



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
REASONS**

In the matter between:

WENDELINUS LOMBOLENI	Case no: CA 12/2015 APPELLANT
TIMOTHEUS KRISTIAN LUNGISHA	Case no: CA 15/2014 APPELLANT
SHUUDIFONYA SHOWANYA NGHIKONGWA	Case no: CA 51/2014 APPELLANT
SHAETONGHOKO JOSUA	Case no: CA 37/2014 APPELLANT
RUVAO PAULUS MUPIA	Case no: CA 40/2014 APPELLANT
PETER SHILONGO	Case no: CA 26/2014 1ST APPELLANT
MICHAEL SHILONGO	2ND APPELLANT
LINUS JOHANNES TJAPA	Case no: CA 01/2014 APPELLANT
ABSALOM JOSEF	Case no: CA 13/2015 APPELLANT
	Case no: CA 121/2010

JOHANNES NGHISHEKWA JUSTUS

APPELLANT

Case no: CA 28/2010

KOMORANA KAVARI

APPELLANT

Case no: CA 20/2013

HERMAN KAMUJANE

APPELLANT

AND

THE STATE

1st RESPONDENT

THE MINISTRY OF SAFETY AND SECURITY

2ND RESPONDENT

THE COMMISSIONER GENERAL OF PRISONS

3RD RESPONDENT

Neutral citation: *Liboleni v The State* (CA 12-2015) NAHCNLD 43 (02 September 2015)

Coram: DAMASEB, JP

Heard on : 25 August 2015

Delivered: 25 August 2015

Reasons: 02 September 2015

REASONS

DAMASEB JP:

[1] A great number of appeals are pending at the Northern Local Division (NLD). Based on data provided to me by the Court's administration they are in excess of 80 appeals which, for one or other reason, remain pending. I personally verified from the court files that in some of these matters the convicted persons were released while awaiting hearing dates for their appeals. That is a very sad commentary on our justice system.

[2] The delay in finalisation of the appeals is attributable to one or other of the following reasons:

- a) the failure by presiding officers in the magistrate courts to reconstruct records even after court orders were made by the High Court directing them to do so;
- b) the failure by the Directorate of Legal Aid to process applications for legal aid;
- c) the failure by the Prison Authorities to produce the convicted persons to prosecute their appeals;
- d) failure by legal practitioners appointed by the Directorate of Legal Aid to appear at court to assist the prisoners in the prosecution of their appeals.

[3] In compliance with my duty as Judge-President to ensure expeditious dispatch of the business of the High Court, I directed the Registrar of the High Court to set down all pending NLD appeals before me for the purpose of their being managed so that the prisoners have their proverbial day in court. The first batch of such appeals (46) were therefore set down for case management on 24 and 25 August 2015.

[4] In alignment with the reasons I previously set out for the appeals not seeing the light of day, I further directed the Registrar to serve notices on the following office bearers and institutions in connection with the set downs:

- a) Directorate of Legal Aid
- b) The Ombudsman
- c) The Chief: Lower Courts
- d) The Director: Court Services
- e) The officers in charge of the 13 prisons.

[5] To ensure that no effort is spared in bringing the prisoners before Court, the following requests were made to the heads of all known prisons¹:

¹ Windhoek Prison; Omaruru Prison; Hardap Prison; Keetmanshoop Prison; Luderitz Prison; Grootfontein Prison; Swakopmund Prison; Walvisbay Prison; Oluno Rehabilitation Centre; Elizabeth Nobemba Juvenile Centre; Divundu Rehabilitation Centre; Farm Scott Prison and Gobabis Prison.

'Whereabouts of inmates in your respective prisons

The above matter refers.

We are requesting your usual assistance in providing us with information to the whereabouts of the following inmates as to whether they are in your respective prisons.

You are also required to provide our office in writing if the appellant has been released, by indicating the month and year of that particular person'.

A list of 85 appellants was then provided to the heads of prisons.

[6] When the appeals were called before me on 24 and 25 August 2015, the Assistant Registrar of the NLD confirmed into the record that she had caused the Deputy Sherriff to serve the notices on all the prisons. It is the conduct of some of the prison officials that has caused the Court grave concern.

[7] Those errant officials had, according to the Deputy Sherriff's return of service, given explanations which the Court finds unacceptable and not in keeping with the ethos of the Constitution as I will presently demonstrate. I prefer to quote verbatim one typical return of non- service by the Deputy Sheriff:

'NONE-SERVICE

According to SCCO NAKATANA, AT OLUNO REHABILITATION CENTRE, this appellant is not held at this institution. The appellant might be in another prison, but she cannot say which one.

I return this case to you.'

[8] As I pointed out to counsel for the State during the hearings, these responses are unacceptable. How can all 13 prisons be unable to account for the whereabouts of a prisoner received into the custody of Correctional Service? In terms of the Correctional Service Act ², the Commissioner General of Prisons has the following responsibilities:

² Act 9 of 2012.

'3. Functions of Correctional Service

The functions of the Correctional Service are-

- (a) to ensure that every inmate is secured in safe and humane custody, within a correctional facility, until lawfully discharged or removed therefrom;
- (b) . . . ;
- (c) . . . ;
- (d) . . . ;
- (e) to perform all work necessary for, arising from, or incidental to, the effective management, administration and control of correctional facilities and community correctional centres; and
- (f) . . . '

[9] The Minister of Safety and Correctional Service has the political oversight responsibility over the Correctional Service in terms of the Correctional Service Act.

[10] A person who is sentenced to a term of imprisonment is lawfully detained and has no right to freedom, unless such term of imprisonment is set aside by a competent court. He or she, however, enjoys the right under our law to challenge any conviction and or sentence as prescribed by law. That right is inviolable. He or she is entitled to appear before a competent court to ventilate that right according to the prescripts of the law.³ No official or person, however powerful, has the power to frustrate that right. If they do they act in violation of the law and the Constitution and must be made to account for their actions and conduct. Where there is a right clearly identifiable and which has been breached, it is the Court's duty to fashion a remedy to ventilate that right.

[11] Although the facts of the present case are not of the kind which ordinarily justify the habeas corpus mandamus for the production of a body to justify the lawfulness of a detention,⁴ it has always been recognised in Anglo-saxan jurisprudence, that the superior court of unlimited original jurisdiction enjoys the power to demand the production of a person before it to enquire into the unlawful restrains on a person

³ Section 309, s 311 and s 315 of the Criminal Procedure Act, 51 of 1977.

⁴ Habeas Corpus is part of Namibian law. See *Wood v Ondangwa Tribal Authority* 1975 (2) SA 294(A); Isaacs I. 1982. *Becks Theory and Principles of pleading in Civil Actions*. Durban: Butterworths, note 111.

liberty or the circumstances relating to his or her detention.⁵ The writ is a judicial mandate to a prison official ordering that an inmate be brought to the court so that it can be determined whether or not that person is imprisoned lawfully and whether or not he/she should be released from custody.⁶

[12] There is nothing in logic or principle why the habeas corpus mandamus should not be extended to circumstances where the conduct of officialdom has the effect of frustrating a prisoner in his or her right to come before court to prosecute an appeal an appeal pending before the High Court. The High Court as upper guardian⁷ of the rights of all subjects may issue such mandamus *mero motu* if it is satisfied that there is no reasonable explanation by the authorities for the failure to bring to court a prisoner who is in detention in terms of the Correctional Service Act.

[13] The failure of the prison authorities to produce in Court persons who are in their custody, and who thereby are being denied their rights of appeal as allowed by law, is conduct to which this Court cannot turn a blind eye. As has famously been said by Thomas Jefferson, ‘the price we pay for liberty is external vigilance.’ I am satisfied that the writ is also available for purposes of requiring the authorities to bring a person before court to enable the ventilation of a right allowed to him/her by law. I am heartened that counsel for the State, who were equally flabbergasted by the responses of the prison authorities to which I have made reference, were in agreement that this Court must censure that conduct and require the responsible government officials to ensure that the prisoners are produced in court for the purpose of their appeals.

[14] Given that there appears on the face of it to be systemic failure which accounts for the individual prisons being unable to know where a prisoner is being held at any given time, the appropriate course is to direct the Minister responsible, and the Commissioner General of Prisons, to see to it that the Court’s orders are complied with. In terms of Article 91(d) of the Constitution, the Ombudsman is enjoined to protect and defend the constitutional rights of the subject. Similarly, the Attorney General has the duty under Article 87(c) of the Constitution to ensure compliance with

⁵ Wilkes, Donald E.Jr., ‘*The writ of Habeas Corpus in Georgia*’ (2007). Popular Media. Paper 63. Available online: http://digitalcommons.law.uga.edu/fac_pm/63. See e.g. the State of Georgia case of John v Smith, 280 Ga 235,626 S.E 2d 470 (2006).

⁶ Ibid, endnote 1.

⁷ Article 25 of the Namibian Constitution.

the laws of the land. I have therefore decided that these two constitutional officers must be served with the court's order in light of the interest they have.

[15] It was for the above reasons that on 24 and 25 August, I made the following orders in the above cited matters:

'Second and Third Respondents are directed:

- (i) To produce the following prisoners before court on 09 October 2015 at 10h00:
 - a) Wendelinus Lomboleni;
 - b) Timotheus Kristian Lungisha;
 - c) Shuudifonya Showanya Nghikongwa;
 - d) Shaetonghoko Josua;
 - e) Ruvao Paulus Mupia;
 - f) Peter Shilongo;
 - g) Michael Shilongo;
 - h) Linus Johannes Tjapa;
 - i) Absalom Josef;
 - j) Johannes Nghishekwa Justus;
 - k) Komorana Kavari;
 - l) Herman Kamujane.

For the purpose of enabling the named prisoners to prosecute their appeals in the High Court of Namibia according to law.

- (ii) To ensure that the named prisoners remain in attendance at Court until a judge of the High Court inquiries into the prisoners circumstances and gives further directions as to the prosecution of any appeal relating to them and pending before the High Court.
- (iii) The Registrar of the High Court is directed to cause the Deputy Sherriff (Main Division) to have this order served on the second and third respondent, including the Ombudsman and the Attorney General.

PT Damaseb
Judge President

TO:

Office of the Prosecutor-General

Office of the Ombudsman

Attorney General

Director of Legal Aid

Chief: Lower Courts

Head of all 13 Prisons:

- Windhoek Prison;
- Omaruru Prison;
- Hardap Prison;
- Keetmanshoop Prison;
- Luderitz Prison;
- Grootfontein Prison;
- Swakopmund Prison;
- Walvisbay Prison;
- Oluno Rehabilitation Centre;
- Elizabeth Nobemba Juvenile Centre;
- Divundu Rehabilitation Centre;
- Farm Scott Prison
- Gobabis Prison.