

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

CASE NOS: CA40/2003; CA207/2003

DATE DELIVERED: 19/2/04

In the matter between:

THE STATE

and

MFEZEKO ZUBA AND 23 SIMILAR CASES

JUDGMENT

PLASKET J:

[A] INTRODUCTION

[1] In October 2003, we delivered a judgment in this matter in which, inter alia, we recorded an agreement between the parties to the effect that the Departments of Education and of Social Development in the Eastern Cape Provincial Government would file reports on their efforts in establishing a reform school in the Eastern Cape and related issues.¹

[2] The issue is an important one in this province. The legislature has, in s290 of the Criminal Procedure Act 51 of 1977, made provision for courts to refer youthful offenders to a reform school as a sentencing option less severe and less detrimental to the youthful offender than imprisonment. There are, however, no reform schools in the Eastern Cape. Youthful offenders who are referred to a reform school are sent to the Ethokomala Reform School in the province of Mpumalanga. This process is beset with a range of administrative difficulties that have resulted in sentences not being put into effect timeously or at all.

¹ *S v Zuba and 23 Similar Cases* ECD 2 October 2003 (case nos. CA 40/2003; CA 207/2003) unreported. (This judgment will be referred to below as *Zuba (1)*.)

[3] The effect of this is that the will of the legislature is in danger of being undermined: there are disturbing indications that referral to a reform school as a sentencing option may be widely regarded, because of the difficulties in its implementation, as a dead letter. In a system such as ours, which is premised on the separation of powers, it is not permissible for the executive branch of government (which includes the administration), either through act or through omission, to prevent the enactments of the legislative branch of government being put into operation and being implemented.² In addition, s7(2) of the Constitution places positive obligations on the State to 'protect, promote and fulfil the rights in the Bill of Rights' in addition to the negative obligation to respect fundamental rights.³ The failure to implement orders of courts that have sentenced youthful offenders to a reform school constitutes an infringement of certain of the youthful offender's fundamental rights⁴ and s237 of the Constitution requires that '[a]ll constitutional obligations must be performed diligently and without delay'.

[B] THE REPORTS

[4] Both Departments have duly filed reports as contemplated in the judgment in *Zuba (1)*. Mr Euljen, who appeared for the Legal Resources Centre who acted as amicus curiae on the request of the court, argued that the reports do not comply fully with the terms of the agreement in all respects. It is, however, apparent that while the reports may be criticised in certain respects, there has been substantial compliance with that judgment. To the extent that further action is required, the order that will be made will deal with those issues that require further reporting. A large measure of agreement was reached between the parties on what order should be made.

² *Ex Parte Minister of Safety and Security and others; In re: S v Walters and another* 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC), para 73; *August and another v Electoral Commission and others* 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC), paras 16 and 22.

³ *Jaffa v Schoeman and others; Van Rooyen v Stoltz and others* 2003 (10) BCLR 1149 (C), para 39.

⁴ *Zuba (1)*, para 21.

[5] The report of the Department of Social Development has been drafted by Mr Dalindyabo Moxegwana, the Director: Children, Youth and Family in the Department. He has reported that: (a) there were currently no juvenile offenders incarcerated in places of safety as at the date of his report; (b) as at 13 August 2003 (when the Department's previous report was written) three juvenile offenders required designation but they have now been designated to, and had been admitted to, the Ethokomala Reform School; (c) of two further juvenile offenders, Gordon Galant and Bongani Teya, Galant had been designated to the reform school and his admission was being processed and Teya's matter was also being dealt with; (d) admission to the reform school is 'now routine, once the designation has been made'; and (e) the number of juveniles who were sentenced to reform school in the province from 1999 to 2003 were 19, 14, five, six and seven, a total of 51 and an average of ten per year.⁵

[6] The report of the Department of Education was signed by Reverend Lulamile Mbete, the Superintendent-General of the Department. It confirms the report of the Department of Social Development in respect of Galant and Teya and provides interesting statistics of the number of convicted and awaiting trial juveniles in prisons in the province: there were, as at October 2003, 194 youths between the ages of 14 and 18 years serving sentences in prisons in the province, and there were 237 youths in the same age group who were awaiting trial in prisons in the province. (Of these only two convicted youths were girls and only one juvenile awaiting trial prisoner was a girl.)

[7] Reverend Mbete confirmed that the Ethokomala Reform School in Mpumalanga was the only reform school to which youthful offenders from the Eastern Cape could be sent but that plans were afoot to change this. The Department of Education in the national sphere of government was involved in a major initiative that involved the development of policy and the preparation of legislation in the form of a Childrens' Justice Bill and a Childrens' Bill. Reverend Mbete stated that 'the provision of reform schools is

⁵ These statistics would tend to bear out the view expressed above that presiding officers have increasingly begun to regard this sentencing option as a dead letter.

but one part of a massive overhaul of the criminal justice system as it interacts with children'.

[8] The report proceeds to outline the steps taken by Reverend Mbete's Department, in the provincial sphere of government, to realise essentially the same goals. First, and very importantly, he reported that 'the need for the provision of a reform school within the Province was first made policy of the Department in November 2002 by the then MEC, Mr Stone Sizani'. Flowing from this, a concept proposal was commissioned and duly accepted in principle as the way to analyse and deal with the problem. (This proposal proceeds from the premise that '[i]t is the constitutional right of all children to have relevant education adapted to their particular needs' and that '[c]hildren in conflict with the law as well as those who do not benefit from the services of existing facilities, have the right to be educated in a secure and learner-friendly environment where they can develop their full potential'.

[9] As a result of both the national and provincial initiatives, the provincial Department formulated concrete plans that included converting the JJ Serfontein School of Industry to enable it to accommodate girls, to establish a reform school in the province and, in order to do so, to convert a building in Grahamstown appropriately. More detailed planning was then set in motion and a task team was created. The task team subsequently reported that the building in Grahamstown was not suitable, that, in the medium term, the JJ Serfontein School could be developed into a reform school and, in the longer term, a reform school could be established at Mount Coke or Queenstown. A schedule was also proposed by the task team.

[10] The current state of affairs is captured by the concluding paragraphs of Reverend Mbete's report, which I quote:

'9.14 Arising from this report, the department has developed a detailed action plan for the development of the JJ Serfontein School. This program deals with the structural alterations required, the development of the staff complement and its training. ...

9.15 At present the department has decided to revoke its earlier decision relating to the admission of girls to JJ Serfontein. At this stage this appears to be a complication which is not warranted by the number of girls requiring such admission. The department is, however, aware of the problem and should the need arise, the decision can be revisited.

9.16 I comment on this plan as follows:

9.16.1 The plan has my general approval.

9.16.2 The plan is, however, ambitious in its time scale. The department has the required human resources to allot the various tasks. However, the implementation will require all to work efficiently at their respective tasks, and detailed coordination will be required at every step. The Special Needs Directorate of the department is extremely committed to the task and it is confident that the program can and will be implemented.

9.16.3 The department hopes to be able to receive the first learners into the new facility by April 2004. But, we provide ourselves a period of grace until July 2004, should there be delays in the implementation of the program.

9.17 As to the budgetary implications of the plan, I annex hereto ... a memorandum dated 7 October 2003. It is difficult to implement new policies within any given financial year. The memorandum deals with methods of obtaining the necessary funding by the diversion of funds from existing budgets. It appears to be possible. The need for the operation of the JJ Serfontein School in its developed capacity will be included in the next budget.

9.18 The long-term plans for the development of a separate reform school have had to be held back, while the immediate problem has been addressed. Once the JJ Serfontein School has been developed as envisaged, the department will turn its attention to its long-term goal of developing a separate reform school.'

[C] INDIVIDUAL JUVENILE OFFENDERS

[11] The cases of Galant and Teya have been mentioned above. It would appear from the reports that there is no need to make orders in respect of those cases.

[12] In *Zuba (1)* we ordered the release of Donovan Jacobs.⁶ He had been held for longer than two years and consequently his sentence had lapsed. It would appear that he was not released but was, instead, transferred to Ethokomala reform school. Ms Sarah Sephton of the Legal Resources Centre investigated how this had happened and a letter from her to the Registrar, dated 24 November 2003, she stated:

'I am advised by the probation officer that she had no knowledge of the order handed down by His Lordship, Judge Plasket on 2 October 2003 and that as far as she was aware the judgment had not been received by Stepping Stones despite the Legal Resources Centre mailing it to her. She further advised me that Jacobs was expected in Port Elizabeth during the course of this week as Ethokomala was closing for the Christmas Holidays and that in any event he had turned 18 and would not be returning to the school. I will again mail the judgment to Stepping Stones.'

In the light of this information, it is not necessary to make an order in respect of Jacobs.

[13] In *Zuba (1)* we ordered that 'the records of the proceedings in the cases of Ricardo Tiervlei, Siyanda Msizi, Klaas Loggerenberg, Lemiel Ruiters and Lenovan Titus, as well as those in any other matter that is identified in which juvenile offenders are sentenced to reform school, must be placed before this court for consideration on 24 November 2003'.⁷ None of the files were placed before us. Ms Sephton has investigated and has reported in her letter of 24 November 2003 that she will request the relevant Magistrate's Courts to send these records to the Legal Resources Centre. She will hand them to Mr Euijen

⁶ Para 47.4.

⁷ Para 47.5.

and Mr Henning 'who will then consider whether they need to be placed before the full bench'. This strikes me as a sensible approach to take for all of the cases except that of Siyanda Msizi: more information about him was placed before us in a letter written by the Director: Children, Youth and Family in the provincial Department of Social Development. This letter, which is dated 28 November 2003, stated that the department had encountered certain unspecified problems that had prevented it from transporting Msizi to Ethokomala reform school but that this would be done in January 2004 after the school re-opened after the Christmas vacation and after a pending case against him has been finalised. In the light of this information, there is no need to make an order in respect of Msizi.

[D] THE ORDER

[14] It is not necessary, in the light of the above, to make orders in respect of individuals. Adequate steps have been taken to safeguard the interests of those who have been mentioned specifically in these proceedings. In consequence of our decision in *Zuba (1)* on the interpretation of s304 of the Criminal Procedure Act, the automatic or special review of sentences in terms of s290 of the Act that have not been put into operation can be dealt with as the need arises.

[15] Mr Euijen stressed that it was still necessary for reports to be filed on the bigger issue of the establishment of a reform school in the province because, as he stated in his heads of argument, little of practical effect had been achieved since the assurance given in 1999 to Erasmus J in *S v Z en vier ander sake*⁸ that 'construction of a "jeuginrigting" would commence early in 2000' an assurance that 'has not come to pass' and because 'what action there has been has only become more focused and imperative since this Court handed down its order on 2 June 2003'.

⁸ 1999 (1) SACR 427 (E), 431d-e and 434b-d.

[16] I am in agreement with him as to the necessity for the further filing of reports from time to time, but it is also important to note the progress that has been made (whether as a result of the earlier proceedings or not) in addressing the needs of juvenile offenders in the province.

[17] The parties have agreed on the terms of an order, the only issue left for us to decide being the regularity of the reports.⁹ I make the following order as a result:

(a) The Director: Special Needs in Education in the Department of Education in the Eastern Cape Provincial Government is directed to submit reports every four months, until the completion of the project, on the progress achieved towards the conversion of the JJ Serfontein School of Industry into a youth care facility, to:

- (i) the Judge President of this court;
- (ii) the Inspecting Judge of Prisons;
- (iii) Advocate Anne Skelton of the Child Justice Project and the Centre for Child Law, Faculty of Law, University of Pretoria;¹⁰
- (iv) The Director of the Legal Resources Centre, Grahamstown.¹¹

(b) The reports mentioned in paragraph (a) above shall be filed on or before 1 April, 1 August and 1 December of each year, commencing on 1 April 2004. The obligation to file reports in terms of this order shall persist until the Director: Special Needs in Education is released from the obligation in writing by the Judge President of this court.

(c) The Superintendent-General of the Department of Education in the Eastern Cape Provincial Government is directed to submit reports

⁹ I have not always retained the wording of the draft order that Mr Euijen handed up. The essence of the draft has been retained in the order that I have proposed. His order provided for reports to be filed by the Director: Special Needs in Education on a monthly basis. It also provided that the Superintendent-General of the Department of Education should report quarterly. In my view these time-frames are too onerous. In the order that I have proposed I have placed an obligation on them to report every four months, commencing on 1 April 2004. The draft order also dealt with certain of the individual cases. The need to provide for them fell away when further information that we had asked for came to hand.

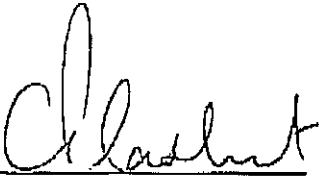
¹⁰ Neither Mr Henning nor Mr Paterson had any objection to this provision in the draft order. It was motivated by Mr Euijen on the basis of the expertise of Advocate Skelton in issues relating to juvenile justice and the involvement of herself and the bodies mentioned in juvenile justice reform nationally.

¹¹ This provision of the order is of great practical importance because, in these proceedings, the interests of juvenile offenders, specifically and generally, have been articulated and advanced by the Legal Resources Centre.

every four months, until the tasks are completed, to the persons listed in paragraph (a), setting out the progress achieved towards the establishment of a reform school in the Eastern Cape Province, and the development of a protocol to be followed when designating and transferring juvenile offenders who have been sentenced to reform school in terms of s290(1)(d) of the Criminal Procedure Act 51 of 1977.

(d) The reports mentioned in paragraph (c) above shall be filed on or before 1 April, 1 August and 1 December of each year, commencing on 1 April 2004. The obligation to file reports in terms of this order shall persist until the Superintendent-General of the Department of Education is released from the obligation in writing by the Judge President of this court.

(e) The matter is postponed sine die.



C. PLASKET

JUDGE OF THE HIGH COURT

I agree.



L.E. LEACH

JUDGE OF THE HIGH COURT

I agree.

A handwritten signature in black ink, appearing to read "pp. Chasler", written over a horizontal line.

J.O. FRONEMAN

JUDGE OF THE HIGH COURT