

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 45/04

WILLY AARON SIBIYA First Applicant

PURPOSE KHUMALO Second Applicant

JACOBUS PETRUS GELDENHUYS Third Applicant

DAVID NKUNA Fourth Applicant

versus

DIRECTOR OF PUBLIC PROSECUTIONS:
JOHANNESBURG HIGH COURT First Respondent

MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT Second Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH
AFRICA Third Respondent

MINISTER OF CORRECTIONAL SERVICES Fourth Respondent

Supervision by Court commenced on : 25 May 2005

Supervision completed on : 28 July 2006

Final Judgment on supervision delivered on : 30 November 2006

JUDGMENT

YACOOB J:

[1] On 28 July 2006 this Court completed its supervision of the first mandamus and supervisory order issued by it. Pursuant to this order this Court supervised the process by which sentences of death imposed before this penalty was declared inconsistent with the provisions of the interim Constitution in *Makwanyane*¹ were substituted by other lawful sentences. It is appropriate to give some account of and make some comment on the process of supervision that has lasted for more than a year.

The supervisory order: background

[2] This Court in *Makwanyane*, in addition to declaring the death sentence unconstitutional, ordered that all people who had been sentenced to death were to remain in custody under their sentences until these sentences had been set aside “in accordance with law and substituted by lawful punishments.”² Two years after the decision in *Makwanyane* had been given, Parliament passed a law prescribing the procedure for the replacement of any death sentence with an appropriate alternative sentence.³ Some eight years later part of that legislation⁴ was declared inconsistent with the Constitution by the Witwatersrand High Court.⁵ The order of constitutional invalidity was referred to this Court for confirmation.⁶ On 25 May 2005, this Court in

¹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

² Id at para 2(b) of the order.

³ Section 1 of the Criminal Law Amendment Act 105 of 1997.

⁴ Id at subsections (1) to (5).

⁵ In *Sibiya and Others v Director of Public Prosecutions and Others* [2005] 1 All SA 105 (W).

⁶ In terms of section 172(2)(a) of the Constitution.

*Sibiya I*⁷ declined to confirm the order of invalidity on the basis that the procedure prescribed was not inconsistent with the Constitution.

[3] In considering the application for confirmation, it became clear that the sentences of 62 people who had been sentenced to death before the judgment in the *Makwanyane* matter was handed down, had still not been substituted by lawful sentences.⁸ The Court expressed dismay at this delay and concluded that a supervisory order to monitor the process of the substitution of these sentences was appropriate in the circumstances. The concern of this Court and the basis upon which a mandamus and supervisory order were granted is reflected in the following passage from the judgment:

“The process of the substitution of sentences generally is not satisfactory. At the time of the decision in *Makwanyane* it was estimated that between 300 and 400 people were on death row in our country. By the time the papers were filed in the High Court the number of cases in which people who had been sentenced to death still required attention was estimated at 134. When the case was argued before us we were informed by counsel for three of the respondents that there were 62 people whose sentences had not yet been substituted. We were also told that every effort was being made to ensure that all outstanding cases would be appropriately dealt with before the end of June.

The process of the substitution of sentences has taken far too long. It is important that all outstanding death sentences be set aside and substituted as soon as it is possible.

⁷ *Sibiya and Others v Director of Public Prosecutions, Johannesburg, and Others* 2005 (5) SA 315 (CC); 2005 (8) BCLR 812 (CC).

⁸ See above n 3.

Counsel for the second, third and fourth respondents was inclined to concede that the substitution process should be completed quickly. I accept his statement to the effect that the relevant authorities envisage that the process of the substitution of sentences will be completed by the end of June. However, the process has taken so long that it will be inadvisable for this Court to assume that the death sentences will be substituted as envisaged.

This Court has the jurisdiction to issue a *mandamus* in appropriate circumstances and to exercise supervisory jurisdiction over the process of the execution of its order. It is appropriate in this case for this to be done. The question of a supervisory order was raised with counsel at the hearing of the case. None raised any objection to a supervisory order.”⁹ (footnotes omitted).

The mandamus and supervisory order

[4] The mandamus and supervisory order made by this Court reads:

- “... (2) The respondents are directed to take all the steps that are necessary to ensure that all sentences of death imposed before 5 June 1995 are set aside and replaced by an appropriate alternative sentence in terms of section 1 of the Act as soon as possible.
- (3) The respondents are required to report to this Court concerning all the steps taken to comply with paragraph (2) of this order by not later than 15 August 2005.
- (4) The report must include the following information:
- (a) the name of every person who was being detained under a sentence of death as at 5 June 1995;
 - (b) the name of every person in respect of whom the death sentence has been set aside and replaced by an appropriate alternative sentence, particulars as to whether the alternative sentence was determined and imposed in terms of ss (1) to (5) or ss (7) to (10) of s 1 of the Act, particulars of the judge who advised the President, or the Court of Appeal that imposed the new sentence as the case may be, the date on which the new sentence was imposed and particulars of the sentence; and

⁹ Above n 7 at paras 59-62.

- (c) the names of all people who are still being detained pursuant to the sentences of death imposed upon them together with particulars as to the date on which the sentence of death was imposed, the case number and the Court that imposed the death sentence, whether a record of the proceedings before that Court is available, all the steps that have been taken to ensure the setting aside of the death sentence and the imposition of a new sentence in each case.
- (5) The respondents are directed to ensure that an appropriate affidavit or affidavits are filed with the Registrar of this Court not later than 15 August 2005:
 - (a) setting out in full the reasons why each death sentence has not yet been set aside, the steps that will be taken to ensure that the death sentence will be set aside and replaced by an appropriate alternative sentence; and
 - (b) motivating fully any order that might be required of this Court to facilitate the setting aside of the death sentence concerned and replacing it with an appropriate alternative punishment.
- (6) This Court will issue further directions in relation to supervision of the execution of paragraph (2) of this order as circumstances may require.”¹⁰

[5] Paragraph 2 of the order contains what is generally referred to as a mandamus. It compels the respondents to do certain things. This Court deemed it appropriate in this case to go beyond a declaration and to issue a mandamus aimed at ensuring the completion of the process of substitution of sentences. The essential reason for this was that the death sentences had not been substituted as required by this Court’s order in *Makwanyane*. The mandamus was therefore principally aimed at ensuring compliance with the order of this Court in *Makwanyane*.

[6] The Court felt that given the delay that had occurred since its order in *Makwanyane* coupled with the pressing need for the sentences to be replaced, it was

¹⁰ Id at para 64.

an appropriate case for a supervisory order to be made in addition to the mandamus. The relevant respondents were ordered to take “all the necessary steps” with each step not being described in specific terms. The result is that the debate as to whether the respondents did everything in their power that was necessary would be both pertinent and likely in any enforcement proceedings. There is no date by which the death sentences must be replaced. The words “as soon as possible” carry a certain lack of specificity which brings enforcement complications.

[7] Paragraphs 3 and 4 are part of the order. They may be referred to as the prerequisites that must be satisfied before effective supervision is possible. It will have been seen that paragraphs 4(a) and (b) require considerable detailed information to be furnished in relation to each person that had been sentenced to death and in relation to people whose death sentences had already been set aside. This became necessary because this Court’s order was made at a time when substitution was already in progress. It would have been impossible for this Court to provide effective supervision until it knew exactly how far the process had already moved forward. The detail was also essential so that this Court would not have to rely completely on the say-so of some other person that a particular stage in the process had been reached; there had to be sufficient information for the Court itself to be satisfied that a particular stage had been reached. The detail was necessary in order to ensure that this Court did not engage in the process of supervision on an incorrect footing. It will be seen later that the detail provided was subjected to careful examination.

[8] Paragraph 4(c) of the supervisory order is an effort to secure information in relation to all people whose death sentences had not yet been replaced by other punishment. The Court attempted to discover in relation to each person how far the process of substitution had progressed, what still needed to be done and most importantly perhaps, the obstacles that stood in the way of substitution. A proper understanding of the obstacles was essential to appropriate supervision. The sworn material required by paragraph 5 of the order was aimed principally at placing this Court in a position to be of assistance in the process of ensuring the most speedy substitution of sentences. This Court might have been able to make an order at the specific request by the respondent designed to assist in the completion of the process in the light of the information received. Finally the order in paragraph 6 was necessary to ensure continuous supervision until completion.

The application for an extension of time

[9] The second and third respondents found themselves unable to furnish the required information by 15 August 2005 and made an application to this Court requesting a one month extension of time to enable them to furnish the information. After hearing oral argument this Court in *Sibiya 2*¹¹ concluded that it was in the interests of justice to grant the application for a number of reasons.¹² Perhaps the most powerful reason advanced was that it would be impossible for the Court to perform its supervisory function unless the information had been furnished. The refusal to grant the extension of time would not prejudice anyone except those likely

¹¹ *Sibiya and Others v DPP, Johannesburg High Court and Others* 2006 (2) BCLR 293 (CC).

¹² *Id* at paras 11-13.

to benefit from the Court's supervision and from the speedy substitution of sentences; conversely the grant of an extension of time would be to the advantage of those people whose death sentences had not yet been set aside.

The first report and this Court's response

[10] The first report by the second and third respondents was filed on 15 September 2005. That report was carefully evaluated in *Sibiya 2*.¹³ Save for certain exceptions and concerns that are discussed later, this Court concluded that the details furnished together with the contents of the affidavit amounted to substantial compliance with the orders made in terms of paragraphs 3 and 4. It may also be mentioned that the second and third respondents sought no order from this Court that would facilitate the replacement of any sentence of capital punishment with an alternative punishment.¹⁴

[11] The report demonstrated that there were, as at 15 September 2005, 40 people who had been sentenced to death at a time when that sentence was still competent and whose sentences had not yet been replaced by other punishment. The process by which their sentences were to be substituted entailed two steps: the first was the recommendation by a judge after considering argument;¹⁵ the second and final step was the order made by the President substituting capital punishment with the sentence recommended by the judge concerned.¹⁶ According to the report, sentences of 40 people had not yet been substituted; the cases of 24 people had already been

¹³ Above n 12 at paras 16-21.

¹⁴ Paragraph 5(b) of the *Sibiya 1* order quoted in paragraph 4.

¹⁵ Above n 3 at section 1(3).

¹⁶ *Id* at section 1(4).

considered by a court and awaited finalisation by the office of the President; the cases of the other 16 people had not yet been considered by a court. Acceptable reasons were given for the fact that the sentences of 40 people had not yet been substituted. In the circumstances, it was ordered that the process of supervision should continue and that a further report should be filed by the respondents on or before 7 November 2005.

The report was unclear in relation to three people:

- (a) In the case of Mr B W Pule, although the report said that the death sentence had been set aside and substituted, no details were given.
- (b) While Mr D N Bezuidenhout was listed as a person who had been sentenced to death his name did not appear anywhere else in the report except that an annexure to the affidavit mentioned that the case concerning him was to be heard by a court.
- (c) There was some confusion in the documentation about whether Mr P L Kadiege had died or whether the death sentence imposed upon him had still to be substituted.

Clarity was therefore required in respect of these issues.

[12] In the result, on 7 October 2005 the Court made the following order after considering the first report.

“The second and third respondents are ordered to ensure that a report is filed in this Court on or before 7 November 2005:

- (a) on the progress made in the substitution process by 31 October 2005; and
- (b) complying with the terms of this Court’s order dated 25 May 2005 in relation to Mr D N Bezuidenhout, Mr P L Kadiege and Mr B W Pule.”

The second report and the consequent order

[13] The second report covered the period up to and including 31 October 2005 and showed that the number of people who had not yet had their sentences substituted had decreased from 40 to 28. The report also showed that only five of the outstanding cases had yet to be considered by a court and that the position of the remaining 23 people had been considered by a court and had still to be substituted by the President. Continued supervision was again indicated and ordered.

[14] In relation to the specific difficulties that had been raised in the order made pursuant to the first report, the second report informed us that:

- (a) particulars in relation to Mr Pule were still being sought from the National Archives;
- (b) the sentence of Mr Bezuidenhout had been substituted; and
- (c) Mr Kadiege was deceased and the documents had erroneously mentioned that his sentence had still to be substituted.

[15] Accordingly, on 30 November 2005 the following order was made:

- “(1) The second and third respondents are ordered to file in this Court on or before 15 February 2006 a further progress report in respect of the substitution of sentences of death that had been imposed before the death penalty was declared to be inconsistent with the Constitution with other appropriate punishment.
- (2) If the further report contemplated in paragraph 1 of this Order is to the effect that the process of substitution has not yet been completed, the second and third respondents are ordered to file an affidavit:

- a. setting out fully the reasons why the death sentences that remain effective have not yet been substituted;
- b. indicating the time that is required to effect the remaining substitution accompanied by a proper motivation;
- c. making out an appropriate case justifying any additional orders that may be required from this Court to facilitate the substitution.”

The third report and consequent order

[16] The third report filed timeously on 15 February 2006 showed that there were now only nine people whose sentences had not yet been substituted. A judicial recommendation had been made in respect of eight people while the ninth person Mr Z Machaisa had not yet been considered by a court because a transcript had not been available. In the circumstances, supervision had to continue. The Court considered however that it was reasonable to expect the process to be completed by 15 May 2006.

[17] In relation to Mr Pule it was now established that he had passed away.

[18] Accordingly on 16 March 2006 this Court made the following order:

- “1. The second and third respondents are ordered to file in this Court on or before 15 May 2006 a final report in respect of the substitution of sentences of death that had been imposed before the death penalty was declared to be inconsistent with the Constitution with other appropriate punishment.
2. If it becomes impossible to file this report on time, the second and third respondents are required to make a fully motivated application for an extension of time on or before 7 May 2006.”

The end of the process

[19] The second and third respondents filed what they termed a final report on 15 May 2006 showing that the sentences of all the people who had been subjected to capital punishment had been substituted except the case of one person, Mr Zacharia Machaisa.

[20] This Court made the following order on 1 June 2006:

- “1. The second and third respondents are required to ensure that the process in relation to the replacement of the sentence of death imposed upon Mr Zacharia Machaisa by an appropriate alternative sentence and to report to this Court:
 - (a) as soon as the sentence has been appropriately substituted; or
 - (b) on 1 September 2006 if the sentence has not yet been substituted by that date.
2. If the sentence has not yet been substituted, the report must set out the reasons why this has not yet been done and recommend the steps that may be taken to expedite substitution.”

[21] On 28 July this year, the second and third respondents reported that the sentence of Mr Machaisa had been substituted.

Conclusion

[22] Each report that was submitted was considered by a conference of judges of the Court. The order to be issued was determined by the conference. This judgment on

the supervisory process in relation to the substitution of the death sentence shows the following:

- (a) Successful supervision requires that detailed information be placed at the disposal of a court.
- (b) Supervision entails a careful analysis and evaluation of the details provided.
- (c) Supervision cannot succeed without the full co-operation of others in the process.
- (d) Courts should exercise flexibility in the supervisory process.

[23] Once the supervisory order had been made, all the members in the offices of the second and third respondents, the office of the Director of Public Prosecutions and all the courts involved made a contribution towards ensuring that the vexed issue of the substitution of sentences of death by alternative appropriate sentences was brought to an end. This Court is indebted to all who were part of the process for their contribution. We appreciate in particular the fact that the orders made in *Makwanyane* have at last been fulfilled and that the unconstitutionality of the death penalty can now be said to have been realised in practice.

Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, O'Regan J, Sachs J, Nkabinde J and Van der Westhuizen J concur in the judgment of Yacoob J.

For the applicant:

F Snyckers

For second and third respondents:

V Soni SC and T Machaba instructed by the
State Attorney, Johannesburg