

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION – MTHATHA)**

Reportable/Not Reportable

Case no.: 3088/2024

Matter heard on: 08 August 2024

Judgment delivered on: 27 August 2024

In the matter between:

MARTIN IRUNGU NJUGUNA

Applicant

And

THE MINISTER OF HOME AFFAIRS

1st Respondent

MR JUBASE, THE MAGISTRATE, FLAGSTAFF

2nd Respondent

THE HEAD OF IMMIGRATION, LUSIKISIKI

3rd Respondent

**MRS MATANDABUZO, THE IMMIGRATION
OFFICER**

4th Respondent

JUDGMENT

ZONO AJ

Introduction

- [1] This applicant approached this court for an order that is divided into two parts. Part A of the application was brought on urgent basis. In terms of the notice of motion the application in Part A would be heard on 30th July 2024. On 30th July 2024 the application was postponed to 06th August 2024 and the respondents were directed to file their answering affidavit.
- [2] On 06th August 2024 the respondents served their answering affidavit deposed to by Nomzolisa Siyanda Jelashe at 10:35 and thereafter filed same on record. The deponent describes herself as Head of Immigration in Lusikisiki in the OR Tambo Region, Eastern Cape. The court could not have had sight of the answering affidavit on 06th August 2024 and the parties agreed on a court order directing the applicant to file replying affidavit and both parties were directed to file their respective heads of argument by the end of day on 07th August 2024. The matter was postponed for full hearing on 08th August 2024. The matter was indeed fully heard on 08th August 2024.
- [3] The main relief the applicant is seeking in Part A is couched in the following terms:

“4. Ordering the immediate release of the applicant from detention at Bizana Correctional Centre (Awaiting Trial Prisoner Section) or where he is detained, pending the final determination of the review of the decision to detain him as contemplated in Part B of the notice of motion and his obtaining of Asylum seeker status as contemplated in the Refugees Act 130 of 1998.”

- [4] It is inherent in this relief that the applicant is detained in Awaiting Trial Prisoner Section at Bizana Correctional Centre. It is unequivocally clear in the founding and replying affidavit that the Commissioner of Oath is Head

or an Official of Bizana Correctional Centre. When the founding and replying affidavits were attested to, the applicant was detained in and was in the control of the Bizana Correctional Centre. Mtshoba was a Correctional Officer who signed the affidavits as a Commissioner of Oath. Differently put, the applicant took an Oath before Mtshoba Z in Bizana Correctional Centre.

[5] It is not without significance that a relief with similar effect is sought by the applicant in Part B in the following terms:

- “1. Reviewing and setting aside the second respondent’s decision of 15th July 2024 refusing applicant’s release from detention in order to enable him to prosecute his application for Asylum.*
- 4. Declaring unlawful the continued detention of the applicant at Bizana Correctional Centre (Awaiting Trial Prisoner Section) or wherever applicant is detained after he communicated his intention to apply for Asylum to third respondent on 26th June 2024.”*

Non-Joinder

[6] While release of the applicant from the Prison cells is sought, it is indeed true that the lawfulness of applicant’s detention at Bizana Correctional Centre is, by necessary implications, in issue. That attack can appropriately be directed at the institution detaining the applicant, which is Bizana Correctional Centre. It is the Bizana Correctional Centre that has the keys of the Prison Cell from which the applicant has to be released.

- [7] During the hearing of this matter, I invited the parties to make submission about the non-joinder of Head of the Bizana Correctional Centre as a party who is in charge of the detention facility and in whose control the applicant is. That point is accompanied by the provisions of Section 2(1) of the State Liability Amendment Act 14 of 2011 which provides as follows:

“In any action or other proceedings instituted by virtue of the provisions of Section 1 the executive authority of the Department concerned must be cited as nominal defendant or respondent.

- [8] Applicant’s Counsel strongly submitted to the effect that the Head of the Correctional facility¹ or any Other relevant Official representing the Correctional Centre is not a necessary party as the court order directing the cited or joined respondents can significantly be carried into effect without prejudicing the Head of or relevant Official the Correctional Centre. In the same vein it was conceded in the oral submissions by the applicant’s Counsel that, the applicant is detained in the Bizana Correctional Centre.

- [9] I invited the parties to make oral submissions on this point being mindful of the fact the point was not expressly or pertinently raised in the papers. I even made invitation to parties to deliver their supplementary written submissions if they so wish. Invitation was not heeded by any of the parties. I have no doubt in my mind that the issue of non-joinder of Head or relevant Official of the Bizana Correctional Centre and the Minister of Correctional Services is apparent on the papers as I have demonstrated in the preceding paragraphs.

- [10] **Ngcobo J** in **Cusa**² held thus:

¹ The executive authority is by implication included

² CUSA v Tao Ying Metal Industries and Others 2009 (2) SA 204 (CC); 2009 (1) BCLR1 (CC); 2009 (1) BLLR 1 (CC); (2008) 29 ILJ Z2461 (CC) Para 67

“These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled mero motu to raise the issue of the Commissioner’s jurisdiction and to require argument thereon. However, as will be shown below, on a proper analysis of the record, the arbitration proceedings in fact did not reach the stage where the question of jurisdiction came into play.”

[11] In **Fischer Theron**³observed as follows:

“13. ... There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to proviso that no prejudice will be caused to any party by its being decided...”

[12] A party or organ of state ⁴in whose custody the inmate is kept, becomes a necessary party to the proceedings, because there is no one who can appropriately comply with the court order, if an order releasing the inmate is granted. It is generally known that remand or detention facilities detain the inmate in terms of a warrant of detention signed by the judicial officers, authorizing them to detain the inmate. It is prejudicial to the detention

³ Fischer v Ramahlele 2014 (4) SA 614 (SCA) at 620C-621C Para 13

⁴ Section 239 of Constitution

facility to be ordered in their absence to release the inmate when it lawfully detained him in terms of the warrant of detention, which has not been set aside or otherwise cancelled. It must be borne in mind that the instant proceedings are not directed at impugning the validity of the detention warrant authorizing the detention facility to detain the inmate.

[13] For, it is well settled in our law that until a decision is set aside by a court in proceedings for judicial review, it exists in fact and it has legal consequences that cannot simply be overlooked.⁵ The organ of state or facility reposed with a power or duty to keep in custody an inmate is a necessary party when the release of that inmate is an issue to be decided. It is quintessentially the same organ of state keeping the inmate in custody who must be saddled with a duty to release the inmate.

[14] Non-joinder is the failure of a plaintiff to join a particular defendant with another when he is suing, in circumstances in which the law requires that both should be sued together.⁶ The test is whether or not a party has a direct and substantial interest in the subject matter of the action that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.⁷ The Rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party.⁸

[15] Accountability is a central value of our Constitution. This means that our law must be developed and interpreted in a manner that ensures that all bodies exercising public power are held accountable. However, it also means that courts should be slow to infer the delegation of power to

⁵ Ouderkraal Estates (Pty) Ltd v City of Cape Town and others 2004 (6) SA 222 (SCA) Para 26

⁶ Erasmus Superior Court Practice, 2nd Edition Vol 2 Page D1-124; Mgatyelwa v Minister of Police and another (1174/2016) [2024] ZAECHMHC 13 (19 March 2024)

⁷ Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 (O) at 168-170

⁸ Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 659

bodies that cannot be held directly accountable through ordinary political process.⁹

[16] I am, a matter of law, precluded from considering whether a case has been made out for the grant of the relief being sought.¹⁰ I have no discretion to exercise until all the necessary parties are before court.¹¹In **Khumalo Milne J**¹²remarked as follows:

“Once it is shown that a party is a necessary party in the sense that he is directly and substantial interested in the issues raised in the proceedings before the court and his rights may be affected by the judgment of the court, the court will not deal with those issues without such a joinder being effected and no question of discretion nor of convenience arises.”

[17] I am disposed to follow a long line of authorities or decisions where the courts refused to hear matters without joinder of all the necessary parties. Those decisions are binding on me.¹³I am left with no option but to postpone the matter.

[18] The applicant is liable to pay costs occasioned by the postponement of the matter. The nature of the relief sought in the notice of motion should have informed and guided the applicant to see that the relief about his release cannot be carried into effect without the participation of the detention facility and its executive authority in the proceedings.

Order

⁹ AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and another 2007 (1) SA 343 (CC) Para 89

¹⁰ Du Preez v Du Preez (3619/2022) [2024] ZAECQBHC 4 (30 January 2024) Para 13

¹¹ Nyume and another v Walter Sisulu University and others (580/19) [2-119] ZAECMHC 13 (20 February 2019) Para 12

¹² Khumalo v Wilkins and another 1972 (4) SA 407 (N) 457 A-B

¹³ True Motives 84 (Pty) Ltd v Madhi 2008 (4) SA 367 (CC) Para 100-101

[19] In the result I make the following order:

[19.1] Part A application is hereby postponed sine die pending the joinder of the Head of Bizana Correctional Centre or any other relevant functionary in the Correctional Centre and the Minister of Correctional Services in terms of Section 2(1) of the State Liability Amendment Act 14 of 2011.

[19.2] The applicant is hereby ordered to pay costs occasioned by the hearing of the matter on 08th August 2024 on an opposed scale.

Zono AJ
Acting Judge of the High Court

APPEARANCES:

For the Applicant : **Adv Mbiko**

Instructed by : **MANITSHANA ATTORNEYS INC**
27 Delville Road
Mthatha
Tel: 047 050 0988
Cell: 0731926718/0607676575
E-mail : manitshana9@gmail.com
(Ref: MR MANITSHANA/MARTIN
IRUNGU NJUGUNA)

For the Respondents : **Adv.Maliwa**

Instructed by : **STATE ATTORNEY**
Broadcast House
No 94 Sission Street
Fortgale
Mthatha
(Ref:835/24-A6S)