

SOUTH AFRICA / JUDGMENT

Makhuvha v Minister of Justice and Correctional Services Ronald Lamola N.O. (77433/2018) [2021] ZAGPPHC 873 (7 December 2021)

[2021] ZAGPPHC 873

COURT

North Gauteng High Court, Pretoria

BEFORE

Khwinana

CASE / FILE NUMBER

77433/2018

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 77433/2018

In the matter between:-

NDIVHO KNOWLEDGE MAKHUVHA

APPLICANT

AND

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

RONALD LAMOLA N.O.

FIRST RESPONDENT

MINISTER OF POLICE, BHEKOKWAKHE HAMILTON CELE N.O.

SECOND RESPONDENT PUBLIC

PROSECUTIONS, SHAMILA BATHOHI N.O.

THIRD RESPONDENT

THE STATION COMMANDER, SOUTH AFRICAN POLICE SERVICES

MODJADJISKOOL, KD MACHETE

THE DIRECTOR OF PUBLIC PROSECUTIONS, SHAMILA BATHOHI N.O.

MODJADJISKLOOF, KD MACHETE

FOURTH RESPONDENT

JUDGMENT

KHWINANA AJ

INTRODUCTION

- [1] This is an application to set aside a conviction and sentence of the applicant in terms of section 57(7) of the Criminal Procedure Act 51/1977 as amended.
- [2] The applicant approaches this court in terms of section 304 of Criminal Procedure Act. The applicant in his notice of motion prays for the:-
- (a) setting aside of summons issued under number DN 3369 on 26th April 2020,
 - (b) removal of the conviction from the SAPS records,
 - (c) that the applicant be refunded his R 1000.00,
 - (d) that the respondents comply within 15th days of receipt of the order and
 - (e) no order as to costs unless opposed.

BACKGROUND

- [3] The applicant states that the purpose of this application is to set aside the conviction and sentence that emanated from him paying an admission of guilt fine on this the 26th day of April 2020 under duress in ModjadjisKloof, Limpopo Province.
- [4] The applicant states that the lockdown due to Cov-19 pandemic started on the 26th March 2020 for a period of twenty one days. The country was put under level five which ended on the 01st day of May 2020. The applicant has referred to Annexure which had a list of essential goods and services. The said list was amended to include massbuild being building materials emergency repairs for residential homes.
- [5] The applicant states that when the lockdown was imposed he went to his hometown in Malonga where he stayed until the 26th April
2020. He says that he received a call from his supervisor who informed him that he was to be regarded as an essential service provider due to the amendment of the list of essential goods and serves. He was informed to return to work on the 27th April 2020 by the said supervisor namely Rosaline Msimango.

- [6] The applicant states that he knew that a permit was to be issued to him by his employer. He says he awaited same until Mr Lukas Kotze send same to him via what's 'up which document was unsigned. He says he enquired from Mr Kotze if same would not pose a problem however he was informed that there was no one working at the offices thus unable to have same signed, He had annexed the copy of the said unsigned permit.
- [7] The applicant says he printed the permit and proceeded to catch a taxi as he was instructed to come to work that was on the 26th April 2020. He says while on the taxi the SAPS had a roadblock and the taxi he was travelling in was halted and he produced the unsigned and unstamped permit to the police officer. He says he was however arrested with other colleague as they were told their permits were not acceptable. He says he made a call to Mr Kotze whom wanted to talk to the police officer who refused to take the call. He says was advised that he was guilty and would have to pay a fine or go to jail until after the lockdown.
- [8] The applicant says that Mr Kotze sent a signed and stamped permit before paying the admission of guilt fine. He says he attempted to show it to the officer but he told him that he was not the only person he had to deal with. He says he explained to the officer that he did not have funds on him safe for funds that he could withdraw from his bank account. He says he explained to Mr Kotze that he had to pay a fine and he advised that he must ensure that he is being issued with a receipt. He was accompanied to the ATM with his colleague and they both withdrew the funds and the lady who did not have funds was left at the police station. He says this was a traumatic experience for him to this day he has nightmares regarding same.
- [9] The applicant states that he was merely given a notice to appear or summons which was not explained to him. The implications of paying an admission of guilt fine was not explained to him, that he was going to have a criminal record, that he had the right to contest the fine, arrest and or charges in court. He says he was afraid to go to jail as he would not be able to practice social distancing and might contract the virus.
- [10] He says that he was given same number as his colleague which he attached as proof thereto. He says the charge depicted on the summons was failure to stay at home which according to him was wrong. He says he was coerced into paying the fine as if same had been explained to him he would not have paid. He says procedure in terms of section 56 or 57 of the CPA 51/1977 as amended was not adhere to.

LEGAL PRINCIPLE

- [11] It is trite that admission of guilt fines are regulated by Section 57 of the Act. The purpose of allowing the payment of an admission of guilt fine is to enable a person to admit guilt in advance and thereby avoid having to appear in court on a "minor" criminal charge. Although the payment of a fine may seem innocuous, there could be serious consequences which may not be realised by the person who pays the admission of guilt fine.
- [12] When a person pays an admission of guilt fine he/she:

* waives a number of rights including but not limited to the right to be found guilty beyond a reasonable doubt;

* admits his/her guilt;

* is deemed to have been convicted and sentenced and a criminal conviction is recorded against that person's name in the criminal record book for admissions of guilt. A criminal conviction remains recorded against the person's name for life (unless expunged) and must be disclosed when that person applies for a job, a firearm licence or a visa, to name but a few instances.

[13] It is highly recommended that a person faced with the option of paying an admission of guilt fine should seek professional legal advice before doing so in order to enable that person to fully understand the consequences of his/her actions prior to doing so. Inter alia rights include the right to • remain silent, • be told of your right to remain silent, • be released from detention, if arrested for allegedly committing an offence, if the interests of justice permit, • be told that you are not obligated to make any admission that can be used in evidence against you, • be told of the reason for your detention, • choose to consult with an attorney or to have one assigned by the State if a substantial injustice will result due to lack of legal representation, and • communicate with and be visited by your spouse or partner, family, chosen religious counsellor and medical practitioner.

[14] One is not left without a remedy if one has already paid an admission of guilt fine and is in fact innocent. The Act makes provision to set aside the conviction and sentence in appropriate circumstances. It is once again suggested that professional legal advice is sought to assist with the process in this regard[1].

[15] In *S v Madhinja*[2] the accused was arrested for an altercation at the roadside when he was attempting to sell grass sods. He was arrested and handed a J534 which included an admission of guilt fine of R 500.00 without appearing in court. He paid it and the magistrate recorded the conviction and sentence accordingly. In his affidavit to set aside he stated that he paid in order to secure his release. The court was satisfied with his explanation thus the conviction was set aside as well as the sentence.

[16] In *Cedras*[3] it was said that the accused must demonstrate an arguable defence on the merits of the charge. In the current constitutional regime, however, I do not think this should be regarded as a requirement, at least not invariably. As Mr Stephen has pointed out, an accused, even if he knows he committed the offence, is entitled to require the State to prove its case beyond reasonable doubt. For any number of reasons the State may not be able to adduce sufficient evidence and the accused might thus be entitled to a discharge at the end of the State's case. And as the magistrate has said, the State might be persuaded to drop the charge or (in the case of drug possession) divert the case from the criminal justice system.

[17] For these reasons I consider that the accused's admission of guilt was not in accordance with justice and should be set aside. It will be for the State to decide whether to proceed with a prosecution. In the Tong[4] judgment, the court held that the accused person must be informed and warned by the police officer serving the notice that, should he or she elect to pay the admission of guilt fine, a conviction will be noted against his or her name. As a result, the court held that the existing written notice usually used (J534 form) is inadequate and may not pass constitutional scrutiny[5].

[18] In terms of section 56 of Criminal Procedure Act 51/1977 as amended:-

- (1) If an accused is alleged to have committed an offence and a peace officer on reasonable grounds believes that a magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, such peace officer may, whether or not the accused is in custody, hand to the accused a written notice which shall-
 - (a) specify the name, the residential address and the occupation or status of the accused;
 - (b) call upon the accused to appear at a place and on a date and at a time specified in the written notice to answer a charge of having committed the offence in question;
 - (c) contain an endorsement in terms of section 57 that the accused may admit his guilt in respect of the offence in question and that he may pay a stipulated fine in respect thereof without appearing in court; and
 - (d) contain a certificate under the hand of the peace officer that he has handed the original of such written notice to the accused and that he has explained to the accused the import thereof.

[19] In terms of the Bill of Rights:

1. Everyone who is arrested for allegedly committing an offence has the right
 - a. to remain silent;
 - b. to be informed promptly
 - i. of the right to remain silent; and
 - ii. of the consequences of not remaining silent;
 - c. not to be compelled to make any confession or admission that could be used in evidence against that person;
 - d. to be brought before a court as soon as reasonably possible, but not later than
 - i. 48 hours after the arrest; or

- ii. the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
- e. at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
- f. to be released from detention if the interests of justice permit, subject to reasonable conditions.

ANALYSIS

- [20] It is important to note that the applicant has been confirmed as an employee of Builders in a letter that has been attached to his application. It is so that the lockdown regulations were lax to include shops such as builders. However, what is concerning is that a store as big as builders would be so careless to issue an unsigned, unstamped and undated permit, that the author of the said permit being one Edgar Fourie has failed to attest in a confirmatory affidavit that indeed on the day in question he authorised Mr Kotze to send a permit via what's App to the applicant.
- [21] It is also concerning that the so-called signed and stamped permit is now attested to by a different person being Dirk Marais again not the one applicant alleges was communicating with. The applicant is not playing open cards with the court in that he does not share the what's App messages where it is said the permit emanated from. The signed permit appears with a date of the 24th April 2020 whereas according to the evidence in the founding affidavit it was arranged by Mr Kotze on the 26th April 2020 whilst the applicant was already at the roadblock.
- [22] The applicant says that he alerted the police to the first permit which was dismissed due to it being unsigned and unstamped. He fails to also mention that it was undated. The applicant further states that he telephoned Mr kotze explained to him that the permit was unacceptable to the police and Mr Kotze went to work to arrange for another permit. He says the new permit was sent to his phone again via what's App whilst he was at the roadblock prior him paying the admission of guilt fine. He opines that his arrest was unlawful despite that as at that time he did not have permit that was signed.
- [23] It cannot be ignored that even 'the second time around he shares a permit without the what's up message wherein it would indicate the time it was sent and from whom was it received. The applicant with his own explanation understood the importance of having a permit. He says Mr kotze told him to make sure that he is being issued with a receipt for the fine. He knew he was paying a fine.
- [24] I must say the version of the applicant has lacunas and one can safely say it is like a bucket with holes yet one pours water in it. However, It is very sad that the respondents in this matter have failed to oppose neither did they file any opposing papers. The version of the applicant as is, is unrebutted. It was imperative for the police to give their side of the story in

order for this court to arrive at a just decision. This court is compromised as the version of the applicant is that his constitutional rights were not explained to him and the implications of paying an admission of guilt fine. The court was not there and it cannot make assumptions that the police did their work.

- [25] It is concerning to see that one summons number has been used for the applicant and his colleague however the applicant denies receipt of the summons. This would be a gross miscarriage of justice. It might be that same could be explained or verified but with the respondents doing a no show this court's hands are tied. I acquiesce with the judgment *supra* that it is not about whether the person is guilty or not. It is unheard of that you accuser should be the one to also finalise your matter. It is not enough to hand over the notice of constitutional rights of an accused without explaining them and also informing him of a fine without an explanation as to the ramifications as clearly required.
- [26] The bill of rights confers the rights of an accused person however it is upon the police officer effecting the arrest to explain the reasons for the arrest and to hand over the summons. Here is an accused person who is at the mercy of an officer and is being told the only option that will allow him to be released is if he pays a fine. Surely that will be an option to take especially because at the time the concern was one incarcerated you would be in custody God knows for how long. He says he was told until the end of the lockdown. I take judicial notice that courts were not functioning optimally and accused were not being brought to court.

They were appearing via the CCTV whilst in prison. I also cannot lose sight of what was said by the applicant that he was afraid that he might be exposed to Cov-19 pandemic as in jail he would not be able to observe social distancing. I must concur with the applicant anything was possible especially because the world at large was still learning about Cov-19 virus.

- [27] I therefore accept the explanation given by the applicant in his affidavit and I order that the admission of guilt under DN 2336639 be set aside, conviction and sentence in the criminal record book against applicant be set aside and or the register of SAPS be removed/expunged or set aside, R 1000.00 be refunded to the applicant and this order to be complied with within 15 days of receipt of this order. No order as to costs. It will be for the State to decide whether to proceed with a prosecution.

ENB KHWINANA

ACTING JUDGE OF NORTH GAUTENG

HIGH COURT, PRETORIA

APPEARANCES:

Counsel for the Applicant : Adv. Nadia Nortje

GAUTENG DIVISION, PRETORIA

Before the Honourable Justice Khwinana AJ

On the 07 December 2021

Number on the Roll: 88

The matter will be heard on MS Teams

Case Number: 7052/2021

In the matter between:

NDIVHO KNOWLEDGE MAKHUVHA

Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES,

RONALD LAMOLA N.O.

First Respondent

Second Respondent

Third Respondent

MODJADJISKLOOF, KD MACHETHE

Fourth Respondent

This Order is made an Order of Court by the Honourable Justice Khwinana AJ, duly stamped by the Registrar of the Court and submitted

electronically to the Parties/their legal representatives by email. This Order is further uploaded to the electronic file of this matter on CaseLines by the Judge or his/her secretary. The date of this order is deemed to be 07th December 2021.

COURT ORDER

HAVING heard the counsel as well as read the documents filed of record

IT IS ORDERED THAT:

1. The Applicant's admission of guilt made on 26 April 2020, under summons number D2336639 is set aside.
2. The entry of the conviction and sentence, against the Applicant, into the Criminal Record Book under summons number D2336639 and/or into the register of criminal convictions of the South African Police Services is set aside and removed/expunged from the Applicant's criminal record.

3. The admission of guilt fine of R1000.00 paid by the Applicant is paid back to his/refunded to him.
4. The Respondents are to comply with this order within 15 (fifteen) court days of a copy of this order being served on them.
5. No order as to the costs.

BY THE COURT

REGISTRAR OF THE HIGH COURT

PRETORIA

FOR APPLICANT: ADVOCATE NADIA NORTJE

[1] Article written by Jerome Levitz, Director Fluxmans

[2] 2019 (1) SACR 297 (WCC)

[3] STATE And DANE HOUTZAME High Court Ref No: 141171

[4] S v Tong 2013 (1) SACR 346 (WCC) – see para 13).

[5] Derebus article 2014 Sugar-coating guilt Admission of guilt fines – no easy fix By Dr Llewelyn Curlewis

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