

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION: PORT ELIZABETH)

CASE NO:246/2018

In the matter between:

LUSANDA SULANI

APPLICANT

AND

MS T. MASHIYI AND ANO

RESPONDENTS

REASONS FOR ORDER GRANTED

DAWOOD, J:

1. The Applicant herein brought an application against the Respondent in the following terms:

“[1] Declaring the application to be one of urgency as contemplated in Rule 6(12) of the rules of the above Honourable Court and dispensing insofar as is necessary with the usual forms and service provided for in the said rules.

[2] Reviewing and setting aside the order made by the First Respondent in Port Elizabeth’s Court case no 27/1497/17 on 29 January 2018 declaring the Applicant’s bail provisionally cancelled and her bail money provisionally forfeited to the State and issuing a warrant for the Applicant’s immediate arrest.

[3] Re-instating the Applicant’s bail of R2000 in Port Elizabeth Magistrate’s Court case no. 27/1497/17.

[4] Granting the Applicant further and/or alternative relief”.

2. The facts of the matter are briefly as follows:

- a) The Applicant resides in Durban.
- b) The Applicant was represented at the hearing on before the First Respondent 29th January 2018 by Mr P Daubermann.
- c) The Applicant was unable to attend the hearing of the matter on the 29th of January 2018.
- d) The reasons furnished for her non-attendance by her legal representative was that she had given birth by caesarean section and was not in a position to travel due to her medical condition.
- e) A medical certificate by Dr Mashiloqne was produced and accepted that she was unfit to travel on the 29th of January 2018 due to caesarean operation.
- f) The prosecutor accepted the authenticity and correctness of the medical certificate and it was handed up as an exhibit.

g) The Magistrate nonetheless was of the view that she was bound by four corners of the statute and did not have a discretion to stay execution of the warrant of arrest and provisionally estreat bail.

h) She accordingly made an order in the following terms insofar as it is relevant to these proceedings :

“A warrant of arrest is authorised forthwith for accused no. 2 who is absent; her bail money is provisionally [indistinct] to the state and for her final forfeiture of bail; it is postponed until the 13th of February this year.”

g) The Magistrate as well as the state prosecutor appear to have based their interpretation on the provisions of section 67 of the Criminal Procedure Act which reads as follows:

“67 Failure of accused on bail to appear

(1) If an accused who is released on bail—

(a) fails to appear at the place and on the date and at the time—

(i) appointed for his trial; or

(ii) to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned; or

*(b) fails to remain in attendance at such trial or at such proceedings, the court before which the matter is pending **shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused.***

(2)

(a) If the accused appears before court within fourteen days of the issue under subsection (1) of the warrant of arrest, the court shall confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, unless the accused satisfies the court that his failure under subsection (1) to appear or to remain in attendance was not due to fault on his part.

(b) If the accused satisfies the court that his failure was not due to fault on his part, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall lapse.

h) The learned Magistrate appears to have furthermore relied upon the conclusion reached in **S v Lerumo**¹ for her finding, Hendricks J held *inter alia* as follows:

“[16] ... The presiding magistrate is correct and the matter is therefore not reviewable.

[17] I am of the view that the practice of issuing warrants of arrest for accused persons and **staying the execution thereof is not in accordance with the prescripts of section 67** of the Criminal Procedure Act, and **should be done away with**, unless the legislature amend the said section. Until then, this practice must be stopped.”(my emphasis)

3. Issue for determination.

3.1 The crisp issue for determination is whether or not the provisions of section 67 (1) of the Criminal Procedure Act compelled the learned Magistrate to issue a warrant for the immediate arrest of the Applicant or whether the Magistrate was able to stay execution.

3.2 The Respondents filed a notice to abide by the decision of this court.

3.3 Mr Daubermann referred this court to *inter alia* the provisions of section 12 (1) (a) of the constitution and Bertie’s case in support of his argument for the relief sought:

¹ (08/2017) [2017] ZANWHC 63; 2018 (1) SACR 202 (NWM) (10 August 2017)

a) Sub-section 12 (1) (a) of the Constitution provides as follows:

“12. (1) 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”;

b) In *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others*² the Constitutional Court held as follows:

“[20] The Constitution requires courts deciding constitutional matters to declare any law that is inconsistent with the Constitution invalid to the extent of its inconsistency. However, the Constitution in section 39 (2) also provides that:

*“When interpreting **any legislation**, and when **developing the common law** or customary law, every **court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.**”*

*“The Constitution requires that judicial officers read legislation, where possible, in ways which give **effect to its fundamental values.** Consistently with this, when the **constitutionality of legislation is in issue, they are under a duty to examine the objects** and purport of an Act and to read the provisions of the legislation, **so far as is possible, in conformity with the Constitution.**”*

“The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39 (2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the ‘spirit, purport and objects of the Bill of Rights.’”

² (CCT 77/08) [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) (7 May 2009) paras [20] to [23]

[23] This Court has recognised that the process of determining the constitutionality of legislation requires a resolution of the following inherent tension:

On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. **There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read ‘in conformity with the Constitution’.** Such an interpretation should not, however, be **unduly strained.**”(my emphasis)

- 3.3 Section 67 (1) (b) of the Criminal Procedure Act is silent with regard to the execution of the warrant it merely makes provision for the issuing of a warrant of arrest but does not provide that it has to be executed immediately.
- 3.4 The Act gives the accused a grace period of at least 14 days to state why the bail should not be finally estreated it is unlikely that the drafters did not envisage a situation where the same grace period should not be applicable with regard to the execution of a warrant of arrest where applicable.
- 3.5 Section 67 (1) (b) is accordingly capable of being interpreted in conformity with the Constitution.

- 3.6 I am in agreement with the dicta in **Terry v Botes and another**³ where the following was stated by Foxcroft J:
- “What is quite clear from these provisions is that an accused person may, either himself or through his legal representative, satisfy the Court that his failure under s 67(1) was not due to fault on his part, and also that the Court may receive any evidence as it considers necessary in order to determine this question. **Nowhere is it stated that a warrant of arrest must be executed before an accused in these circumstances may be heard, nor is it stated that an accused person is obliged to give evidence and that his attorney may not address the Court in regard to this question. (my emphasis)***
- 3.7 On my reading and interpretation of the relevant portion of the Act the section of the Act does not preclude the Magistrate from staying the execution of the warrant of arrest until a future date. It is in fact silent with regard to the issue of execution.
- 3.8 A Magistrate would accordingly not be acting outside the four corners of the statute in the event that he or she orders a stay of the execution upon the issuing of the warrant of arrest.
- 3.9 The Magistrate in my view accordingly was not compelled to order the immediate execution of the warrant.
- 3.10 The learned Magistrate had no discretion in issuing the warrant because that is expressly provided for in the Act, however she had to have regard to the representations made to determine whether or not to order the immediate execution thereof.

³ 2003 (1) SACR 206 (C)

- 3.11 Section 67 does not preclude her from determining whether or not the warrant should be executed immediately or stayed until a further date, due to its silence on the issue.
- 3.12 The learned Magistrate failed to have regard to the facts placed before her in order to consider whether or not to stay execution of the order.
- 3.13 The factors set out by the Applicant's attorney in my view were sufficiently cogent to warrant a stay of the execution of the warrant in this case.
- 3.14 The learned Magistrate was presented with the fact that the Applicant had delivered a baby by caesarean section 15 (fifteen) days prior to the hearing. A medical certificate from a gynaecologist was provided to court and accepted by the Magistrate and the prosecutor as being correct that the Applicant was unable to travel from Durban to Port Elizabeth as a result of the caesarean section and was accordingly unable to attend court for a legitimate justifiable reason.
- 3.15 There was no reason to gainsay what was put on her behalf nor was the veracity of the averments challenged.
- 3.16 In this case it is not just the question of the liberty of an accused person who has just delivered a baby by caesarean section but also the rights of a 15 (fifteen) day old child that needed to be considered in determining whether or not to have her arrested immediately and brought to court two (2) weeks hence.

- 3.17 Our law provides that even where an accused person has been convicted the rights of her minor children are considered where she is the primary care giver of minor children in determining whether or not to impose a custodial sentence.
- 3.18 It would be unfathomable that this factor would play no role in determining whether or not to order the immediate execution of a warrant of arrest which would mean the mother of a 17 day old child being incarcerated for a possible 2 week period of time without any regard being had for the rights of this vulnerable extremely young child that is completely dependent on her mother for her care. These factors were not presented but the fact that she has a 17 day old child alone would prompt such an inquiry.
- 3.19 This is an untenable situation and is clearly not what would have been envisaged by the legislature as a possible consequence of the relevant provision.
- 3.20 The restrictive interpretation placed on the provision of section 67 by the learned Magistrate, if it indeed could be read to direct the immediate execution of the warrant execution of the warrant of arrest in all cases irrespective of the peculiar personal circumstances of the individual accused person, would clearly be unconstitutional as it will fall foul of a number of provisions of the constitution particularly in this case.
- 3.21 This clearly would amount to a grave injustice and a contravention of numerous constitutional rights not only of the Applicant but of her young infant as well.

- 3.22 It is evident that the Applicant's non-appearance was not contemptuous but based on a legitimate medical condition that precluded her from travelling to Port Elizabeth.
- 3.23 This clearly is an exceptional case that militates against the immediate execution of the warrant of arrest and requires that the right of liberty, dignity and family life come to the fore in considering the peculiar circumstances of this case.
- 3.24 The Magistrate's failure to consider these factors and her restrictive interpretation of the relevant provision of the Act is incorrect and in the circumstances of this case amounts to a gross irregularity warranting the inference of this court⁴.
- 3.25 I have taken cognisance of the fact that the Applicant may not be able to attend on the 13th of February 2018 but that can be dealt with at that time and an extension of the date applied for as is provided for in the Act.
- 3.26 The Magistrate was not constrained to order the immediate execution of the warrant of arrest in terms of section 67 she can with respect in appropriate cases stay execution. This clearly was one of the cases that cried out for a stay of execution.
- 3.27 The Magistrate's decision with regard to the immediate execution of the warrant is accordingly wrong and is hereby reviewed and set aside and replaced with an order staying the execution of the warrant of arrest.
- 3.28 The provisional cancellation and forfeiture of the bail money are pre-emptory provisions that the Magistrate is obliged to make due to no-appearance and that accordingly cannot be set aside nor can the decision to issue a warrant of

⁴ Section 22 of the Superior Courts Act no 10 of 2013

arrest. The only part of the order that is reviewable and falls to be set aside is the ordering of the immediate execution of the order.

3.29 As is apparent from the foregoing I with all due respect disagree with the restrictive interpretation placed on the provisions of section 67 (1) (b) of Act 51 of 1977 in Lerumo's case supra.

3.30 I am of the view that the provision of section 67 (1) (b) does not preclude a court from staying execution in appropriate cases for the reasons already set out above and upon a reading of the Act the conformity with the constitution.

4. ORDER

I accordingly make the following order:

- 4.1 The Applicant's bail is provisionally cancelled;
- 4.2 The Applicant's bail money is provisionally forfeited to the state;
- 4.3 A warrant of arrest is authorised as against Ms Lusanda Sulani, the Applicant herein; and
- 4.4 The order granted by the First Respondent that the warrant of arrest is authorised forthwith in respect of the Applicant is set aside and replaced with the following order:
 - a) The execution of the warrant of arrest is to be stayed until the 13th of February 2018 or such further extended dates as may be agreed upon for the finalisation of the inquiry pertaining to the provisional cancellation of the bail and the provisional forfeiture of the bail money.

DAWOOD J

JUDGE OF THE HIGH COURT

DATE HEARD: 02 February 2018

DATE ORDER GRANTED: 02 February 2018

DATE REASONS GIVEN: 02 February 2018

FOR THE APPLICANT: Mr P Daubermann

APPLICANT'S ATTORNEY: PETER DAUBERMANN ATT
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FOR THE RESPONDENT: NO APPEARANCE