

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Case No: 2232/2022

Reportable: YES/NO

Of interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the *ex parte* application between:

JOHAN DAVID REYNEKE

Applicant

In re

THE STATE

versus

THABO HENDRIK MOKOENA¹

Coram: Opperman, J

Date of hearing: 16 May 2022

Order: 18 May 2022

Reasons for Judgment: The reasons for judgment were handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 18 May 2022 and in Court. The date and time for hand-down is deemed to be 18 May at 15h00.

Summary: Habeas Corpus – legality of custody of accused following the refusal of release after a bail application in terms of the Criminal Procedure Act 51 of 1977 but

¹ "Mr. Mokoena" & "the accused".

after discharge from hospital following an order in terms of section 47(6)(e)² of the Mental health Care Act 17 of 2002.

JUDGMENT

[1] This is an urgent application “that the accused be released immediately in terms of the principles of *de libero homine in exhibendo* or *habeas corpus*.

[2] It is alleged that the accused was unlawfully held in custody from 30 March 2022 to date.

[3] The *de libero homine in exhibendo* is an important writ in constitutional law and must be afforded a swift remedy in all cases of illegal restraint or confinement. It was therefore ordered that the Uniform Rules relating to service and process are dispensed with and it was directed that the motion be heard on an urgent basis in terms of the provisions of Uniform Rule 6(12).

[4] The facts and circumstances of the case are *sui generis* and definitely not as straight forward as it would seem at first glance.

[5] In *Lethoko and another v Minister of Defence and others* 2021 (2) SACR 661 (FB) I ruled that:

[32] ...A healthy democracy and the protection of the citizen in general demand that cases of this nature be tried and concluded. The inappropriate management of criminal cases by individuals must not cause the rule of law to fail the country.

² Section 47(6) On considering the application, the judge in chambers may order that the State patient—

- (a) remain a state patient;
- (b) be reclassified and dealt with as a voluntary, assisted or involuntary mental health care user in terms of Chapter V;
- (c) be discharged unconditionally; or
- (d) be discharged conditionally.

[6] The matter *in casu* is an example of human errors that shamed the administration of justice; this is true for all the parties involved. The administration to ensure the proper handling of the case was not done.

[7] The accused was arrested on 4 May 2016. After an unsuccessful application for bail, he remained in custody pending the finalization of the trial.

[8] It would appear that bail was refused due to his previous convictions, the manner in which he attempted to evade arrest by the use of alias's, his unstable family circumstances, the seriousness of the crime and the strength of the case.

[9] On 3 September 2018 the court ordered a separation of trials in terms of section 157(2) of the Criminal Procedure Act 51 of 1977 ("CPA") between the accused ("Accused 1") and his co-accused. The accused was declared a State Patient in terms of Chapter 13 of the CPA due to his incapacity to understand the proceedings. The diagnosis was Psychotic Disorder Unspecified & Cannabis Use Disorder. His abuse of harmful substances apparently caused his condition. He was ruled to, at the time of the alleged crime, had the ability to distinguish between right and wrong and to control his actions accordingly.

[10] The order of 3 September 2018 reads as follows:

1. Accused 1 is declared a State Patient in terms of Section 77(6)(i) of the Criminal Procedure Act 51 of 1977, as amended.
2. Accused 1 is referred to the Free State Psychiatric Complex Bloemfontein for admission and treatment and be kept there until an order is granted by a Judge in Chambers on Application.
3. The trial of Accused 1 is separated from that of Accused 2 in terms of section 157(2) of the Criminal Procedure Act 51 of 1977, as amended.

4. Accused 2 is to continue to stand trial under case number 12/2017.
(Accentuation added)

[11] The court *a quo* neglected to order the continued incarceration of the accused after his discharge from the Free State Psychiatric Complex. The court *a quo* also neglected to issue a warrant to the Free State Psychiatric Complex that makes provision for the accused to be transferred to a prison after discharge from the hospital. It is an administrative action and order that would ensure the administrative and formal legality of the incarceration of the accused.

[12] The above did not affect the *ex lege* reality that the accused was to be held in custody pending the finalisation of the trial in terms of the CPA.

[13] There is an important and crucial distinction to be made between the discharge of an accused from the hospital and his release from custody and prison after arrest. The discharge of an accused from the hospital is just that and not from custody in terms of Chapters 5, 9 or 10 of the CPA. His incarceration will continue and perpetuate until he is released by a court in terms of the CPA.

[14] The Free State Psychiatric Complex acted legally sound and correct when they apparently transferred the accused to the Grootvlei Prison after the Order of the Judge in Chambers on 30 March 2022 for his conditional release in terms of the Mental Health Act 17 of 2002. They discharged him from hospital as they had the legal capacity to do but, not from the custody of the police as they had no authority to do.

[15] “Accused 1 is referred to the Free State Psychiatric Complex Bloemfontein for admission and treatment and be kept there until an order is granted by a Judge in Chambers on Application” assumes a legal court order made after due cognisance of all the relevant factors.

[16] The Order by the Judge in Chambers on 30 March 2022 was irregular. The Order by the Judge in Chambers for the conditional release of the accused from the Free State Psychiatric Complex, first of all, did it not order the release from custody in terms of the CPA, secondly was the fact that the accused was in custody pending the finalisation of the trial not brought to the attention of the Judge in Chambers and thirdly was the history and reason for the refusal of bail not known to the Judge in Chambers. If that was the case, the incarceration of the accused would have been ordered. This does not distract from the fact that even though the administrative “paper-work” was apparently not available, the accused was lawfully and *ex lege* in custody

[17] The travesty of justice lies in the fact that a man that was described by the investigating officer in this case as a “career criminal” coming from a family that is known for their criminal activities, was released by the Free State Psychiatric Complex on two stints into the community even though he was in custody for murder and robbery with aggravating circumstances. His previous convictions depicted on the so-called SAP 69-document were available in the docket that was made known to the authorities at the Free State Psychiatric Complex and the Director of Public Prosecutions when his conditional release was recommended on 28 March 2022. The previous convictions are extensive and includes violence. It had to form part of the application in Chambers for the release of the accused. This, as well as the fact that bail was refused for the accused and that he was *ex lege* the CPA in custody. The Notice to Abide by the Office of the Director of Public Prosecutions, filled in this application, is of grave concern.

[18] Notwithstanding the release in terms of section 47 of the Mental Health Act 17 of 2002 was the accused in custody in terms of the CPA and would any release after the Order of the Judge in Chambers have been unlawful.

[19] It is therefore not a question whether the accused is unlawfully in custody; it is a matter of the accused being unlawfully released on the application that now lies before the court. Or for that matter, by any of the other authorities beforehand and that include

the Free State Psychiatric Complex, the Grootvlei Prison and the South African Police Service.

[20] His incarceration from 30 March 2022 until his first appearance in court on 3 May 2022 was thus lawful. The lawfulness was confirmed by the court that remanded the matter and ordered the accused to remain in custody on 3 May 2022. The same is true for the subsequent appearances and remands in custody.

[21] He stands accused of the most serious offences being: Count 1: Robbery with aggravating circumstances as in section 1 of the CPA and Count 2: Murder. The law does not prevent a bail application on new facts caused by the changed circumstances of the accused. Hence the bail application pending before this court. There is no prejudice to the accused and the justice system dealt with him correctly but administratively awkwardly. The summary release of the accused just because there apparently is not and was not a warrant will bring the administration of justice into disrepute.

[22] The facts and questions in law of the cases on which the applicant relies is different from this case. In *De Klerk v Minister f Police* 2020 (1) SACR 1 (CC) the issue was:

[46] Even if Isaacs stands for the proposition that a remand order by a magistrate necessarily renders the subsequent detention lawful, how does this impact the liability of the police for unlawfully arresting and factually causing the subsequent detention? Put differently, assuming that a magistrate does remand someone lawfully, would it necessarily follow that the police cannot be liable for the subsequent detention factually caused by an unlawful arrest? What difference would it make if the remand was unlawful?

In casu the accused was to remain in custody after a proper and effective bail application was refused. The discharge from a hospital does not cause the release of

the accused ordered in terms of the Criminal Procedure Act. The arrest of the accused in 2016 was lawful to begin with.

[23] I align myself with the finding at paragraph [62]:

The principles emerging from our jurisprudence can then be summarised as follows. The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since Zealand, a remand order by a magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made. (Accentuation added)

[24] The facts and findings in *Minister of Police and Another v Muller* 2020 (1) SACR 432 (SCA) are also different but support the finding in this case. The continued incarceration of the accused was justified:

[36] The magistrate, in considering whether to release Muller, accordingly enquired into his previous convictions. Thus, it emerged that he had previously been convicted of rape. By virtue of the formulation of sch 5 to the CPA, the admitted previous conviction, in the opinion of the magistrate, elevated the offence of which he was charged to a sch 5 offence. Section 60(11)(b) of the CPA provides that, where accused persons have been charged with an offence referred to in sch 5 (but not in sch 6) they shall be detained in custody until they are dealt with in accordance with law, unless they, having been given a reasonable opportunity to do so, adduce evidence which satisfies the court that the interests of justice permit their release. In the circumstances it placed an onus on Muller to adduce evidence to satisfy the

court, on a balance of probability, that the interests of justice permitted his release.

[37] The presiding magistrate ruled that a formal bail application would have to be heard in the bail court in order for Muller to adduce such evidence. Despite the best endeavours of the court prosecutor, the bail court was unable to determine the matter on 28 November 2013. In these circumstances the magistrate postponed the matter and ordered Muller's further detention until 2 December 2013, which was the first occasion that the bail application could be entertained.

[38] In summary, the decision taken to prosecute Muller was taken by the screen prosecutor. She had before her all the relevant information to do so. At the first appearance the magistrate gave judicial consideration to Muller's release and remanded him in custody. That she was obliged to do in terms of s 60(11)(b) of the CPA. Neither the prosecutor nor the police had knowledge of Muller's previous conviction and accordingly could not have foreseen that he would be remanded in custody.

[39] In the circumstances the liability of the police for the wrongful and unlawful arrest and detention was truncated, upon the remand order made at the first appearance. The appeal must therefore succeed in respect of the further detention.

[25] To summarise:

1. The Order for Discharge in terms of the Mental Health Act 17 of 2002 of 30 March 2022 was irregular due to a lack of relevant information submitted in the application and thus illegal;

2. The accused was in custody after lawful arrest and a proper bail application that refused his release and this in terms of the Criminal Procedure Act 51 of 1977;
3. Discharge from hospital in terms of the Mental Health Act does not permit release from custody in terms of the Criminal Procedure Act.
4. The incarceration of the accused is lawful. The release of the accused will be unlawful.

[26] **ORDER**

After judicial consideration of the facts and the applicable law, having heard the arguments of the applicant and the representative of the Office of the Director of Public Prosecutions and with regard to the papers filled the following order is made:

1. The application is dismissed.
2. No order is made as to costs.
3. The record of the application as well as the consequent bail application must be transcribed and referred to the Director of Public Prosecutions: Free State in order for pro-active measures to be declared in the form of directives to all parties to prevent a repeat of this situation.

M OPPERMAN, J

JD REYNEKE

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BLOEMFONTEIN

