



IN THE HIGH COURT OF SWAZILAND

Civil case No: 08/2013

In the matter between:

ZEPHANIAH MAGAGULA

APPLICANT

AND

SHELL DLAMINI

FIRST RESPONDENT

**THE COMMISSIONER OF HIS
MAJESTY'S CORRECTIONAL
SERVICES**

SECOND RESPONDENT

ATTORNEY GENERAL

THIRD RESPONDENT

Neutral citation:

Zephaniah Magagula v Shell Dlamini & 2 Others
(08/2013) [2013] SZHC28 (2013)

Coram:

M.C.B. MAPHALALA, J

For Applicant
For Respondent

Attorney Zonke Magagula
Senior Crown Counsel S.
Gama

Summary

Civil Procedure – application for the release of a child detained in custody for purposes of correction – court finds that such detention is unlawful and unconstitutional – such detention is an infringement to the right to personal liberty, the right to dignity as well as the rights of the child – application granted with costs against the first respondent on the ordinary scale.

JUDGMENT
28th FEBRUARY 2013

- [1] An urgent application was instituted by the father of the child directing the respondents to forthwith release the person of Vuyesihle Magagula from detention. Alternatively, the applicant sought an order directing the second respondent to produce the person of Vuyesihle Magagula before the High Court on a date to be fixed for purposes of determining the lawfulness of the detention. They further sought an order for costs.
- [2] The applicant and the first respondent are the biological parents of Vuyesihle Magagula; she was born within wedlock but her parents subsequently separated in 1999 even though their marriage was never formally dissolved. She is twenty-one years of age.
- [3] The Principal Magistrate for the Manzini Magistrate's Court issued a Court Order at the instance of the first respondent for the detention of the child for purposes of correction. It is not in dispute that at the time of detention she was residing with her boyfriend in Matsapha; and, that she was four months pregnant with their baby. It is also not in dispute that in February 2012 she was employed in South Africa where they met with her boyfriend, and subsequently agreed to relocate to this country.
- [4] The applicant was advised of the detention of her daughter on the 21st December 2012 by her boyfriend Colani Dlamini. Subsequently, he

approached the Deputy Commissioner of the second respondent and demanded the release of her daughter; he advised the applicant that his daughter was being detained at the instance of a Court Order issued by a magistrate.

[5] The respondents did not file any papers opposing the application. The first respondent attended court during the hearing in person; and, she confirmed that her daughter was detained at Mamelawela Women's Correctional Facility at her instance pursuant to an order issued by the Principal Magistrate. She didn't dispute that her daughter was detained against her will or that she had not committed any offence. She further admitted that her daughter was not kept at the second respondent's Industrial School but at the Mawelawela Women's Correctional Facility together with convicted prisoners. The boyfriend has also deposed to a confirmatory affidavit in support of the application.

[6] On the other hand, the Attorney for the respondents told the court that he was not opposing the application. However, the court issued an order directing the Magistrate to file an affidavit stating the legal basis for the detention of Vuyesihle Magagula. In his affidavit the magistrate stated that the first respondent brought a letter from the second respondent admitting "the daughter" into the second respondent's Juvenile Industrial School

“which is both responsible for both rehabilitating deviant juveniles and providing them with education in general”.

[7] Paragraphs 2 and 3 of the affidavit state the following:

“2. Attached to aforementioned letter, was a letter written by the abovementioned parent to the child, mentioning how the child had gone out of hand in terms of behaviour and how she had done everything in a bid to have her reformed without success and that as a last resort she had decided to surrender the child to the Correctional Services for rehabilitation and schooling in the Industrial Juvenile School.

3. Both the Commissioner and the parent above applied for a consent order for the child to be kept at the Industrial Juvenile School for purposes of both schooling and rehabilitation which order was made.”

[8] It is apparent from the above affidavit that the Magistrate doesn't state the source of his authority for issuing the said order. The said order contravenes the daughter's fundamental right to personal liberty, the right to dignity as well as the rights of the child; these rights are guaranteed and enshrined in the Bill of Rights contained in chapter III of the Constitution.

[9] Section 16 (1) of the Constitution provides the following:

“16 (1) A person shall not be deprived of personal liberty

save as may be authorised by law in any of the following cases-

- (a) in execution of the sentence or order of a court, whether established for Swaziland or another country, or of an international court or tribunal in respect of a conviction of a criminal offence;**
- (b) in execution of the order of a court punishing that person for contempt of that court or of another court or tribunal;**
- (c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on that person by law;**
- (d) for the purposes of bringing that person before a court in execution of the order of a court;**
- (e) upon reasonable suspicion of that person having committed or being about to commit, a criminal offence under the laws of Swaziland;**
- (f) in the case of a person who has not attained the age of eighteen years, for the purpose of the education, care or welfare of that person;**
- (g) for the purpose of preventing the spread of an infectious or contagious disease;**

- (h) in the case of a person who is, or reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of the care or treatment of that person or the protection of the community;**
- (i) for the purpose of preventing the unlawful entry of that person into Swaziland, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Swaziland or for the purpose of restricting that person while being conveyed through Swaziland in the course of the extradition or removal of that person as a convicted prisoner from one country to another; or**
- (j) to such extent as may be necessary in the execution of a lawful order-**

 - (i) requiring that person to remain within a specified area within Swaziland or prohibiting that person from being within such an area;**
 - (ii) reasonably justifiable for the taking of proceedings against that person relating to the making of any such order; or**

(iii) reasonably justifiable for restraining that person during any visit, which that person is permitted to make to any part of Swaziland in which in consequence of that order, the presence of that person would otherwise be unlawful.”

[10] Section 16 (1) of the Constitution does not authorise either the first respondent or the magistrate to deprive Vuyesible Magagula of her personal liberty; hence, her detention is unlawful and thus infringes upon her right to personal liberty.

[11] Similarly, section 18 of the Constitution provides for the right to dignity. It provides as follows:

**“18. (1) The dignity of every person is inviolable.
(2) A person shall not be subjected to torture or to inhuman or degrading treatment or punishment.”**

[12] The conduct of the first respondent in causing her daughter to be detained in a prison facility with inmates against her will is a violation of her right to dignity; she was subjected to inhuman and degrading treatment. Her personal liberty was similarly restricted, and, she was denied visitors not

sanctioned by the first respondent; she was treated in the same way as convicted inmates.

[13] Section 29 (2) of the Constitution provides that:

“A child shall not be subjected to abuse or torture or other cruel, inhuman and degrading treatment or punishment subject to lawful and moderate chastisement for purposes of correction.”

13.1 Clearly, the conduct of the first respondent infringes upon the Rights of the Child as reflected in section 29 of the Constitution.”

[14] In the circumstances I make the following orders:

- (a) The Respondents are directed to forthwith release Vuyesihle Magagula from detention into the custody of the applicant.
- (b) The applicant is granted costs of suit against the first respondent on the ordinary scale.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT