

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Case no: 476/2015

In the application of:

IN THE EX PARTE APPLICATION OF

RICHARD KABI

Applicant

In re:

Case no: 476/2015

In the matter between:

**GROENPUNT CORRECTIONAL SUPERVISION
AND PAROLE BOARD**

Applicant

And

THE STATE

Respondent

MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES

1ST INTERVENING RESPONDENT

NATIONAL COMMISSIONER OF
CORRECTIONAL SERVICES

2ND INTERVENING RESPONDENT

REGIONAL COMMISSIONER OF
CORRECTIONAL SERVICE

3RD INTERVENING RESPONDENT

AREA COMMISSIONER, GROENPUNT
CORRECTIONAL SERVICES

4TH INTERVENING RESPONDENT

HEAD GROENPUNT MEDIUM
CORRECTIONAL FACILITY

5TH INTERVENING RESPONDENT

CORAM:

MOLOI J

HEARD ON:

15 OCTOBER 2015

DELIVERED ON:

30 OCTOBER 2015

[1] This is an application for amendment of an order given by Boonzaaier, AJ on 30 April 2015 granting a convicted prisoner conversion of his imprisonment term to correctional supervision. The application is made by the Groenpunt Correction Supervision and Parole Board and was against the State. The Minister of Justice and Correctional Services, the National Commissioner of Correctional and Others applied to intervene in the proceedings as they were not parties and had interest in the matter on various grounds. They also filed a Counter-application seeking to set aside the order granted by Boonzaaier, AJ mentioned above. The said order read as follows:

- i. That, the remaining term and/or terms of imprisonment in respect of the sentence and/or sentences imposed by the above Honourable Court to the offender on or about 2008 August 19, be combined as one sentence for the purposes of conversion, and that the remaining terms and/or terms of imprisonment be converted as such, into **Correctional Supervision in terms of Section 276(1)(h) of the Criminal Procedure Act, No: 51 of 1977** as amended.
 - a) that, once the said remaining term and/or terms of imprisonment is combined, and converted into **Correctional Supervision** as such, in terms of the provisions of the above mentioned act, the offender be considered for possible placement on **Correctional Supervision** by the above **Honourable Court**, since he has already served the required “*one fourth*” (1/4) of the total sentence and/or sentences.
 - b) that, the offender must be considered, and placed on **Correctional Supervision** and as such, be released from custody on Correctional Supervision.

BY ORDER OF THIS COURT

[2] On the date of hearing it was decided that the application for intervention be heard first. It was not possible to argue the application for intervention without reference to the main

application to amend the order as well as the counter-application. It needs to be mentioned that the order did not make reference to the convicted and sentenced prisoner, RICHARD KABI, and the amendment was sought for that purpose. The interests of the intervening parties are self-evident as they are all concerned with the administration and proper running of Correctional Services and must ensure that the facilities are not abused and prisoners are dealt with within the law.

AUTHORITY OF RESPONDENTS DEPONENT NAUDE

- [3] The opposition to the intervening was based on the fact that the section under which the application was brought (*Section 276A(3) (a) (ii) of the Criminal Procedure Act*) made reference to the prosecution services only and not the intervening parties and, secondly, the deponent of the answering affidavit, one Christiaan Petrus Naude was not authorised to do so on behalf of the Minister and the intervening parties had no proof of such authorisation nor alleged despite the fact that in paragraph 1.1 of his affidavit he stated “ *I have been duly authorised to depose to this affidavit on behalf of the First to the Fifth Intervening Respondents.*” Mr Naude is an Assistant Director in the Department of Correctional Services stationed at Groenpunt Maximum Correctional Centre and also a chairperson of the Case Management Committee at the Maximum Correctional Services Centre, Groenpunt, Management Area.
- [4] It is clear from the above that Naude is an employee of the First Intervening party and can be expected to have a better understanding of the procedures and processes involved in

Correctional Services than the Minister. As an employee he cannot be expected to prove his authority on the same basis as that of an agent who is acting on behalf of a principal. Moreover there is no evidence gainsaying what Naude stated at the beginning of his affidavit quoted above in paragraph 1.1 thereof. More than that a party challenging the authority of a deponent can only do so by taking steps that are envisaged in Rule 7 (1) or the Uniform Rules of Court and not only be argued from the bar. The issue of authority was settled in Unlawful Occupiers, School Site v City of Johannesburg. 2005 (4) SA 199 (SCA) at 206 par. 14 where the following was stated:

“At the hearing of the appeal, Counsel for the Appellants conceded that she could not support this ground of appeal. I think the concession was fairly made. The issue raised had been decided conclusively in the judgment of Flemming DJP in Eskom v Soweto City Council 1992 (2) SA 703 (W), which was referred to with approval by this court in Ganes and another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at 6241-625A. The import of the judgment in Eskom (supra) is that the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant, is provided for in rule 7(1). The ratio *decidendi* appears from the following dicta (at 705D-H):

“The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to

the opposite party, to the administration of justice and sometimes even to his own attorney..."

The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority."

(My emphasis)

The State Attorney acts on behalf of all the National Department *ex lege*. He derives his authority from the *State Attorneys Act No 56 of 1957*. Naude's affidavit is compiled and served by the State Attorney. Naude, therefore, does not require any additional authority to depose his affidavit.

APPLICATION IN TERMS OF SECTION 276A (3) (a)(ii)

- [5] An application for conversion of the imprisonment to correctional supervision of a convicted and sentenced person is regulated by *Section 276A (3) of the Criminal Procedure Act No.51 of 1977* as amended. The section provides as follows:

"(3) (a) Where a person has been sentenced by a court to imprisonment for a period:

- (i) not exceeding five years; or (ii) exceeding five years, but his date of release in terms of the provisions of the

the regulations made thereunder is not more than five years in the future.

and such a person has already been admitted to a prison, the Commissioner or a parole board may, if he or it is of the opinion that such a person is fit to be subjected to correctional supervision, apply to the clerk or registrar of the court, as the case may be, to have that person appear before the court *a quo* in order to reconsider the said sentence.

- (b) On receipt of any application referred to in paragraph (a) the clerk or registrar of the court, as the case may be, shall, after consultation with the prosecutor, set the matter down for a specific date on the roll of the court concerned.
- (c) ...
- (d) Whenever a court reconsiders a sentence in terms of this subsection, it shall have the same powers as if it were considering sentence after conviction of a person and the procedure adopted at such proceedings shall apply *mutatis mutandis* during such reconsideration: Provided that if the person concerned concurs thereto in writing, the proceedings contemplated in this subsection may be concluded in his absence: Provided further that he may nevertheless be represented at such proceedings or cause to submit written representations to the court.
- (e) After a court has reconsidered a sentence in terms of this subsection, it may:
 - (i) confirm the sentence or order of the court *a quo*; (ii) convert the sentence into correctional supervision on the conditions it may deem fit; or (iii) impose any other proper sentence."

[6] The first to be noted is that the applicant should not have a period exceeding five years to serve. He must be admitted to a prison. The Commissioner or the Parole Board should be of opinion that such a person qualifies to be subjected to Correctional Supervision. Such person may thereupon apply to the Clerk of the

Court or the Registrar to let the person appear in a court that convicted and sentenced him in order that the court can reconsider the sentence it imposed. Upon receipt of the application the Clerk of the Court or the Registrar must consult with the prosecutor and decide on the date on which the application for conversion of the imprisonment sentence may be reconsidered for correctional supervision. On the day the court reconsiders the sentence it shall have the *"same powers as if it were considering sentence after conviction of a person and the procedure adopted at such proceedings shall apply mutatis mutandis during such reconsideration,"* subsection (d). What this means is that the court must consider evidence placed before it in mitigation and aggravation of the sentence and arguments placed before it by the prosecution and the convicted person's legal representative or the convicted person himself/herself, take into account the gravity and seriousness of the offence committed and also take into account the interests of the society, the so-called triad of sentencing in addition to the recommendations of the Commissioner or Parole Board. These factors must, in addition, be balanced the one against the others without over/or under-emphasizing the one against the others: S v Rabie, 1975 (4) SA 855 (A) at 866 A-C. The person concerned, i.e. the sentenced person must be present during this process of reconsideration except if he, in writing, agreed to be excused. Such person may be legally represented or cause written representations be submitted to the court on his behalf.

- [7] Before this process takes place, the Clerk of the Court or the Registrar shall for purposes of reconsideration of the sentence

within a reasonable time submit the case record to the judicial officer who imposed the sentence or, if he is not available, another judicial officer of the same court. Where evidence was mechanically recorded only certain parts of the record may be indicated as necessary for transcription. The Clerk of the Court or the Registrar must inform the Commissioner or the Parole Board concerned in writing of the date of the hearing and request him/her or the Parole Board to submit written motivated recommendation to be placed before the judicial officer and submit such recommendations to the judicial officer: *Section 276A (3)(c)(i)(ii) and (iii) of the CDA*. After reconsidering the sentence as provided for the court concerned has the powers to (i) confirm the sentence or order of the court *a quo* i.e. the trial court, (ii) convert the sentence into correctional supervision on the conditions it may deem fit, or (iii) impose any other proper sentence.

- [8] In this matter, the impugned application sought to be amended deviated from the prescribed procedures and processes materially in several respects. I have pointed out above that three applications were before me, namely, the application for amendment of the court order granted by Boonzaaier, AJ on 30 April 2015 seeking to make reference to a sentenced offender, Richard Kabi (the main application), the application by the five respondents seeking to intervene, by being joined as parties to the application (the Intervention application) and the application to set aside the order granted by Boonzaaier, AJ (the Counter application). I have also pointed out that it was agreed and expedient to commence with the hearing of the Intervention application otherwise the five respondents would not have *locus*

standi. Most importantly I pointed out that the Intervention/Joinder application could not be argued without reference to the main application and the counter application. In effect all the three applications were so intertwined that they were in fact, argued all at the same time.

- [9] The shortcomings of the main application are numerous and material. The application was not brought by the affected person, Richard Kabi, but by the Groenpunt Correctional Supervision and Parole Board, the body that could only make recommendations to the court hearing the conversion to correctional supervision of the imprisonment sentence of Richard Kabi. The premise on which the applicant based the application was a disputed parole board meeting. I do not intent to deal with that dispute as it will not take the matter further. The essence of the dispute is that, on the one hand, the chairperson of the Parole Board, one Hlaoli Litsoane, contends the Board had taken the decision to have Mr Kabi's sentence converted into correctional supervision. He, however, does not state when and where the meeting was held nor does he produce the minutes and/or resolution taken. On the other hand, the secretary of the Board, one Tsediso Petrus Tekane, being a person that keeps the records and must be present at such meetings, does not know anything about the decision to convert Mr Kabi's sentence.

- [10] It is, however, strange to note that the chairperson of the parole board was the main deponent to the application to convert Kabi's sentence to correctional supervision. He describes himself as "Applicant" in his founding affidavit. The *locus standi* and the

objectivity of the boards' chairperson, Hlaoli Litsoane, immediately comes into question. The application was brought *ex parte* and only after being granted, served on the Directorate of Public Prosecutions. No basis was laid for the granting of the application without notice. An *ex parte* application is brought without notice to anyone (contrast this with the provisions of *Section 276A (3) (b)* requiring a consultation by the Clerk of the Court or the Registrar as to the set down of the matter with the prosecutor); an *ex parte* application can be brought when the applicant is the only person who is interested in the relief sought. This cannot be the case in this matter as the Department of Correctional Service and the parties seeking to intervene have direct and statutory interest and obligations in all the sentenced offenders under their care. An *ex parte* application can be brought if the nature of the relief sought is such that the giving of the notice may defeat the purpose of the application. Mynhardt v Mynhardt, 1986 (1) SA 456 (T) at 458 H-J. This cannot be said of this application. Nowhere in the papers does it seem the person concerned, Mr Kabi, appeared before the court or waived in writing his right so to appear or filed written representations as contemplated in sub section (3)(d).

- [11] The powers of the Court after reconsidering the sentence in terms of *Section 276A (3)(e)* are only to (a) *confirm the sentence or order made by the court a quo*; (b) *convert the sentence into correctional supervision on conditions it may deem fit* or (c) *impose any other proper sentence*. Clearly in this matter the court did not do any of the only things it was empowered to do but simply made an order in terms of the notice of motion with the result that the orders make no sense at all and do not relate to any sentenced offender, hence

the application to amend that very order. Furthermore, the order made relates to combination of sentences into one which cannot be done under *Section 276A (3)(a)(ii)*. Nowhere does the section refer to such combination.

- [12] It is abundantly clear from the above that the orders given by Boonzaaier, AJ are abortive and therefore are a nullity having been obtained illegally and in contrast to the clear directives contained in *Section 276A (3)(a)(ii) of the Criminal Procedure Act*. Abortive proceedings cannot be amended nor even be set aside as they constitute a nullity *ab initio*: R v Mhlanga 1959 (2) SA 220(T) at 222. In S v De Koker, 1978 (1) SA 659 (O) at 66 H the following was stated:

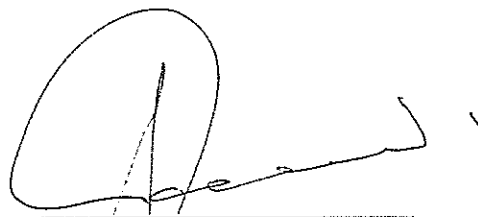
“Volgens die regspraak bring onmoontlikheid daarvan om met die verhoor voort te gaan wees onbeskikbaarheid van die landros mee dat die verrigtinge sonder meer as abortief beskou word en verval sonder die noodsaak van enige tersydestelling deur 'n Hoër Hof.” (My emphasis).

It is fortunate in the interest of justice that the intervening parties stood up and prevented one of the worst failures of the administration of justice taking place. The involvement of Hlaoli Litsoane warrants a further investigation.

- [13] Since the Groenpunt Correctional Supervision and parole Board had no record of the meeting where the decision was taken to launch the application before Boonzaaier, AJ and Hlaoli Litsoane describes himself as the applicant, it will be unfair to order costs against the Groenpunt Correctional Supervision and Parole Board

as it may deny that it was a party to the application: Unlawful Occupiers, School Site, Supra. Par 14.

[14] In the result HLAOLI LITSOANE is ordered to pay the costs of the Intervening parties in respect of the application to intervene.



K.J MOLOI. J

On behalf of the applicant: Mr N W Phalatsi: N W Phalatsi & Partners
Bloemfontein

On behalf of the state : Adv Murray: State Attorney
Bloemfontein