



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 261/2014

In the matter between:

ADRIAAN JACOBUS PIENAAR

APPLICANT

And

THE PROSECUTOR-GENERAL

1ST RESPONDENT

MINISTER OF SAFETY & SECURITY

2ND RESPONDENT

THE MAGISTRATE OF KEETMANSHOP

3RD RESPONDENT

THE HEAD OF PRISON HARDAP

4TH RESPONDENT

*Neutral citation: Pienaar v The Prosecutor-General (A261/2014) [2014]
NAHCMD 320 (29 October 2014)*

Coram: SMUTS, J

Heard: 21 October 2014

Delivered: 29 October 2014

Flynote: Urgent application for mandamus against a magistrate to strike his case from her roll because he was not requisitioned to attend court. He also sought other relief. The applicant failing to make out a case for a mandamus or

for the other relief sought. Application dismissed.

ORDER

That the application is dismissed with costs.

JUDGMENT

SMUTS, J

(a) The applicant brought an urgent application against the Prosecutor-General as first respondent, the Minister of Safety and Security as second respondent, the Magistrate of Keetmanshop as third respondent and the Head of the Hardap Prison, as fourth respondent on 30 September 2014. In the notice of motion, the applicant, in addition to seeking condonation for bring the application as one of urgency in paragraph 1, sought the following relief:

- '2. Seeking a mandamus to compel the Magistrate, Keetmanshop to strike case number KMH 1771/2013 from the court roll;
3. In the alternative to two, directing that the applicant in future need only appear in respect of that case via a warning or subpoena;
4. Ordering the Prosecutor-General and the Minister to charge police officers who are in contempt of a court order and for perjury by reason of what they stated to the court on 12 May 2014 and on 1 July 2014;
5. Directing the Ombudsman to report again as to why the Minister and Magistrate 'again make a mockery of justice by lying to court and to refuse to bring the applicant to court'

(b)

(c) When the matter was called on 30 September 2014, it was postponed to 15 October 2014 to enable the respondents to file answering affidavits. On 15 October 2014, the applicant pointed out that he was not able to file a replying affidavit for various reasons and the matter was then postponed to 21 October

2014 when it was heard.

(d)

(e) This application has arisen in the following way. The applicant is in custody in the Hardap Prison. He is awaiting trial on a number of charges in the Mariental Regional Court after a number of different charges in different districts were consolidated for the purpose of conducting a single trial in respect of those charges. The applicant however also awaits trial in the Keetmanshoop District Court for an alleged contravention of immigration legislation.

(f)

(g) The thrust of the applicant's complaints, forming the subject matter of this application, concern the fact that he had not been taken to court by police officers on different occasions when the immigration charge had been postponed in the Keetmanshoop Magistrate's Court. He ascribes the conduct of the police officers and the prosecution to malice and repeatedly alleges that they had lied to the court concerning his non-appearance.

(h)

(i) He first complains that he had not been brought to court in February 2014 when the matter had been remanded. He also complained that he had not been brought to court on 14 May 2014 when it was stated that the applicant might be busy with the bail application in Windhoek. He complained that he had not been taken to court on 21 May 2014 when the matter was called again or on the remand date of 12 June 2014. It was then postponed for the final remand on 1 July 2014. He complained that he was not brought to court on that date either. He claims that the documentation to requisition him for court appearances had not been properly attended to. He refers to some complaints which he brought to the attention of the Judge-President who had in turn requested the Ombudsman to file a report. He then referred to the court hearing on 19 September 2014 in Keetmanshoop where he complained to the presiding magistrate that he had not been brought to court previously and referred to two occasions when he had not been brought to court and accused those responsible for misleading the court. He further stated that if the police failed to bring him to court then the matter should be struck from the roll. He accordingly sought an order to that effect from the magistrate on 19 September 2014.

(j) The presiding magistrate responded that case law did not provide that matters should be struck from the roll due to a failure on the part of the police to bring accused persons to court. The applicant then responded that he would bring this urgent application as the matter should already have been struck from the roll and that his appearance on that date was according to him illegal and that he would seek the necessary and appropriate relief in this urgent application. The matter was then postponed to 30 October 2014 for the outcome of this application.

(k)

(l) The applicant's complaint is that the presiding magistrate should have read the case record and seeing that it was for a final remand, the matter should have been struck from the roll. He complained that the prosecutors had misled the court about the reason for his non-appearance in court. He complained that the prosecutors had perjured themselves and should be charged for that.

(m)

(n) In the answering affidavit, most of the allegations were put in issue. Certain preliminary points were also taken. It was pointed out that the applicant sought relief against the Ombudsman. Yet he had failed to cite the Ombudsman as a respondent. It was submitted that failure to have joined the Ombudsman was fatal to the proceedings against that functionary.

(o) The respondents also disputed that the matter should be heard as one of urgency. The point was taken that any urgency was self created by the applicant. A jurisdictional point was also taken. It was contended that this court could not interfere in proceedings before a magistrate courts as it was not sitting as a criminal court. This point was understandably not persisted with in the oral argument and is without substance.

(p) The material facts raised in support of the merits of the application were denied by the respondents. It was pointed out that the February postponement was in order to provide the applicant with the opportunity to apply for legal aid as well as for further investigation and that the applicant had been in court.

(q) In denying that the reason given by the applicant for his non appearance

14 May 2014 and 21 May 2014, the respondent pointed out that there were at the time protracted proceedings in a bail application brought by the applicant in the regional court. The transcript was attached in support of the denials raised concerning statements made as to the applicant's non appearance. The applicant's non appearance on 1 July 2014 was also explained with reference to a court appearance by the applicant in the High Court on 30 June 2014 which meant that it was not possible to transport him to Keetmanshoop for the next appearance on the next day.

(r) It follows that several of the applicant's extravagant statements concerning perjury and lying levelled at the prosecution and police are unsustainable. But apart from that, it soon becomes evident that the main relief sought, being a mandamus, would not be competent and that the applicant has not made out a case for relief of that nature directed against the Magistrate, Keetmanshoop.

(s) It is well settled that a mandamus is an order requiring an authority to comply with statutory duty imposed upon him or her or to perform some act which remedies a state of affairs brought about as a result of his or her own unlawful administrative action.¹ A mandamus is thus available to an applicant to compel the performance of a specific statutory duty and to remedy the effect of unlawful action already taken.² It is also trite that a mandamus will only be granted where the public authority is under a clear duty to perform the act ordered. Where a public authority has a discretion, the order would only then extend to directing that authority to comply with its duty of deciding the matter properly.³

(t)

(u) The applicant has failed to establish the requisites for a mandamus. He has not established a statutory duty on the part of the magistrate to strike the matter from the roll. There is simply no such duty upon a magistrate in those circumstances. At the very best for the applicant, a magistrate may have a duty

¹See Baxtor *Administrative Law* (1984) at p687.

²See Baxtor *supra* at p690.

³See Baxtor *supra* at p691.

to exercise his or her discretion in respect of the applicant's application to strike the matter from the roll. This the magistrate did.

(v)

(w) If the applicant is dissatisfied with the outcome of that application he would need to consider other remedies and not that of a mandamus. But quite apart from the legal difficulties the applicant faces in seeking a mandamus, it is clear to me that he has not established on the facts any entitlement to an order of that nature. Nor has the applicant established any entitlement to the alternative relief sought to a mandamus in paragraphs 3 of the notice of motion.

(x)

(y) Quite apart from the legal difficulty which the applicant encounters with paragraph four of the relief – seeking an order to compel the Prosecutor-General and the Minister to charge the police officers for contempt and perjury, it is also clear to me from the facts properly approached in motion proceedings that there is not only a dispute of fact⁴ on the question. On the contrary, it would appear that some of the allegations levelled by the applicant against the police officials and prosecutors concerning his non appearance in court, extravagantly made, are without substance.

(z)

(aa) As for the relief sought directing the Ombudsman to provide a further report, the point taken by Mr Dausab on behalf of the respondents, of non-joinder of the Ombudsman, is well taken. Certainly, if any relief was to be sought against the Ombudsman, he would at the very minimum need to be cited as a respondent and the application served upon him. That did not occur. There can thus be no question of even considering the relief contained in paragraph 5 of the notice of motion. There was also no attempt made to join the Ombudsman after the point was taken.

(bb)

(cc) Although it follows that the applicant is unsuccessful in this application, it is however appropriate to stress the importance of securing the applicant's presence in court on the part of those responsible for his incarceration. It is fundamental that an accused is entitled to be present at each of his hearings, except of course if that were to be impossible such as in circumstances where

⁴See *Plascon Evans Paints (Pty) Limited v Van Riebeeck* 1984 (3) SA 623 (A).

that accused is appearing in another court on a very same day or physically unable to be in court for any reason. If that were to occur, those reasons must be properly provided to the presiding magistrate so that an enquiry can be made, if the need be, in respect of them.

(dd)

(ee) But the applicant has not established in this application that the police or the prosecution were culpable in respect of his non-appearances.

(ff)

(gg) It accordingly follows that the application is to be dismissed with costs.

(hh)

D SMUTS

Judge

APPEARANCES

APPLICANT: A. Pienaar the applicant in person

1ST AND 4TH RESPONDENTS: Dausab
Instructed by Government Attorney