

SOUTH AFRICA / JUDGMENT

Minister of Justice and Correctional Services and Others v Wilhelm Pretorius and Others (440/2022) [2023] ZASCA 155 (17 November 2023) [2023] ZASCA 155

COURT

Supreme Court of Appeal

BEFORE

Dambuza, Meyer, Matojane, Goosen, Unterhalter

CASE / FILE NUMBER

440/2022

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 440/2022

In the matter between:

MINISTER OF JUSTICE AND CORRECTIONAL

SERVICES

FIRST

APPELLANT

THE NATIONAL COMMISSIONER DEPARTMENT

OF CORRECTIONAL SERVICES SECOND

APPELLANT

THE HEAD OF THE PRISON: ZONDERWATER

PRISON THIRD

APPELLANT

and

WILHELM PRETORIUS FIRST

RESPONDENT

DR JOHAN PRETORIUS

SECOND RESPONDENT

DR JOHAN (LETS) PRETORIUS

THIRD RESPONDENT

Neutral citation: Minister of Justice and Correctional Services and Others v Wilhelm Pretorius and Others (Case no 440/2022) [2023] ZASCA 155 (17 November 2023)

Coram: DAMBUZA, MEYER, MATOJANE AND GOOSEN JJA AND UNTERHALTER AJA

Heard: 13 September 2023

Delivered: 17 November 2023

Summary: Appeal – Superior Courts Act 10 of 2013, s 16(2)(a) – mootness – whether, irrespective of mootness, interests of justice require decision on appeal.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Adams J with Mudau and Dippenaar JJ concurring), sitting as court of appeal):

The appeal is dismissed with costs, including those of two counsel.

Meyer JA (Dambuzza, Matojane and Goosen JJA and Unterhalter AJA concurring):

- [1] This is an appeal against the judgment and order of the full court of the Gauteng Division of the High Court, Johannesburg (the full court), per Adams J, with Mudau and Dippenaar JJ concurring, delivered on 21 January 2022. The first appellant is the Minister of Justice and Correctional Services (the minister), the second appellant, the National Commissioner: Department of Correctional Services (the national commissioner), and the third appellant, the Head of the Zonderwater Correctional Centre, Cullinan, Gauteng. The first respondent, Mr Wilhelm Pretorius, was registered for a doctoral degree in Theology at the University of Pretoria. The second respondent is his brother, Dr Johan Pretorius, a medical doctor who was registered for a masters degree in Biblical and Ancient Studies at the University of South Africa. The third respondent is their father, Dr Johan (Lets) Pretorius, a medical doctor, who was registered for an honours degree in Political Sciences at the University of South Africa.
- [2] The respondents were long term prisoners serving sentences of between 20 and 30 years' imprisonment at the Zonderwater Correctional Centre, Cullinan, Gauteng. Although they had access to computers in the Zonderwater Correctional Centre's computer room between the hours 7:00am and 2:00pm, they were not permitted to use their personal computers in their cells to progress their studies during the lengthy hours that they were locked up in their cells. They accordingly brought proceedings in the Gauteng Division of the High Court,

Johannesburg (the high court), to challenge the Policy Procedures Directorate Formal Education (the policy), pursuant to which their requests to use their personal computers in their cells for the purpose of their studies, were declined.

- [3] On 14 May 2018, the high court, per Swanepoel AJ, granted an order in their favour. The order reads:

‘50.1 The Policy Procedures on Formal Education Programmes, as approved by the [National Commissioner: Department of Correctional Services], insofar as it relates to the use of personal laptops without a modem in any communal or single cell, is declared to constitute unfair discrimination in accordance with the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 [the Equality Act], as against applicants.

50.2 First, second and third applicants shall be entitled to use their personal computers without the use of a modem in their cells, for as long as they remain registered students with any recognized tertiary institution in South Africa.

50.3 All of applicants’ computers shall be made available for inspection at any given time by representative of the respondents.

50.4 First and second respondents shall pay the costs of the application jointly and severally, the one paying the other to be absolved.’

- [4] Aggrieved by that order, the appellants, with leave of the high court, appealed to the full court. On 21 January 2022, the full court dismissed the appeal with costs. This appeal, with leave of this Court, lies against that order. Another appeal, involving similar facts and the same issues of law, was pending before this Court. It is the matter of Minister of Justice and Constitutional Development and Others v Ntuli (Judicial Inspectorate for Correctional services intervening as amicus curiae).[1] The Ntuli appeal was enrolled for hearing in this Court on 12 May 2022. At the request of the appellants, due to their counsel’s indisposition, the parties agreed to request that the Ntuli appeal be removed from the roll. This Court considered it efficient and appropriate that this appeal and the Ntuli appeal be heard together, and both appeals were enrolled for hearing on 13 September 2023.

- [5] However, it turned out that the three Pretorius family members (the respondents in this appeal) were all released on parole, at the end of March 2022. They, therefore, adopted the stance that the appeal became moot. In a letter dated 30 March 2022, their attorney brought that fact to the attention of the State Attorney, representing the

appellants. The appellants nevertheless elected to pursue this appeal.

- [6] Section 16(2)(a) of the Superior Courts Act 10 of 2013, stipulates:

‘(2) (a)

- (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.’

[7] It is clear from the factual circumstances that this matter is moot. In other words, a decision on appeal would have no practical effect or result. This, however, is not the end of the inquiry. The central question for consideration is whether, irrespective of its mootness, it is in the interests of justice for this court to decide the appeal.[2] The interests of justice might well have compelled us to decide this appeal on its merits had it not been for this Court’s

judgment

in Ntuli.

[8] The high court found the policy, insofar as it relates to the use of personal laptops without a modem in any communal or single cell, to constitute unfair discrimination in terms of the provisions of the Equality Act as against the three Pretorius family members. Hence, subparagraph 1 of the high court order. The full court endorsed that order. However, the parties could not demonstrate to us that Swanepoel AJ, who presided in the high court, had been designated as a presiding officer of the equality court.

[9] The same happened in Ntuli. There this Court, per Unterhalter AJA, said:

‘[12] I consider, first, Mr Ntuli’s challenge to the policy under the Equality Act. Did the high court enjoy jurisdiction to entertain this challenge? I think not. A person wishing to institute proceedings under the Equality Act must notify the clerk of the equality court and a presiding officer of the equality court must decide whether the matter is to be heard in the equality court (s 20(3)(a)). Although every high court is an equality court in its area of jurisdiction, a judge of the high court can only serve as a presiding officer of the equality court if so designated (s 16(1)).

[13] Designation is a ministerial act taken by the Minister after consultation with the Judge President (s 16(1)(b)). A high court

judge, once designated, serves as a presiding officer of the equality court. Until so designated, a high court judge enjoys no such competence. When a matter comes before the high court which raises claims both under the Equality Act and outside of it, the judge of the high court before whom this matter is brought has the power to entertain all of these claims only if he or she is a judge designated as a presiding officer of the equality court. If the judge of the high court has not been so designated, then the judge cannot entertain those claims which have been brought under the Equality Act.

[14] We raised this matter with the parties. They could not demonstrate to us that Matsemela AJ, who presided in the court below, had been designated as a presiding officer of the equality court. Once that is so, Matsemela AJ enjoyed no power to entertain Mr Ntuli's claim under the Equality Act. The court below made an order that the policy is declared to constitute unfair discrimination in terms of the Equality Act. Matsemela AJ had no power to make such an order, and, as a result, that order must be set aside.'

[10] This court, therefore, inter alia set aside the order of the high Court granted under the Equality Act, it declared the policy, to the extent that it prohibits the use of personal computers in cells, constitutionally invalid and set it aside. It suspended that order for 12 months and directed the minister and the national commissioner, after consultation with the Judicial Inspectorate for Correctional Services, to prepare and promulgate a revised policy for correctional centres permitting the use of personal computers in cells for study purposes. Paragraph 6 of this Court's order provides, inter alia, that:

'6. Pending the revision of the education policy:

6.1 The applicant is entitled to use his personal computer in his cell, without the use of a modem, for as long as he remains a registered student with a recognised tertiary or further education institution in South Africa.

6.2 Any registered student in a correctional centre who needs a computer to support their studies, and/or any student who has registered for a course of study that requires a computer as a compulsory part of the course, is entitled to use their personal computer without the use of a modem in their cell for as long as they remain a registered student with a recognised tertiary or further education institution in South Africa.'

[11] This Court's order in Ntuli, therefore, is not confined to Mr Ntuli, but extends to '[a]ny registered student in a correctional centre who needs a computer to support their studies, and/or any student who has registered for a course of study that requires a computer as a compulsory part of the course'.

[12] In the light of this Court's order in Ntuli, paragraph 1 of the high court's order need not be corrected in this appeal. Furthermore, the Pretorius family members, who are on parole, are afforded adequate protection against an infringement of their constitutionally entrenched right to further their education should their parole be revoked, and they are reincarcerated.

[13] Finally, the matter of costs. The respondents request that the costs of the appeal should be awarded in their favour on the scale applicable as between attorney and client on the basis that: (a) the appellants steadfastly persisted with their appeal despite their knowledge that the Pretorius family members were released on parole almost eighteen months before the hearing of the appeal; and (b) the appellants failed to bring that fact to this Court's attention prior to the granting of leave to appeal on 21 April 2022. I agree that the appellants should bear the respondents' costs of the appeal. But this, in my view, is not one of those 'rare'

occasions where a deviation from the ordinary rule that the successful party be awarded costs as between party and party, is warranted.[3]

[14] In the result, the appeal is dismissed with costs, including those of two counsel.

P MEYER

JUDGE OF APPEAL

Appearances

First, second and third appellants: M T K Moerane SC (assisted by E B Ndebele)

Instructed by: State Attorney, Johannesburg

State Attorney, Bloemfontein

First, second and third respondents: R du Plessis SC (assisted by A D Theart)

Instructed by: Julian Knight and Associates Inc., Pretoria

Rossouws Attorneys, Bloemfontein

[1] Minister of Justice and Constitutional Development and Others v Ntuli (Judicial Inspectorate for Correctional services intervening as amicus curiae) (539/2022)

[2023] ZASCA 146 (8 November 2023) (Ntuli).

[2] Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum, Exportation and Exploitation SOC Ltd & Others [2020] ZACC 5; 2020 (6) BLCR 748 (CC); 2020 (4) SA 409 (CC) paras 46-50.

[3] See LAWSA Vol 3 Part 2 (2 ed) para 320.

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