

IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

CASE NO : 1868/2002

In the matter between :

ANTONIOTERRY

Applicant

and

**MR F F BOTES : ADDITIONAL REGIONAL COURT
MAGISTRATE FOR THE REGIONAL DIVISION
BELLVILLE**

First

Respondent

**THE DIRECTOR OF PUBLIC PROSECUTIONS FOR
THE WESTERN CAPE**

Second

Respondent

JUDGMENT DELIVERED THIS 30th DAY OF APRIL, 2002

FOXCROFT, J : This is a review application in which Applicant moved to

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set aside First Respondent's decision of 16 November 2001. That decision, which was by Regional Magistrate Botes, was made on that date and is reflected in the review papers at p.53 as follows :

*"Hof bevind skuld aan kant van beskuldigde.
Sien bylae vir bevel met borg. Ing art 70 Wet 51/1977 word gelas dat
'n gedeelte nl R2 500,00 van die borggeld kwytgeskeld word wat ing art
67 verbeuris."*

Section 33 of the Constitution proclaims in subsection (1) that

*"Everyone has the right to administrative action that is lawful,
reasonable and procedurally fair",*

and section 35(3) provides that every accused person has a right to a fair trial; there are a number of specified rights in sub-sections (a) to (o). Sub-section (o) provides for the right of appeal to, or review by, a higher court.

Mr *Mihalik*, who appeared together with Mr *Loots* for Applicant, submitted that the matter was properly before us as a review, and neither Respondent resisted this contention.

As has been recently pointed out by CORA HOEXTER, with others, in Vol 2 of The New Constitutional and Administrative Law, entitled *Administrative Law* at p.91, the influence of the common law will not be confined to certain categories.

*“As CHASKALSON P explained in the **PHARMACEUTICAL MANUFACTURERS ASSOCIATION** decision, 2000(2)(SA) 674 CC, the common law will continue to inform the content of administrative law and will contribute to its future development. The Courts will thus rely on common-law principles when interpreting the constitutional provisions and the Act.”*

Courts are, of course, part of the judiciary so that their decisions are not administrative action. But in **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA v SOUTH AFRICAN RUGBY FOOTBALL UNION, 2000(1) SA 1 (CC) p.67, para 141**, it was said that

*“What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in **FEDSURE**, ... that some acts of a legislature may constitute “administrative action”. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is “administrative action” is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.”*

HOEXTER suggests at p.94 that it is in fact possible for judicial officers to

exercise administrative functions, and she gives as an example the issuing of a warrant.

The issuing of a warrant of arrest was where the trouble started in this case. For present purposes it will be sufficient to go back to July 2001 to determine the facts which led to this review.

The Applicant was at that time released on R5 000 bail without any further conditions being imposed. He was warned to appear in court on 2 November 2001, but had appeared on two occasions between July and November. On 2 November 2001 he failed to appear in court at the required time, but sent his fiancé to the prosecutor to explain that because he was ill as a result of a surgical procedure on the previous day, he would not be able to attend. The attitude of the prosecutor was to call for a warrant of arrest, which was duly issued. The Applicant immediately telephoned an attorney, one Noorudien Hassan, who advised him to go to court immediately. All of this happened on the same day. Therefore, at about 3:15 p.m. and in spite of the fact that he

was still in pain, the Applicant arrived at the regional court at Bellville and saw the control prosecutor immediately to explain his situation. The woman to whom he spoke contacted the clerk of the criminal court, who informed her, (and she relayed this to the Applicant), that a warrant of arrest had indeed been issued for Applicant's arrest. The clerk then further informed the prosecutor, who in turn informed the Applicant as follows :

"Die klerk het verder die [sic] meegedeel dat die ondersoekbeampte die lasbrief vir my arrestasie op Maandagoggend 5 November 2001 sou afhaal." [Record p.12 para 26]

The control prosecutor then told Applicant that it was already late and that he should contact the investigating officer, a Mr Baardman, in connection with the warrant. Applicant thereafter again contacted his attorney and asked him to represent him at the hearing which would take place on Monday 5 November.

In his Affidavit instituting these proceedings, Applicant tells how he went to court on Monday 5 November 2001, where he met Mr Hassan (his attorney). He was told that the only court which was available to hear this matter on short notice was Regional Court 5. They went to that court and were told that the matter would be heard at the end of the Roll. This took place at about 12 noon. First Respondent was the presiding officer at the hearing.

Applicant's attorney was told by First Respondent before the matter was heard that he would not hear it unless Applicant was arrested. At that stage Applicant was outside the courtroom, and found it strange that he had to be arrested and kept in custody since he had come to court of his own free will,

"En aangesien daar geen risiko was dat ek sou vlug nie. Ek is deur 'n vroue polisiebeampte gearresteer en is aangehou in die hofsel totdat die aangeleentheid geroep was om ongeveer 12h00. Dit is my eerbiedige mening dat ek gearresteer is en in hegtenis geplaas is bloot om my te verneder."

In his Opposing Affidavit, First Respondent maintains that while it is true that

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the Applicant was arrested on 5 November, the reason for this, which the First Respondent provided in paragraph 11 of his Affidavit at p.94 of the papers before me, was that

“Dit doen ek eerbiediglik aan die hand spruit voort uit die bepalings van artikel 67 van die Strafproseswet 51 van 1977 (“die Wet”).”

The magistrate misunderstood the section in the Act, which provides in subsection 1 that if an accused who is released on bail fails to appear at the place and on the date and at the time appointed for his trial, 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.”

Subsection (2)(a) continues :

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- “(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.”*

Subsection (c) deals with an accused person who does not appear before Court within the required fourteen days, and subsection (3) is to the effect that

“The Court may receive such evidence as it may consider necessary to satisfy itself that the accused has under subsection (1) failed to appear or failed to remain in attendance, and such evidence shall be recorded.”

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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 subsection 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.

The warrant of arrest had been issued on the Friday, 2nd November, and had not been carried out. The magistrate seems to have adopted a policy in general that before he would be prepared to listen to the reasons why bail should not be forfeited through non-appearance, that the arrest and incarceration of the accused was a necessary precursor to any judicial

consideration of the matter. There is no legal foundation for such a view.

Applicant describes in his affidavit that when his attorney, Mr Hassan, rose to address the Court on 5 November, First Respondent was visibly unhappy about the fact that Mr Hassan was not wearing a jacket under his gown. After apologising for this, he attempted to address the Court, but was refused permission to do so. First Respondent insisted that Applicant should give evidence. This is confirmed by Mr Hassan in his affidavit which appears at p.61 of the papers, where he says :

“Toe ek opstaan om die Hof toe te spreek het die Eerste Respondent my onmiddellik gevra waar my baadjie was.

19.1 Aangesien dit 'n uiters warm dag was en aangesien ek meestal in die Wynberg howe praktiseer waar dit, volgens my waarneming, die gebruik is dat indien dit onhoudbaar warm is, praktisyns verskyn sonder baadjies onder hulle togas. Ek het dus verkeerdelik aangeneem dat dit deurgaans die gebruik sou wees en dat ek my toga bo-oor my hemp kon aantrek. Ek het dit gedoen sonder om eers die Eerste Respondent se vergunning te vra. Ek is uiters verleë daaroor.

19.2 Ek het in antwoord op die Eerste Respondent se vraag dit

genoem en die onmiddellik voorafgaande sub-paragraaf aan hom verduidelik, waarop ek meegedeel is dat ek na die hooflanddros te Wynberg moes gaan en dat ek by hom moes uitvind waarom hy sulke dinge in sy howe toelaat.”

Mr Hassan continues to say that he again apologised, whereupon he was allowed to continue. Immediately thereafter First Respondent informed him

“dat hy dit nie sou toelaat nie en dat ek die Applikant moes roep om te getuig. Ek beweer, met eerbied, dat die Eerste Respondent my ten minste die geleentheid moes gegun het om die grondslag van die applikantse verweer op rekord te plaas.” (para. 23)

Applicant then did testify just for “*etlike minute*”, when his cell phone unexpectedly began to ring. What follows is important – p.63, para. 26 :

“Die Eerste Respondent het onmiddellik homself vererg en gesê dat “dit genoeg was” en “dat die applikant nou in die moeilikheid was”. Hy

het daarop vir my en die Applikant meegedeel dat hy die aangeleentheid uitgestel word vir sewe dae en dat die applikant in hegtenis moes bly. Dat die Eerste Respondent homself vererg het is te verstane. Wat egter daarop gevolg het, beweer ek met eerbied, was uiters onregverdig teenoor die Applikant.”

Mr Hassan adds that he was

“úiters verbaas oor die Eerste Respondent se optrede en het verleë gestaan teenoor my kliënt. Soos voormeld is geen redes verskaf waarom die ondersoek uitgestel moes word vir sewe dae nie. Die applikant is geen geleentheid gegun om 'n verduideliking oor die voorval te gee nie.”

In answer to these allegations, First Respondent agrees that he did question why Mr Hassan was not wearing a jacket, and then he attaches a letter from the Law Society of the Cape of Good Hope marked “FFB.7”, stipulating a dress code for attorneys appearing in the High Court. He adds :

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“Dit is my respektvolle mening dat dieselfde van toepassing is in die laerhowe.”

It is true that a circular was sent to all firms by the Law Society in October 1995, dealing with rights of appearance of attorneys in the then Supreme Court and providing for dark suits or at least dark jackets for men appearing in court. This rule was laid down after attorneys had obtained for the first time the right to appear in the Supreme Court. There was a need to adopt some uniformity in dress in the Supreme Court where only advocates had previously appeared at the Bar. Negotiations had taken place between the Bench, Bar and Attorneys' Association about the need to adopt a reasonably unified dress code. Attorneys initially wanted to wear advocates' robes, and the advocates were unhappy with this idea. The compromise which was adopted was that attorneys should dress in the manner prescribed. The arrangement had nothing to do with dress in the magistrates' courts, or any other courts, and as far as I understand, no such uniform rule exists.

Certainly, First Respondent's advocate was unable to tell me of any such rule, nor were any other advocates in court - some of whom had been prosecutors - able to shed any light on the matter. It was therefore of no assistance for the First Respondent to suggest that the High Court dress code applied to the magistrates courts. While a magistrate is obviously entitled to hold a view as to how people should dress when appearing before him, he should not suggest that the High Court has somehow laid down a rule which applies to the magistrates courts as well.

All of this should have been of little consequence, since the attorney was obviously not intending to annoy the magistrate, and he apologised.

In regard to the allegation by Mr Hassan that he was not allowed to address the Bench, the magistrate responds in paragraph 15 of his Affidavit (Record

95):

“In terme van artikel 67 moet die beskuldigde die Hof tevrede stel dat sy versuim om op sy verhoordatum te verskyn nie as gevolg van skuld op sy kant is nie. Dit is om hierdie rede dat ek getuienis vanaf die applikant wou hoor. Dit is my respekvolle mening dat slegs die applikant en nie sy regsverteenwoordiger, in staat is om getuienis te lewer.”

It is quite right that only the Applicant could give evidence, but it is quite wrong to suggest that the attorney could not address the Court in order to satisfy the Court as provided in section 67(2)(a) that the accused's failure was not due to fault. If the Court should be dissatisfied with that submission, it is of course open to the Court to receive evidence as it may consider necessary under section 67(3), but to say that an attorney is not permitted to address the Court in such situations was clearly wrong.

The magistrate then went on to deal with the fact of the ringing of the cellular

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telephone, and contends that his reasons for postponing the case were not because of irritation about clothing or cell phones, but the following [Record 96]:

- “17.1 Dit blyk uit die oorkonde van 2 November 2001 dat adv Badenhorst, wie die aanklaer in die applikant se verhoor is, die Hof, by die versoek van 'n lasbrief en die voorlopige opheffing van borg, meegedeel het dat hy ('Badenhorst') 'n mediese sertifikaat ontvang het dat applikant die vorige dag besny is;*
- 17.2 Dit blyk verder uit bogenoemde oorkonde dat Badenhorst die dokter geskakel het wie aan hom meegedeel het dat die besnydenis nie 'n noodsaaklike operasie was nie;*
- 17.3 Dit blyk verder dat die dokter hom meegedeel het dat die applikant die volgende dag in die hof moes wees sou die dokter nie die operasie uitgevoer het nie. Ek heg hierby aan 'n uittreksel uit die oorkonde gemerk “FFB.8”;*
- 17.4 Op hierdie stadium was die applikant se getuienis strydig met die van Badenhorst se mededelings aan die Hof op 2 November 2001.*
- 17.5 Badenhorst se opmerkings aan die Hof op 2 November 2001 dat dit duidelik is dat applikant die regsproses vertraag “met sy alewige afwesigheid op sg. (sogenaamde) mediese gronde”;*
- 17.6 Volgens applikant se getuienis was ek van oordeel dat die saak nie gefinaliseer kon word nie, omdat die mediese getuienis van*

die dokter wie die operasie uitgevoer het, dr Ebrahim, van belang was om vas te stel of die applikant skuld het, aldan nie;

17.7 Dit ook duidelik geblyk het dat die applikant nie gereed was nie, ten minste nie om die dokter as 'n getuie te roep nie;

17.8 Die applikant se aansoek nie op die Hofrol was nie en sodoende die sake wat wel vir daardie dag neergesit is, sou onnodiglik vertraag weens die feit dat dit duidelik was dat dr Ebrahim se getuienis noodsaaklik is."

In a replying affidavit, Mr Hassan has pointed out that there were no further cases on the Roll for that day when the cell phone rang, and that even if Applicant's evidence was contrary to the

".... dubbele hoorsê getuienis van advokaat Badenhorst op 2 November 2001, was dit op sigself geen rede om summier die verrigtinge te staak nie. Die applikant het nog nie sy getuienis voltooi nie, was nog nie kruis-ondervra nie en die Hof het ook nog geen verdere vrae aan die applikant gestel nie. Bo en behalwe die feit dat die eerste respondent met respek die agbare Hof mislei oor die rede vir die uitstel, is dit ook verder aanduidend daarvan dat die eerste

*respondent bereid sou wees om **viva voce** getuienis van applikant te verwerp om deur bloot te kyk na die oorkonde wat voor hom geplaas is, sonder dat daar enige getuienis oor die korrektheid van die oorkonde aan eerste respondent gelewer is nie."*

He goes on at page 135 of the Record in paragraph 16 :

*"Eerste Respondent voer aan dat applikant die regsproses vertraag het "met sy alewige afwesigheid op sogenaamde mediese gronde". Dit was die eerste keer dat die applikant afwesig was van hofverrigtinge. Dit was ook die eerste keer dat die applikant weens mediese gronde nie die hof kon bywoon nie. Die gewig wat eerste respondent geheg het aan hierdie wanvoorstelling is aanduidend van die feit dat eerste respondent nie eens die moeite gedoen het om te verseker dat hierdie stelling korrek is, maar wel hierdie dubbele hoorsê-getuienis (wat verkeerd is) aanvaar het bo die van die **viva voce** getuienis van die*

applikant. Eerste respondent het nie eens applikant gevra of dit wel korrek was nie, maar bloot die verrigtinge uitgestel vir sewe dae.”

Clearly, First Respondent should not have simply relied on what Badenhorst had reportedly said in court on 2 November 2001, and should have considered the question which arose in the circumstances, namely whether there was sufficient time to attempt to get Dr Ebrahim to court that afternoon before deciding whether to continue to hold Applicant in prison or not.

Even if Dr Ebrahim’s evidence was of “*uiterste belang*” for a finding of whether there was any fault on the part of Applicant or not, there was no need to incarcerate the Applicant for a whole week before the matter resumed on 12 November, and indeed continued until 16 November, while that issue was resolved. Even if Applicant’s attorney had not specifically moved for bail after the postponement, it was, in my view, the duty of the Court to raise the question of bail with the attorney, since he had insisted upon the procedure of arresting the Applicant for purposes of the hearing on 5 November, and not for

any other purpose.

If the arrest was only in order to hear the matter, then the arrest should have fallen away once it was no longer possible to hear the matter.

First Respondent himself called Dr Ebrahim as a witness and put certain questions to him on 16 November. After hearing this evidence, First Respondent found that the Applicant had been negligent in his failure to inform the doctor before the operation on 1 November that he had to be in court on 2 November, and ordered that an amount of R2 500,00 of his bail be estreated to the State and that Applicant remain in custody. No reasons exist on record for this finding.

I agree with the submissions of Applicant's Counsel that upon a reading of the

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Record it is abundantly clear that First Respondent remanded the matter for seven days immediately after the cellular telephone rang in court. First Respondent does not deal with the allegation in Mr Hassan's affidavit that First Respondent had said, "*Nou is jy in die moeilikheid*" when this happened. Applicant also makes this allegation at paragraph 34 of his Affidavit (Record 14). There is simply a bald denial in paragraph 54 of First Respondent's Opposing Affidavit of the contents of paragraph 53 of Applicant's Affidavit.

One obtains the strong impression that the magistrate was so incensed by the behaviour of Mr Hassan, which was aggravated by the ringing of the cellular telephone, that he was simply not prepared to go on with the matter. Had that been all that had happened, one could have excused him, but to order that the accused be held in custody for a week in those circumstances was conduct which, in my view, no reasonable Court would countenance and which was an irregularity in the proceedings of so gross a nature that it was fatal or, as is sometimes said, resulted in a failure of justice. [See Section 24(1)(c) of the Supreme Court Act, 59 of 1959]. First Respondent ordered that Applicant remain incarcerated for a week, and no subsequent conduct

on the magistrate's part need be gone into. Suffice it to say that I do not agree that Dr Ebrahim in any way contradicted what the Applicant had said, or that any conduct on the part of the Applicant amounted to negligence for which he should have forfeited his bail.

There was plenty of time for the matter to be properly dealt with after both parties in this confrontation had cooled off, since the Record shows that there was ample opportunity for further evidence to be led. [See Record p65, which deals with Mr Hassan's attempts to get the First Respondent to deal with the matter at two o'clock that afternoon].

It is unnecessary to determine whether First Respondent was himself biased in this matter. He certainly created the perception that he attached more importance to what had been said by the prosecutor on the previous occasion when the matter was in court than anything which might be said by the

Applicant or his attorney. He should also certainly not have said that the Applicant's attorney should go to the Wynberg court and ask the chief magistrate there why he was allowing people not to wear jackets. This statement indicates a degree of frustration, irritation and perhaps overwork or an over-rigid approach. I am sure that if First Respondent were to sit calmly and consider that statement, he would realise that it was a comment which should never have been made.

Applicant was fully entitled to regard what had happened to him as not being a fair trial. Mr Hassan, in my view, is perfectly correct to say that the Applicant should not be punished because of the feelings that the First Respondent might have had against him. Mr Hassan expressed proper regret for an offence which could in any event not be regarded as anything more than trivial.

This whole unhappy saga reminds one of days when members of the public

and legal representatives were treated in some cases with great indifference, and occasional rudeness, in superior and inferior courts. The Constitution insists that people be treated fairly and properly, and the attitude displayed by First Respondent in this matter was reprehensible and cannot be left without criticism.

Mr *De Villiers Jansen*, who appeared for First Respondent, submitted that what the magistrate did was in accordance with law. He could provide no reason why the magistrate had insisted that the Applicant be jailed for seven days before the enquiry of 5 November could be completed other than to suggest that the magistrate seemed to feel that the law had to take its course in the absence of any application for bail by Applicant's attorney. He submitted that it is not the "*intention of the legislature that an accused whose bail has been forfeited be allowed to be on what would effectively be out of custody on his own recognisance*".

While this submission might apply to normal forfeiture of bail situations, the present case was entirely different. The Applicant did not want to forfeit his bail and took steps to ensure that that did not happen. The arrest which took place was for reasons which the magistrate regarded as necessary for the hearing before him as to why bail should not be forfeited and which should, as I have said, been reversed when the matter had to be postponed.

It was for these reasons that my brother and I decided to make an immediate order releasing the Applicant from custody and restoring the forfeited portion of his bail. The order which we made was the following :

1. *Dat die bevinding van die Eerste Respondent hierin op 16 November 2001 tersyde gestel word.*
2. *Dat die bogenoemde Agbare Hof sy inherente jurisdiksie uitoefen deur nie die aangeleentheid terug te verwys na die Streekhof vir 'n **de novo** ondersoek nie, en dat 'n beslissing aangaande die meriete van die ondersoek op die aangehegte stukke gemaak word :*

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- 2.1 *Dat die Applikant onmiddellik vrygelaat word.*
- 2.2 *Dat die Applikant se borg wat verbeurd verklaar is, herstel word.*
3. *Dat die eerste Respondent die koste van die aansoek betaal, wat insluit die koste van een Advokaat.*

POTGIETER, AJ : I agree.

D POTGIETER

FOXCROFT, J : It is so ordered.

J G FOXCROFT

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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

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In the matter between :

ANTONIO TERRY

Applicant

and

**MR F F BOTES : ADDITIONAL REGIONAL COURT
 MAGISTRATE FOR THE REGIONAL DIVISION
 BELLVILLE**

Respondent

 COUNSEL FOR APPELLANT : Adv P F Mihalik et H Loots

 ATTORNEYS FOR APPELLANT : Hassan Attorneys,
 LANSLOWNE.

COUNSEL FOR FIRST RESPONDENT: Adv H Booysen

COUNSEL FOR SECOND RESPONDENT : Adv J E A De Villiers

ATTORNEYS FOR RESPONDENTS : State Attorney

DATE[S] OF HEARING : 12.4.2002

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DATE OF JUDGMENT : ORDER : 26.4.2002
REASONS : 30.4.2002