

SOUTH AFRICA / JUDGMENT

Vis v Minister of Correctional Services and Others (1283/2013)

[2013] ZAFSHC 101 (16 May 2013)

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COURT

Free State High Court, Bloemfontein

BEFORE

C.J. Musi

CASE / FILE NUMBER

1283/2013

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FREE STATE HIGH COURT,
BLOEMFONTEIN
REPUBLIC OF SOUTH
AFRICA
Case No. : 1283/2013

In matter between:

Willem Vis
.....1st
Applicant
Joseph Maruping
.....2nd
Applicant
Sello Mogale
.....3rd
Applicant
Dawid Khambule
.....4th
Applicant
and
The Minister of
Correctional Services
.....1st
Respondent
G4S Correctional
Services (Bloemfontein)
(Pty) Limited
.....2nd
Respondent

Faranani Life Health
Solutions (Pty) Ltd3rd
Respondent
HEARD
ON: 02
APRIL 2013

JUDGMENT

BY: C.J. MUSI, J

DELIVERED ON: 16 MAY 2013

[1] On 2 April 2013 the applicants applied, on an urgent basis, for Anton Pillar-type orders. I dismissed the application. These are my reasons for doing so.

[2] The applicants sought the following orders:

“That any adult person in control of the second Respondent situated at Mangaung Correctional Centre, Bloemfontein;

That any adult person in control of the premises of the Third Respondent’s business situated at Mangaung Correctional Centre, Bloemfontein;

Grant the Sheriff of the above Honourable Court, the independent Supervising Attorneys’ (“the Supervising Attorney”), the independent representatives of the Applicants and a computer expert and, if requested by any of the aforesaid individuals, the Applicants’ Attorneys, access to the premises for the purpose of:

- (a) Inspecting and searching the premises and any containers of whatsoever nature on the premises, for the purpose of enabling any of those persons to identify and point out to the Sheriff originals or copies of or extracts of, all documents relating to:
 - i. Medical and Psychiatric treatment rendered to the Applicants;
 - ii. Medication dispensed to the Applicants;
 - iii. Any communications between the First Respondent, the Second Respondent or the Third Respondent jointly and severally, relevant to the medical treatment applied to the Applicants.
- (b) Examining any item for the purpose of identifying it and deciding whether it is of the nature mentioned in the preceding sub-paragraph;
- (c) Searching the premises and any containers of whatsoever nature on the premises for the purposes of finding any computer data storage device containing any of the items referred to above;

- (d) Enabling the Nursing Attendant set out in Annexure “E” hereto to interact with the Applicants for the purpose of taking body fluids samples and hair samples for toxicology screening.

That any adult person in control of the premises forthwith disclose passwords and procedures required for effective access to any computer, computer file and/or internet website on the premises for the purpose of searching the computer, computer file and/or internet website and making an electronic and/or hard copy of any information contained thereon that falls within the ambit of this order.

That any adult person in control of the premises permit the Sheriff to attach and remove any document, thing or computer and/or computer data storage device that falls within the ambit of this order.

The Sheriff is directed to keep each so removed item in his custody until the Applicants authorize its release or this Honourable Court directs otherwise.

That until completion of the search authorized in the preceding paragraphs, the respective Respondents and/or the person in control of the premises may not, except with the leave of the Supervising Attorney, access any document, thing, computer and/or computer data storage device or make telephone calls or send an electronic message, save to obtain the attendance and advice mentioned in the Notice which is handed over immediately prior to the execution of this order.

The Sheriff is directed in the presence and under the supervision of the Supervising Attorney and before this Order is served or executed to:

9.1. Hand to the respective Respondents or other person/s found in the charge of the premises, a copy of a Notice attached hereto marked “A”;

19.1. Explain the said Notice marked “A”;

19.2. Inform those persons that:

9.2.1. Any interested party may apply to this Honourable Court on not less than twenty- four (24) hours’ notice to the offices of the Applicants’ Attorney for a variation or setting aside of this Order, the Court’s practices and Rules applying unless the Court directs otherwise;

9.2.2. The respective Respondents or their representatives are entitled to inspect items in the Sheriff’s possession for the purpose of satisfying themselves that the inventory referred to herein is correct;

9.2.3. The Supervising Attorney shall, together with the Sheriff, immediately make a detailed inventory of all items attached and removed in terms of this Order. A copy of this list shall be handed by the Supervising Attorneys to Applicants’ Attorney and to the respective Respondents or to the person/s in control of the premises, if present, and a copy shall be retained by the Sheriff.

That, unless a different direction is obtained from Court, the Applicants and the Applicants' Attorney shall, not earlier than three (3) days after the execution of this Order, become entitled to inspect any of the removed items in order to assess whether they provide evidence relevant to the present Application or to the further legal proceedings envisaged in this Application and, if so, to, make copies thereof.

That the Sheriff is ordered to inform the respective Respondents or the person in control of the premises that the execution of this Order does not dispose of all of the relief sought by the Applicants and to serve simultaneously the Notice of Motion herein and supporting Affidavits and explain the nature and exigency thereof.

By no later than five (5) days after the execution of this Order, there shall be placed before this Honourable Court the Report of the Supervising Attorney with proof that a copy thereof has been served on the Applicants' Attorneys and on the respective Respondents (or their Attorney, if represented).

If the Applicants do not institute further legal proceedings against the Respondents which are or may be foreshadowed in this Application, within sixty (60) days of the execution of this order, the Respondent shall, on no less than seventy-two (72) hours' notice to the office of the Applicants' Attorney, be entitled to apply to this Honourable Court for an Order that the Sheriff be ordered to return the removed items immediately and/or an Order determining liability for legal costs.

That in the event of the documents or any of them listed or identified in Annexure "X" hereto not being situate at the premises, then the respective Respondents and the person/s in control of such premises for the time being, are directed to disclose and point out the Sheriff and the Applicants' representatives any other premises or place where such documents or any of them are stored and to point out and to disclose the documents at such other premises or place. In the event that such disclosure and pointing out takes place, then the provisions of this Order shall mutatis mutandis be applicable to such other premises or place.

The Applicants are authorized to supplement these papers in the event that the Respondent/s set the matter down for reconsideration by this Court.

Costs of the proceedings to be reserved for determination in the proceedings to be instituted.

Further and/or alternative relief."

[3] The documents referred to in annexure "X" are hard and electronic copies of:

All medical records, including medical history continuation sheets relevant to each applicant;

Psychiatric treatment records of each applicant;

Unit file of each applicant;

Health care file of each applicant;

Pharmaceutical dispensary records including registers in respect of Schedule 5 to 7 drugs.

- [3] The applicants are inmates at the Mangaung Correctional Centre (the MCC) a private prison which is operated by the second respondent. The first, third and fourth applicants were each sentenced to life imprisonment and the second applicant to twelve years imprisonment in different provinces, for unrelated crimes, and transferred to the MCC.
- [4] The third respondent provides health services at the MCC in terms of an agreement between it and the second respondent.
- [5] The applicants alleged that they were subjected to involuntary treatment at the MCC. They alleged that the involuntary treatment was administered by the nursing personnel employed by the third respondent at the MCC. When they resisted treatment they were pinned down and restrained by warders so that the injections could be administered. The injections were administered at the hospital section of the MCC.
- [6] Although they do not know what medication they received they all believe that it was anti-psychotic drugs. Due to the involuntary treatment administered to them they have all experienced negative symptoms including, tremors, spasms, spasms of the neck, spongy tongues, excessive weight loss/gain, slack jawbones, lack of physical energy, poor concentration and loss of memory.
- [7] According to the applicants, they are victims of a systemic, planned programme of medicating inmates; the aim being to break their spirits and mental resistance, thereby rendering them compliant and submissive to the functionaries of the MCC.
- [8] They alleged that they suffered delictual damages arising from the unlawful involuntary treatment administered to them because it interfered with their physical and mental health. They further alleged that upon ascertaining the exact nature of the treatment rendered to them they intend to:
- 8.1. Apply for an order interdicting the respondents from continuing or re- implementing the programme of involuntary treatment of inmates at the MCC.
- 8.2. Apply for an order to compel the respondents to implement an appropriate treatment plan with each inmates' consent, if such treatment is required;
- 8.3. Institute an appropriate action for delictual damages.
- [9] They alleged that they have a well-grounded apprehension that the documents mentioned in paragraph 3 above will be hidden or destroyed. They hold this apprehension because, should their allegations be proved the contractual relationship that the second respondent and derivatively the third respondent has with the first respondent will be placed in peril. The termination of the contract of the second respondent which is a 25 (twenty-five) year contract, will have a profound effect on the finances of the second respondent.
- [10] They alleged that traces of the anti-psychotic drugs administered to them might be found in their urine and/or hair samples. To that extent, they want their urine and/or hair samples taken, urgently, so that it can be sent for toxicological analysis. According to them, any

attempt to obtain their bodily fluids or hair samples by way of a conventional application will be frustrated by the second and third respondents because the respondents know that every day that passes diminishes the prospects of successfully identifying the substances administered to them.

[11] In *Roamer Watch Co SA v African Textile Distributors* 1980

(2) SA 254 (WLD) at 272 B to 275 A Cilliers AJ suggested guidelines for Anton Pillar-type applications. These are, in summary, as follows:

11.1. The applicant should make out a clear case against the party against whom the order is sought. In *Universal City Studios Inc v Network Video* 1986

(2) 734 (AD) at 755 (A) it was suggested that the applicant should establish *prima facie* that he has a cause of action against the respondent which he intends to pursue.

11.2. The remedy of attachment and, where appropriate, removal of documents, information, articles and the like must be the only practicable means of protecting the applicant's rights and doing justice between the parties, if the applicant can obtain the same evidence in some other way without undue hardship, the procedure of attachment without notice should not be permitted.

11.4. The evidence provided by the documents must be material to the applicant's case. The incriminatory value of such evidence must not be a mere make-weight when considered together with the applicants other available evidence.

11.5. There must be clear evidence that the respondent has such incriminating documents in his possession, or that, at least, there are good grounds for believing that this is the case.

11.6. The applicants must fully set out cogent reasons for believing that there is a real danger that the documents will be removed or destroyed and the ends of justice will be defeated, if the respondent were given notice of the proceedings against him.

11.7. The order should go no further than is strictly necessary for the preservation of the evidence sought to be preserved. It should not afford an applicant the substantive relief which he may be entitled to obtain at a later stage after the respondent has had the opportunity to be heard.

[12] The applicants in essence sought an order, firstly, to take hair and/or urine samples from them and secondly, to search and seize medical records and documents of the applicants on the premises of the MCC.

[13] The hair/urine samples which the applicants want to be taken from them are not in the possession of the MCC. They are inmates at the MCC but that does not mean that hair and/or urine samples may not be taken from them by a medical practitioner of their choice.

[14] Section 12(3) of the Correctional Services Act 111/1998 provides as follows:

“Every inmate may be visited and examined by a medical practitioner of his or her choice and subject to the permission of the Head of the Correctional Centre, may be treated by such practitioner, in which event the inmate is personally liable for the costs of any such consultation, examination, service or treatment.”

[15] Section 12(3) gives an inmate a right to be visited and examined by a medical practitioner of his/her choice. The permission of the Head of the Correctional Centre is only needed when the inmate is to be treated by such medical practitioner.

[16] Regulation 7(5) of the regulations published in Government Gazette No 35277 of 25 April 2012 prescribes what the medical practitioner must do after examining or treating an inmate. It reads:

“If an inmate is attended to by his/her own medical practitioner of choice, such medical practitioner must provide written reports to the Correctional Medical Practitioner made pursuant to the findings of any special examination, diagnoses, proposed treatment, interventions and treatment requires that may be prescribed by the medical practitioner.”

[17] There is no allegation, in the papers, by any of the applicants that they cannot afford a medical practitioner of their choice. There is also no allegation that their own medical practitioner would not be permitted to take their hair and body samples for analysis. In fact, they already procured the services of a nursing attendant to take the samples. They even have a computer expert who they intended to task to search for and seize all electronic medical records and documentation pertaining to them. They went through all this effort without asking their medical practitioner to examine them.

[18] The applicants alleged that upon ascertaining the exact nature of the treatment rendered to them, they propose to instruct their attorney to launch applications wherein they seek the relief in paragraphs 2 and 3 above. It is clear that they wanted to go on a fishing expedition in order to see whether there is any incriminating evidence. That is not the purpose of Anton Pillar-type orders. There is no allegation about the nature of the evidence and its incriminatory value. As a matter of fact, the applicants wanted to make that assessment after they have seized and peeped. They clearly wanted to build their suspicions into a probable case by inspecting the MCC's documents. The applicants alleged that they have a well-grounded apprehension that the second and third respondent will destroy or hide their medical records because the involuntary treatment is illegal and secondly that the respondent might cancel the contract between the first and the second respondent.

[19] The destruction or concealment of an inmate's medical records is also not in the second and third respondent's interest. That too, may lead to the first respondent reconsidering or cancelling the agreement between it and the second respondent. The applicants, in any event, did not allege that records of the illegal treatment were kept.

- [20] Even if I assume in their favour that records were kept, I have serious doubt that the medical practitioners and nurses, who administered the illegal medication, would put their careers at risk by destroying all the medical records of all the applicants.
- [21] The applicants alleged that ordinary application procedure or discovery procedures will be of no assistance to them, because the second and third respondents acted in a constitutionally delinquent manner and cannot, in the circumstances, be expected to conduct themselves honestly with regard to future litigation or discovery. These are bold and unsubstantiated allegations.
- [22] The fear of destruction of the medical records, as expressed by the applicants, is frail. It must be remembered that there must be a “grave danger” or a real possibility that the documents will be destroyed or hidden. See *Hall and Another v Hevns and Others* 1991
- (1) SA 381 (CPD) at 390 D. The keeping of medical records of inmates is expressly and comprehensively outlined in the Health Care Policy and Procedures of the Department of Correctional Services. It inter alia states that only health care professionals and authorised officials will collect and record the health history, vital signs, and other health appraisal data in an inmate’s health file. It sets out the minimum standards of record keeping in detail why and how records should be kept. The relevant part reads as follows:

“Record keeping

This is a critical aspect that affects the outcome of any malpractice suit. It must be assured that documentation is defensible by including details of at least the following:

The name of the inmate, registration and identity number and correctional centre of incarceration.

All entries in the health file must be made in black ink.

All interventions relating to referrals must be documented.

Treatment regime should be documented legibly and in detail regarding name of medication, dosage strength, frequency and education given to patient...

Progress report notes must be accurately documented.

A correction fluid (typex) must never be used to delete or correct errors. A line must be drawn through an incorrect entry and the person making the correction must attach his/her signature and date of the correction including his/her initials and surname in print.

The use of ditto marks must be avoided.

A reason for all late entries must be indicated, and witnessed.

Health records should be secured and safeguarded against loss, defacement, tampering or use by unauthorised persons.

An inmate requesting to review his/her health records may review them in the presence of a health care official.

A system must be maintained for the identification and filing of health files to ensure rapid access to each inmate's health record.

The hospital/clinic must have adequate storage space and equipment for all health records. The storage for the records must be safe from fire and water damage as well as secured from unauthorised access and use...

When an inmate is transferred to another Correctional Centre, the health record must be put in a sealed envelope with the name of the inmate and centre of admission and accompany him/her..." (My emphasis).

[23] It is clear that the medical records of each inmate must be kept properly, safe and secured. The tampering with or destruction of an inmate's health file will have negative consequences for the second and third respondents' case and would probably favour the applicants in later litigation.

[24] The applicants did not give any reason why they did not, in terms of the policy attempt to review their own health files. The policy gives them that right.

[25] In *Economic Data Processing (Pty) Ltd and Others v Pentreath* 1984 (2) SA 603 (TPD) at 618 Coetzee J, correctly in my view, said:

"I do not see how one can make an order for the attachment of property where it is not alleged that a right has already arisen in the sense that a demand has been made for the surrender of the property which he still holds..."

These orders are only made ex parte in any event when it is clear that there is a refusal by a respondent after a demand properly made or there is a reasonable fear that he might destroy it, for instance, if he had notice of the application."

[26] As stated above the applicants did not demand their health records. They did not allege that the records or access thereto would have been refused. All four applicants testified that their medical records in the possession of the second and third respondents are documents commonly accessed and used by the respondent and that the documents are not subject to any special privilege and that they are indeed entitled to access to them via the Promotion to Access to Information Act 20 of 2000. None of them gave any reason as to why that route was not followed. It is clear that their unreasonable apprehension, that the documents will be destroyed, informed their refrain.

[27] I am not satisfied that discovery would not yield any result. Anton Pillar-type orders as Conradie J correctly reminded practitioners are not to be regarded as a form of discovery before commencement of an action. See *Hall and Another v Hevns and Others*, supra, at 392 A

- B.

[28] Lastly, according the fourth applicant:

“Normally as soon as I got ‘chatty’ it would be time for my next injection. The last occasion when involuntary treatment was attempted occurred during February 2013. When I was summoned for my injection I told the nursing staff that I had seen my attorney of record and that he intended to go to court to stop them. This had an immediate effect and they let me go without administering the injection.”

[29] It is clear that, on his version, he informed the nursing staff about a possible application in February 2013 already. If the third respondent wanted to hide or destroy evidence it had more than ample opportunity to do so. They were in effect given notice of litigation. The involuntary medication was stopped on the fourth applicant’s say-so, without any intervention by his attorney. No reason was given as to why the other applicants could not follow the same route or why their attorney did not request the second and third respondents to stop with the treatment or implement an appropriate treatment with their informed consent.

[30] I was convinced that the applicants did not make out a proper case for the orders sought. I therefore dismissed the application.

C.J. MUSI, J

On behalf of applicants: Egon A Oswald Attorneys

PORT ELIZABETH

On behalf of respondents: No appearance

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