in May of 2016 it is submitted that the matter is inherently urgent and must be dealt with as such.

[14] In the case of *Van Gund v Minister of Correctional Services* 2011 (1) SACR 16 the following was said at para 17:

"Lastly, I want to comment on the manner in which these applications are brought to court. Prisoners invariably, and in almost all their cases, bring their matters in the urgent court. In some cases the prisoners have been sentenced to life imprisonment. The argument is often advanced that cases involving prisoners are urgent, in that they involve their liberty. They argue that they have a right to freedom of security in terms of s 12 of the Constitution. In my view there is a fallacy in this argument. It loses sight of the fact that, once a prisoner has been lawfully sentenced by a court of law, his/her right is limited to prison grounds. This limitation is justifiable in an open democratic society. A prisoner has no right to be released before he has served his sentence in full. For this reason I see no reason why they should be treated differently from ordinary litigants. They, like all litigants, must comply with the well-established principles relating to urgent applications. In particular, if a prisoner claims urgency, such urgency must be clearly shown and grounds thereof be clearly stated on the papers. The right to liberty is not a ground per se constituting urgency. Something more is required. It is now well settled that, in the absence of the grounds for urgency, these cases ought to be struck off the roll."

[15] The merits of this case are such that I must take into consideration that:

15.1 This matter was struck off the roll by this court for lack of urgency in February 2016 as I have already stated. No reasons have been advanced as to what has changed since that time for the matter to be treated differently by the same court on the same facts a mere two months later.

15.2 It has taken the applicant about two years to take action regarding his release and the matter cannot therefore become 'urgent' on the mere say so of the applicant. If that were so, urgency would be a matter of semantics and not a matter for factual and/or legal

determination.

15.3 Quiet clearly this is a matter in which the applicant can obtain redress in due course as the applicant is a person whose liberty might be subject to a limitation. That determination in due course must be made after a hearing of all the parties given the fact that the applicant is a convicted prisoner.

[16] In the result I have come to the conclusion that this matter ought to be struck off the roll for want of urgency.

It is so ordered.

S. A. M. BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Date of Hearing: 25 May 2016

Date of Judgment: 25 May 2016 (Extempore)

For the Applicant: Advocate S. W. Burger

Instructed by: Bowman Gilfillan Inc.

For the Respondents: Advocate T. Lupuwana

Instructed by: State Attorney

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