IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.:1485/2018
Date Heard: 27 June 2019
Date Delivered: 16 July 2019

In the matter between:

BRENDA WARDLE Applicant

and

MINISTER OF JUSTICE First Respondent

DIRECTOR GENERAL: DEPARTMENT OF JUSTICE Second Respondent

JUDGMENT

EKSTEEN J:

[1] The applicant seeks to review and set aside the decision of the Magistrate for Gelvandale, Port Elizabeth, in which he finally declared the bail money of one Elvera Smith (hereinafter referred to as "Smith") in the sum of R2 000 forfeited to the State in terms of section 67(2)(a) of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as "the CPA"). She further seeks an order pursuant to the provisions of section 70 of

the CPA that the amount of R2 000 be refunded to the depositor thereof, one Bulelwa Funani.

[2] The applicant, a law graduate, acted in person from the inception of the matter. The papers drawn by her, sadly, are not a model of clarity and to the extent that it can reasonably be done, I shall make allowance therefore in seeking to summarise the facts which emerge from the papers. I pause to record that at some juncture an application to join the Chief Magistrate of Gelvandale, the Public Prosecutor of the Gelvandale Court and the Court Manager of that court as third, fourth and fifth respondents, respectively, was prepared and filed. The application was, however, not proceeded with and there is no indication that it was ever delivered either to the present respondents or the parties who were intended to be joined. I shall accordingly not address this matter further. Suffice it to record that the magistrate who made the decision which is sought to be reviewed is not a party to the proceedings nor is there any indication in the file that he has received notice of the application.

[3] I turn to the facts as they emerge from the papers. The applicant was at all material times a remand detainee at the Correctional Facility in North End, Port Elizabeth. Smith was also detained there at the time and they shared a cell with others. On 7 August 2017 Smith became embroiled in an altercation with detainees in the adjoining cell. Her pleas for assistance to a prison warder did not elicit sympathy, on the contrary, the warder expressed her intention to open the cells so that the adversaries could confront one another.

[4] The applicant states that she was compelled to intervene as she knew both Smith and the detainee in the adjoining cell. Her attempts to mediate were unsuccessful. She then ascertained from Smith that she had been granted bail in the amount of R2 000, which, it would appear, she was unable to pay. The cell in which the applicant and Smith were detained remained locked and the applicant accordingly sent a fellow detainee, one Feti, who appears to have been in the passages at the time, to phone her "personal assistant" in order to request him to send R2 000. She advised Smith that she would pay her bail and requested her to observe her bail conditions.

[5] The money was not forthcoming on 7 August and the applicant again contacted her "personal assistant" the following day. She confirmed her instructions to him. In consequence thereof the said Bulelwa Funani, allegedly a cousin of the applicant, came to the facility and paid the bail. Smith was released. During December 2017 Smith was back in the Correctional Facility and had been sentenced. The applicant learnt that Funani had been advised at the Magistrates' Court in Gelvandale that Smith had breached her bail conditions and that the bail money had finally been forfeited to the State, an allegation which Smith denied. The applicant accordingly corresponded with the clerk of the court who confirmed that the bail had indeed been finally forfeited. In these circumstances the applicant sent a request in terms of section 70 of the CPA that the money be remitted. This too did not have the desired result and the court manager advised that although the magistrate concerned was no longer stationed at Gelvandale,

it had been ascertained that the bail had been correctly forfeited. Against this background the applicant launched the present application.

[6] The applicant's allegation that she paid the bail money is in dispute. She annexed to her founding affidavit a copy of the bail receipt in the name of "Bulelwa Funani" and alleges that the original was mislaid. She also annexed correspondence which she had with the clerk of the court in which she stated that she had given the R2 000 to Funani. This statement was not confirmed on oath.

[7] When the State filed a notice of intention to oppose the applicant proceeded to deliver a supplementary affidavit. She records therein that she had asked Smith to write a short statement "to the effect that (she) had given (her) cousin R2 000 to pay her bail". Smith did indeed pen a single sentence which she signed, albeit not under oath, and which the applicant annexed to her supplementary affidavit in support of the application. The statement by Smith, however, does not provide any corroboration for her averment. Smith, in response to the specific request set out earlier, recorded only that the applicant's cousin, Bulelwa Funani, paid her bail. She made no allegation in respect of the source of the funds. Further, annexed to the supplementary affidavit is a copy of what purports to be the applicant's bank statement with Bidvest Bank. It shows various withdrawals from the account from time to time, but none which corresponds either to the amount or the date of the alleged request to the applicant's "personal assistant". The "personal assistant" is never identified on the papers, however, an affidavit by one Mahlangu is annexed to the supplementary affidavit which confirms the correctness of

the applicant's founding affidavit where it refers to him. During argument the applicant stated that he is in fact the alleged "personal assistant". This confirmation, however, does not advance the debate as to the source of the money.

[8] In the answering affidavit the State specifically challenged the applicant's *locus standi* on the grounds that she had not established that she in fact provided the money. This prompted the applicant in reply to annex a "confirmatory affidavit" attested to by Bulelwa Funani on the 1st August 2018, prior to the delivery of the application. No explanation was forthcoming for withholding this affidavit when the founding papers were delivered. Funani's affidavit offers no support for applicant's contention. Funani states only:

> "I paid R2 000 for Alvera Smith at Gelvandale Court last year (2017). I do not remember the exact date".

If anything I consider that this affidavit, as read with the unsworn statement attributed to Ms Smith, militates against the applicant's assertion.

[9] I turn to consider the merit of the application. In my view the application has no merit and must fail on numerous grounds. First, for the reasons set out earlier, the applicant has failed to make out a case that she in fact provided the R2 000 paid as bail for Smith. Her bank statement does not take the matter any further. When confronted with this difficulty in argument the applicant sought refuge in section 38(a) of the Constitution. The relevant portion of the section provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-
>
> *(a)* anyone acting in their own interest;
> *(b)* …"

[10] Applicant argues that she asserts that her right to property in terms of section 25 of the Constitution has been infringed and that she therefore has *locus standi* to act in her own interest in recovering same. The argument is misdirected in my view. The difficulty is, as set out earlier, that she has not established that she provided the money. No other property is in dispute. I think that the application falls to be dismissed on this ground alone.

[11] Secondly, the relief which she sought before us was that the bail money in the amount of R2 000 be refunded to Bulelwa Funani. She holds no mandate to act on behalf of Funani and Funani is not party to the proceedings. The only affidavit by Funani is quoted earlier and provides no support for the applicant.

[12] Third, the applicant seeks to review and set aside the decision of Magistrate Huisamen. In argument before us she contended that the review is brought in terms of Rule 53 of the Uniform Rules of Court. Rule 53(1) of the Uniform Rules of Court provides:

> "(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected —
>
> *(a)* calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and
>
> *(b)* calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so."

[13] This procedure has not been followed nor has Magistrate Huisamen or the Chief Magistrate of Gelvandale been joined as a party to the proceedings. Magistrate Huisamen has not been afforded the opportunity to provide such reasons as he is by law required or as he desires to give. The proceedings can therefore not be entertained in terms of section 53.

[14] Fourth, the relief which the applicant sought before us was:

(i) That the court review and set aside the decision on 20 November 2017 declaring the bail amount of R2 000 finally forfeited to the State.

(ii) That the review court, acting pursuant to the provisions of s70 of the Criminal Procedure Act, 51 of 1977, orders that the R2 000 bail amount be refunded to the

depositor, Ms Bulelwa Funani within two weeks of the court order, in cash, and on proof of positive identification and a copy of the bail receipt as the original has been misplaced and, that such amount to be paid out from the Port Elizabeth Magistrates' Court.

[15] That brings me to section 70 of the CPA. Section 70 provides:

> "The Minister or any officer acting under his or her authority or the court concerned may remit the whole or any part of the bail money forfeited under section 66 of 67."

[16] The application to remit bail money must therefore be made to the Minister, an officer acting under his authority or the "court concerned", that is to say the Magistrates' Court for Gelvandale. In **S v Nkogatse** 2002 (2) SACR 369 (T) at 373g-374a Webster J gave consideration to the nature of the provision. He stated:

> "The provisions of s 70 are not and cannot be construed as being intended to or capable of being interpreted as requiring a court to review its own decision to declare as finally forfeited bail money in consequence of the violation of bail conditions. In my view, and without in any way prescribing or in any way limiting the relevant criteria, the process must determine whether, taking all the facts into account, including the reason, nature and the extent and duration of the recalcitrance of the accused, the actions taken by the depositor to bring to an end such recalcitrant conduct by the accused, the source of the bail funds, it would be fair and just to remit part or the whole of the bail money estreated. The fact that '(t)he Minister or any officer acting under his or her authority . . .' may exercise an 'administrative discretion' is an indication of the perspective from which such application should be considered. The exercise can never be a rehearing of the estreatment proceedings or a review thereof. In my mind this is fairly obvious, for neither the Minister nor any 'officer acting under his or her authority' may review

> an order of a magistrate. The process set out in s 70 cannot, to my mind, be either *res judicata* or in any way be regarded as review proceedings."

[17] I agree with this reasoning. What emerges from this passage, it seems to me, is that the applicant has misconstrued her remedy. What is required is to make an application to one of the authorised authorities, as set out in section 70, for him or it to exercise an administrative discretion. In the event that the applicant is dissatisfied with the exercise of this discretion it may be subjected to review under the Promotion of Administrative Justice Act, 3 of 2000, just like any other administrative act. Section 70 of the CPA does not, however, authorize the review of the proceedings conducted under section 67(2)(a) of the CPA.

[18] In the present matter the applicant did make a request to the clerk of the court that the bail money be remitted. It is unclear from the papers whether a decision was taken by an authorised officer before her request was denied. If it was, it is that decision which should be subjected to review. If no decision was made an application should first be made to that authority. The present proceedings, however, are not directed at reviewing such administrative discretion.

[19] Fourth, even if I err in the aforegoing, by the time the application was argued the applicant had indeed acquired a copy of the transcript of the proceedings before Magistrate Huisamen. Reliant on the transcript she sought to withdraw her earlier positive statement that the bail money was correctly forfeited. It was argued on the strength of **S v Bkenlele** 1983 (1) SA 515 (O) that where a reverse onus is placed on

an accused, as is the case in section 67(2) of the CPA, an accused must first be warned of the onus and the effect thereof explained to him. This, it was argued, did not occur when Smith's bail was forfeited. Applicant accordingly argued that the ruling, should on this ground, be set aside.

[20] There are, to my mind, at least two difficulties with this argument. Firstly, it is clearly correct that such a warning and explanation is essential when an unrepresented accused comes before court. The position is different, I think, where an accused is legally represented, as Smith was. It might rightly be expected of a qualified legal representative to be acquainted with the law when accepting an instruction for reward from a member of the public to represent him/her in court proceedings.

[21] The second difficulty arises from the transcript itself and the failure to cite Magistrate Huisamen in the proceedings. The transcript commences:

> "COURT: Your witness Madam.
> ALVERA SMITH: (d.s.s)
> DEFENCE: Now Madam on the 15th of November you were meant to attend court …"

[22] This does not appear to me to be the start of the proceedings. The matter would in all probability have be called prior to the recording commencing and the defence attorney would ordinarily also have announced her appearance. Prima facie, therefore, the transcript does not reflect all that occurred. Magistrate Huisamen may well have been able to cast light on the events which preceded the commencement

of the transcript presented had he been joined in the proceedings. In all the circumstances I do not think that there is merit in this argument.

[23] For the reasons set out above the application falls to be dismissed.

[24] In the result, the application is dismissed with costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT

GOOSEN J:

I concur.

G G GOOSEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Ms Wardle, in person.

For Respondents: Adv Nobatana, instructed by the State Attorney, Port Elizabeth