IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 8819/19

DATE: November 2019

JOHAN (LETS) PRETORIUS	First Applicant
WILHELM PRETORIUS	Second Applicant
JOHAN PRETORIUS	Third Applicant
V	
THE STATE	First Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	Third Respondent
HEAD: ZONDERWATER PRISON MAXIMUM	Fourth Respondent
HEAD: ZONDERWATER PRISON MEDIUM	Fifth Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Sixth Respondent

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JUDGMENT

MABUSE J

[1] When this matter came before me the Applicants sought the relief set out in Part B of their notice of motion. That relief was set out as follows:

"1. That it be declared that the trial CC91/03 of the Applicants, their convictions, sentences and incarceration were unlawful and are null and void;

2. That the convictions and sentences of the Applicants as a result of their trial case CC91/03 be set aside;

3. That the Third to Fifth Respondents be ordered to forthwith release the Applicants permanently and unconditionally respectively from the Zonderwater Maximum Prison and the Zonderwater Medium Prison;

4. In the alternative to the aforegoing prayers, the Applicants seek the following relief:

4.1 that the Applicants be released on condition that they do not flee the country pending the decision of the International Human Rights Committee hearing their complaint in terms of the Optional Protocol to the International Covenant on Civil and Political Rights;

5. *That the condition in prayer 4.1 falls away if and when the said International Human Rights Committee finds the trial, convictions, sentences and incarceration of the Applicants to be unlawful in International Law;*
6. *That the Second Respondent and the Sixth Respondent be prohibited from charging the Applicants again with any offences for which they were originally charged in case number CC91/03;*
7. *That the Respondents be ordered to pay the costs of the Applicants on the scale of attorney and own client, jointly and severally, the one paying, and the others to be absolved."*

[2] The application is opposed by the First and Sixth Respondents through the affidavit of one Peter Christian Luyt ("Luyt"), a senior state advocate employed as such by the National Prosecution Authority of this country. He was one of the members of the prosecution team responsible for the prosecution of the Applicants and their co-accused in case number CC91/03. It is also opposed by the Third, Fourth and Fifth Respondents through the affidavit of a certain Thomas Buyani Lukhele("Lukhele").

[3] **THE APPLICANTS**

3.1 The First Applicant is 72 years of age. He was convicted of high treason by this Court by Jordaan J under case number CC91/03 on 29 October 2013 and sentenced to imprisonment for 30 years of which 10 years were suspended for 5 years;

3.2 The Second Applicant is an adult male, 41 years of age, and was also convicted on 29 October 2013 of high treason and sentenced by the same Court under the same case number to 35 years' imprisonment of which 10 years were suspended for a period of 5 years. He was, in addition, found guilty of culpable homicide and sentenced to 5 years' imprisonment for conspiracy to commit attempted murder and sentenced on conviction to 8 years' imprisonment with the latter sentences ordered to run concurrently with the sentence of high treason;

3.3 The Third Applicant is an adult male, 47 years of age. He was also convicted by the same Court under the same case number on 29 October 2013 for the offence of high treason. Upon conviction he was sentenced to 35 years' imprisonment, 10 years of which were suspended for a period of 5 years on certain conditions. He was also found guilty of culpable homicide and

sentenced to 5 years' imprisonment and for conspiracy to commit attempted murder for which he was sentenced to 8 years' imprisonment with all the sentences running concurrently with the high treason sentence.

[4] The Applicants allege that this Court has jurisdiction in this matter. It is however important to point out that the allegation that this Court has jurisdiction to hear the Applicants' application and to grant them the relief that they seek is vigorously challenged by the Respondents. I will deal with this aspect later in the judgment.

[5] According to the Applicants, this application concerns the validity of the trial, in case number CC91/03, in which they were convicted of high treason and sentences which were imposed on them following the trial. They contend that they regard their trial, over which Jordaan J presided, and convictions of high treason by this Court as unlawful in terms of the International Law and South African Constitutional Law. Similarly, they regard their sentencing process, as well as their sentences both unlawful in International and South African law and on that basis a nullity.

[6] The Applicants claim furthermore that following the said unlawfulness of their trial, convictions, sentences and incarceration by this country, acting through its organ, the High Court of the North Gauteng, as well as the Second, Third, Fourth and Fifth Respondents, they have filed a complaint against the First Respondent, the Republic of South Africa, in terms of Optional Protocol to the International Covenant of Civil and Political Rights (ICCPR). They bring this application for *habeas corpus* order or the analogous common law writ of *de libero homine exhibendo*, based on the said international complaint for their personal appearance before Court and their immediate release from prison, either permanently or pending the decision of the International Human Rights Committee as set out hereunder.

[7] It is important, at this stage, to point out that the office of the Commissioner of United Nations Human Rights ("the Committee") received the Applicants' complaint and acknowledged receipt thereof. The written response of the Committee dated 2 July 2018 was forwarded to Mr Booysen. I assume that it is the current counsel for the Applicants. In the said reply, the Committee, having acknowledged receipt of the complaints, informed Mr Booysen that the complaints would be forwarded to the Government of the Republic of South Africa ("the Government") for its comments

and that as soon as the Committee had received from the said Government a reply, it would revert to them.

[8] Indeed the complaints were forwarded to the Government of the Republic of South Africa and the Government dutifully responded. In its response the Government stated, *inter alia*, that:

"The complainant in his submission to the Human Rights Committee indicated that he petitioned the President of the Supreme Court of Appeal directly. It is therefore reasonable that the complainant should wait for the response and the decision of the President of the Supreme Court of Appeal in this regard. Furthermore, the complainant still has the Apex Court of the Land, the Constitutional Court of South Africa at its disposal, in the event that they are of the view that there were violations of his human rights by the State party. In light of the above, it is South Africa's request that the Committee should reject the communication by the complainant as inadmissible."

[9] Ever since then the matter has not progressed any further. The Applicants have not set out what they are doing to obtain the findings of the Committee. They have not set out what the Committee can still do in the circumstances. Accordingly, it is not expected of the Committee to do anything further as their complaint has reached a dead end. The Committee has not made any finding, in particular, that the trial, convictions, sentences and incarceration of the Applicants are unlawful in terms of the International Law. I doubt whether such a finding by the Committee will render the proceedings before Jordaan J a nullity. Therefore, the relief that the Applicants seek in terms of prayer 5 of paragraph 1 supra is a bridge too far and cannot be achieved.

[10] Relying on the provisions of s 35(2) (d) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") which provides that:

"35(2) Everyone who is detained, including every sentenced prisoner, has the right–

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released.",

they contend that the Constitution bestows on them the common law writ of *de libero homine exhibendo*.

[11] They contend furthermore that they regard their trial in the aforesaid case as well as their convictions and sentences given to them by the said trial court as being a violation of the Constitution. It must be emphasised that their opinion is irrelevant. It is not what they think of their trial and conviction that is important but what the Constitution and the Court say about their conduct. They therefore seek a declaratory order that their trial, convictions, sentences and consequential orders to be imprisoned be declared invalid and a nullity in law.

[12] They contend that their trial was not lawful and that the corresponding order authorising their incarceration issued in pursuance of the unlawful trial is likewise unlawful and a nullity in law.

[13] According to them this application is based on three distinct but interrelated broad causes of action, each one on its own making their trial, convictions and sentences and consequential incarcerations unlawful and or one in combination with the other and or with others and each containing multiple grounds of illegality. They contend furthermore that their trial, convictions, sentences and incarcerations will most likely be pronounced as a violation of the international obligations voluntarily undertaken by this country by an international body whose authority this country has recognised, injuring not only the international standing and reputation of South Africa, but also its financial interests.

[14] Relying on s 12(1) of the Constitution that provides that:

"Everyone has the right to freedom and security of the person, which includes the right –

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial.",

the Applicants contend that "trial" in this section presupposes a lawful trial and that theirs was not the trial referred to in Section 12(1) of the Constitution.

[15] They call upon the First Respondent to show cause:

15.1 that the First Respondent is not in breach of Article 14.5 of the ICCPR because they have not yet succeeded in getting a review of their convictions and

sentences on the facts and the law as is required by the said Article, five years after their sentences were imposed;

15.2 that the First Respondent is not in breach of the said Article 14.5 because they still do not have the official record of the trial court and other relevant documents necessary to appeal their case, five years after their convictions and sentences; and,

15.3 that the First Respondent is not in violation of s 35(3)(a) of the Constitution because they have not succeeded to appeal their convictions and sentences for five years after their sentences were imposed on them and still did not have the official record and other documents for this purpose.

[16] In the alternative the Applicants want the First Respondent to show cause why:

16.1 it is not in breach of Article 14(1) of the ICCPR which clearly requires that they must be tried by a tribunal established by the law;

16.2 that their sentencing tribunal was a Court functioning according to legislation in terms of s 171 of the Constitution;

16.3 that their sentencing tribunal was an ordinary court in terms of s 35(3)(c) of the Constitution.

[17] The attitude adopted by the Third, Fourth and Fifth Respondents to the Applicant's application is that this matter should have been dealt with and disposed of in terms of the appeal procedures provided for in terms of chapter 1 of the Criminal Procedure Act 51 of 1977 ("the CPA"). I agree with them.

[18] They contend that the nub of this application relates to the irregularities that allegedly occurred during the course of their trial. To that end s 317 of the CPA provides that if an accused is of the view that any of the proceedings in connection with or during his trial or her trial before a High Court are irregular or not according to the law, he or she may, however during his or her trial or within a period of 14 days after his or her conviction or within such extended period as may upon application on good cause be allowed, apply for a special entry to be made on the record stating the respects in which the proceedings are alleged to be regular or not according to law. The said section also makes provision for an application for condonation for the late filing of the application in that regard.

[19] The application for such special entry should have been made to the judge who presided over the trial of the applicants. If the application for condonation or for a special entry is refused, the accused may, within a period of 21 days of such refusal or within such extended period as may on good cause shown, be allowed, by petition addressed to the President of the Supreme Court of Appeal, apply to the Supreme Court of Appeal ("the SCA") for condonation or for special entry to be made on the record stating the respects in which the proceedings are alleged to be irregular or not according to the law.

[20] Furthermore, s 319 of the CPA, which makes provision for the reservation of a question of law for the consideration by the SCA, permits an accused person who has been convicted at the trial to raise a question of law, as a ground for appeal.

[21] Another crucial factor according to the said Lukhele is the fact that the Applicants' complaint also raises allegations of infringement of their human rights. That indicates that the Applicants could have approached the SCA or the Constitutional Court with an Appeal challenging their convictions or sentences on constitutional reasons or grounds.

[22] It therefore follows that the procedures that were available to the Applicants were to apply for leave to appeal in terms of s 316 read with s 315 of the CPA; or to apply for a special entry to be made on the record concerning an irregularity or illegality connected with their criminal proceedings or to apply for a question of law to be reserved for consideration by the SCA.

[23] It is argued by the Third, Fourth and Fifth Respondents that the Applicants failed to follow these legal processes to the letter or at all despite the fact that they were legally represented during their trial. More importantly, the Third, Fourth and Fifth Respondents are of the view that the Applicants are, in a disguised manner, requesting this Court to review and set aside the decision of the presiding judge. Again I agree with them. This, as it will be pointed out later, is irregular or not in accordance with the law, so the argument proceeded.

[24] It is contended by Mr Lukhele furthermore that the Applicants' convictions and sentencing fall beyond the purview of an admitted action by the State acting through

its organs and/or functionaries which may be reviewed and set aside by a court. Equally, the decision to institute or to continue with a prosecution also falls outside the purview of an administration action.

[25] According to him, the fact that the Applicants have lodged a complaint with the Human Rights Committee ("the Committee") does not necessarily entitle them to bypass the processes provided for in the CPA and approach this Court with an application akin to administrative review proceedings aimed at setting aside the decision of the trial court.

[26] According to him the Applicants allege that the SCA refuses to hear their appeal or petition. He has been advised that this is not correct. According to the correspondence apparently from the Registrar of the SCA, the applicants were advised that their application did not comply with the requirements, rules and practice guidelines of the SCA in as much as the judgment on conviction and sentence was not attached to their petition. The Applicants were apparently advised to attach a copy of the said judgment and file their application again with the SCA. Obviously, the Applicants did not comply with the said directive as a consequence of which their matter could not proceed in the SCA.. Currently that is where their attempts to appeal their convictions by Jordaan J stand. The Applicants have therefore failed to utilise and/or exhaust the prescribed appeal process which were at their disposal in terms of the law. Finally, he contended that the Applicants are not in law allowed to approach this Court with an application for review of the judgment or the presiding judge in their criminal trial. This Court, according to him, lacks jurisdiction to do so.

[27] Mr Lukhele submitted that the Applicants are currently incarcerated by virtue of lawful and legally enforceable warrants of committal which were issued by the Court upon their sentence. He denies, therefore, that their incarceration was unlawful. In the circumstances the Applicants are precluded from seeking an interdict the *libero homino exhibendo*.

[28] In their answering affidavit the First and Sixth Respondents deny that the order of the Court in case number CC91/03 was unlawful. They contend that this Court lacks jurisdiction to consider and decide on the lawfulness or otherwise of the proceedings

before Jordaan J and that the Appellant's right to challenge the lawfulness or otherwise of the proceedings of Jordaan J lies only in an appeal and cannot be done by way of a review. Mr Luyt contends that the interdict *de libero homine exhibendo* is a remedy that is only available to a person who has been detained unlawfully. I agree with him. From their own version, the Applicants were tried, convicted and sentenced to 30 years by Jordaan J of the High Court of Pretoria on 29 October 2013 on charges of, *inter alia,* high treason. Accordingly, there is a valid court order constituting the basis for their incarceration. For the purposes of the relief that they seek, whether or not they believe that the order is wrong or irregular, is irrelevant. For as long as the order issued by a competent Court has not been set aside by a Higher Court such order is binding, must be obeyed and must be given effect to.

[29] This Court before which the Applicants brought this application enjoys the same equal status as the Court that tried, convicted and sentenced them. It goes without saying that this Court lacks the necessary jurisdiction to review the proceedings of the Court that tried, convicted and sentenced them, if the purpose of their application was to review such proceedings, nor does this Court have any jurisdiction to grant the relief sought by the Applicants or to set aside the order of Jordaan J or to order their release from detention. This Court lacks jurisdiction to order the release of the Applicants from custody until their convictions and sentences have been set aside.

[30] In the South African Jurisprudence, there exists no procedure, apart from an appeal, by which the proceedings of a High Court may be brought to review. No right of review of the decision of a judge of the High Court, either in terms of the statutes or common law, especially a judge who exercises jurisdiction, exists.

[31] The issues that this Court has to decide according to the Respondents are whether this application constitute a review; secondly whether this Court is competent to grant the relief that the Applicants seek; and thirdly whether there is any way, apart from an appeal, in which the proceedings of a High Court may be brought to review. In brief the Applicants seek an order declaring that the trial in case number CC91/03 of the Applicants' convictions, sentences and imprisonment are unlawful and null and void. The Applicants regard their trial and convictions for high treason by the High Court of the North Gauteng High Court as unlawful in International Law and South African Law. They seek an order in terms whereof their convictions and

sentences are set aside and they seek an order in terms whereof the Third to Fifth Respondents are commanded by this Court to forthwith release them permanently and unconditionally from their detention.

[32] The Applicants contend that in terms of the International law their rights have been violated in the following respects:

32.1 being chained;

32.2 arbitrary actions of the State;

32.3 trial without undue delay;

32.4 violation of his right to a legal representative;

32.5 violations of the equality of arms principles;

32.6 a tribunal not established by law;

32.7 right to appeal;

32.8 diverse international violations;

32.9 unfair trial.

[33] They contend that the following are the constitutional violations that were committed:

33.1 unfair trial;

33.2 violation of his right to a trial without unreasonable delay;

33.3 violation of his right to legal privilege;

33.4 reliance on unconstitutionally obtained evidence;

33.5 trial by an unconstitutionally constituted court;

33.6 his right of appeal.

[34] The Applicants want their trial, convictions and detentions to be declared invalid because their international rights and constitutional rights were, as they claim, and as set out in paragraphs 18 and 19 *supra*, trampled upon. For that reason, they seek their release from prison. They have set out instances in which they claim their rights, international and constitutional, were violated. It is not for this Court to analyse those violations the Applicants have listed to try and establish their merits. It will serve no purpose to try and do so for at the end of it all whether there is merit in them or not this Court cannot and may not employ such findings to set aside their convictions, sentences and imprisonments. In short, this Court may not use the findings of the merits in their perceived violations to set aside the judgment or order of Jordaan J in case number CC91/03.

[35] For the following reasons, no matter how many violations the Applicants may set out, international or constitutional, no matter how assertive they can motivate such violations, the Applicants will not achieve their goal of declaring the proceedings before Jordaan J unlawful and setting them aside:

35.1 **The binding effect of the order of Jordaan J**

The First Applicant correctly stated that:

"I am held as a prisoner in Zonderwater Prison, near Cullinan. I am incarcerated as a result of the decision of the North Gauteng High Court on 29 October 2013 in case number CC91/03 that I am guilty of the political offence of high treason and that I must be sent to prison for 30 years of which 10 years were suspended for 5 years. I was accused number 13 in case number CC91/03. My prison number is 213639437."

35.2 The Appellants were correctly charged with an offence or offences it was believed they had committed. Their conduct amounted to criminal acts in terms of the South African legal system. Even the Constitution envisages that people who commit certain acts or offences while they are in this country may be arrested, prosecuted, convicted and sentenced to prison. Section 35(1) of the Constitution refers to:

"25(1) Everyone who is arrested for allegedly committing an offence …."

It is accordingly immaterial what the Applicants think of their charges, trials, convictions, sentences and imprisonment. Equally it is immaterial what the Applicants tell the world about their trial, convictions, sentences and imprisonment. What is of paramount importance is whether they were charged before a proper forum and whether the forum before which they appeared adhered to the provisions of s 35 of the Constitution. Where the Applicants complain that the Court before which they appeared flouted their rights in the Constitution, the Applicants are not without a remedy. One of the complaints raised by the Applicants was that they were brought to court in chains. There seemed to have been a reason for that. Mr Luyt admitted that the Applicants were brought from the prison to Court in chains and under heavy police guard. He admits furthermore that the photograph of the First Applicant in chains, that forms part of the Applicants papers, was taken at one of the rear exit doors of the Palace of Justice, properly on his way back to the transport vehicle. He admits, however, that the Applicants were held in leg chains during the

proceedings in Court. It is, however, important, he pointed out, that some of the Applicants' co-accused escaped from lawful custody and others attempted to escape during the trial. This led to the tightening of the security around the Applicants and their court used and also resulted in certain accused, with the consent of the court, being kept in leg chains during the court proceedings. When Jordaan J sat and presided over case number CC91/03 he did so as a High Court of the Provincial Division. He listened to evidence, analysed it and made a finding that the Applicants had committed, among others, the offence of high treason. He sentenced them to imprisonment terms.

35.3 Now s 165(5) of the Constitution provides that:

"An order or decision issued by a Court binds all persons to whom and organs of state to which it applies."

Actually the situation with regard to Court orders is made even clearer by the case of **Culverwell v Beira (1992) 4 ALL SA 650 (W)**. In this case the Court stated that:

"All orders of this Court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside." The word "court" in the cited paragraph does not only refer to Witwatersrand Local Division only, as it was then called, or the South Gauteng Local Division, as it is now called. It refers to any court of law.

The principles adopted in Culverwell v Beira is binding on me. Accordingly, this Court has the duty to respect the provisions of the Constitution as set out in s 165(5) and also the order of Jordaan J as enjoined by the Culverwell v Beira case *supra*. It is the Respondents' submission that the order of Jordaan J, for as long as it has not been set aside, obviously through an appeal, remains in force and must be obeyed, not only by the Applicants but also by this Court. It is a good principle designed to bring harmony to the judgments and orders of the Courts in order to avoid confusion. See also **Federation of Government Bodies of South Africa SA Schools v MEC for Education 2002(1) SA 660 T** and the cases cited therein. This Court is not the proper forum to be approached to set aside the order of Jordaan J nor have the Applicants followed a proper procedure to set aside Jordaan J's decision.

35.4 **<u>Are the proceedings before me an appeal or a review</u>**

I agree with Mr Luyt that in our jurisprudence there is no procedure other than in the form of an appeal, in terms of which the proceedings of the High Court

may be brought to review. The proceedings before me did not constitute such an appeal against the decision of Jordaan J. These proceedings do not represent an appeal or a review, even if the Appellants seek the decision of Jordaan J to be set aside. The Appellants do not even allege that the Court that tried, convicted and sentenced them came to a wrong conclusion on the facts or the law. More importantly there is no right of review from the decision of a Judge of the High Court either by statutes or common law. Accordingly, unless these proceedings were an appeal brought before a proper tribunal such as the Supreme Court of Appeal or the Full Court of this Division, the decision of Jordaan J cannot be set aside nor can it be declared null and void.

35.5 **This Court is incompetent to set aside the decision of Jordaan J**

Section 22 of the Superior Courts Act gives the High Court powers to review the proceedings of Magistrate Courts. No such powers to review the proceedings of another High Court were granted to the High Court. The High Court does not even have an inherent power to review the proceedings of the High Court. Even in terms of common law the High Court does not have the power to set aside or vary an order of another Court having equal jurisdiction. See **Eckard v Olyott 1962(4) SA 189 O.** See also **James v James 1929 WLD**. Accordingly, this Court, having equal jurisdiction as the Court that tried, convicted and sentenced the appellants, does not have any powers, whether arising from statutes or common law, to vary or set aside the decision of such Court. The principle underscored in this matter is that a Court which has equal jurisdiction with the Court whose decision is sought to be varied or set aside does not in law have the power to vary the decision of such Court or to have it set aside. Therefore, the relief that the Applicants seek is incompetent. It is beyond the jurisdiction of this Court to call into question the lawfulness or otherwise of the proceedings before Jordaan J. I agree fully with Mr Luyt that the Applicants' rights to challenge the lawfulness of their trial, convictions and sentences, lie squarely in an appeal and cannot be done by way of a review.

35.6 There exist circumstances under which a Court may vary or set aside the order or judgments of another Court of equal status. These circumstances are however circumscribed. According to Jerold Taitz, The Inherent Jurisdiction of the Supreme Court, page 7:

"The general jurisdiction of the Supreme Court is derived from the legislation, the common law and its inherent jurisdiction."

Insofar as its general jurisdiction is derived from legislation, s 21 of the Superior Courts Act provides that:

"21(1) A Division has jurisdiction over all persons presiding or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may, according to law, take cognisance, and has the power –

(a) to hear and determine appeals from the magistrates court within its area of jurisdiction;

(b) to review the proceedings of all such courts;

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

(2) A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction or any other Division.

(3) Subject to s 28 and the powers granted under s 4 of the Admiralty Jurisdiction Regulation Act, 1982 (Act 105 of 1983), any Division may issue an order for attachment of property to confirm jurisdiction."

35.7 A High Court of equal status has jurisdiction under s 23(a) of the Superior Courts Act to set aside the judgment or order of another court. Example of such jurisdictions are found in Rule 43 of the Uniform Rules of Court, which is designed to correct expeditiously obviously wrong judgments or orders; Rule 31(2)(b) and (6), which deals with rescission of default judgments granted by another High Court, appeals against the order or judgment of another High Court: S 19(d) provides that:

"The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law –

(a) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require."

In the High Court an appeal against the Judgment or order or decision of a single judge is heard not by another single judge but by a bench consisting of three judges. No single judge of the High Court may set aside an order or judgment or decision of another single judge unless it was a judgment listed in Rule 42 or 31(2)(b) and (6) of the Uniform Rules of Court or the Court has the statutory powers to do so. It is now clear that a High Court has so much power to set aside the order of a Judge only if it is so empowered by the Act or rules under which it operates.

35.8 A High Court has jurisdiction in terms of common law to set aside the order or judgment of a judge of equal status only on specified grounds. Those grounds are:

35.8.1 fraud;

35.8.2 *iustus error*;

35.8.3 in exceptional circumstances where new documents have been discovered;

35.8.4 where judgment has been granted by default;

35.8.5 in the absence between the parties of a valid agreement to support the judgment on the ground of *iustus error*.

35.9 The Applicants do not rely, in their application to set aside the decision of Jordaan J, on any of the recognised common law grounds, for setting aside the judgment. In order for the Applicants to succeed with the relief to set aside the order of Jordaan J, it was necessary that they allege and prove one of the common law grounds on the basis of which a judgment or order or decision may be set aside by a single judge.

35.10 Finally, this court could, by exercise of its inherent jurisdiction, set aside the order of Jordaan J. Jerold Taitz says the following about inherent jurisdiction of the High Court:

"This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and subsidiary powers, without which the Court would be unable to act in accordance with justice and good reason. The inherent powers of the Courts are quite separate and distinct from its common law and these subsidiary powers, e.g. in excess of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court. The inherent jurisdiction was defined by Manitoba Court of Appeal S

"… the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. The Superior Courts in South Africa have long acknowledged being possessed of such inherent jurisdiction."

See in this regard **Richie v Andrews (1881-1882) 2 EDL 254**; **Connolly v Ferguson 1908 TS 195**.

35.11 While the High Courts have inherent jurisdiction to prevent injustices,

"*Nowhere does the learned author suggest that the Supreme Court is at large to right the wrongs or prevent injustices save in specific spheres. Indeed he states positively to the contrary at 1:*

'… the inherent jurisdiction of the court should not be regarded as an equitable jurisdiction in terms of which the court dispenses Solomon-like judgments based upon subjective notions of simple justice between man and man."

See in this regard **Wright v St Mary's Hospital, Melmoth & Another (1993) (2) SA 226 D & CLD at p.233 f – g.**

[36] In my view, the inherent jurisdiction of the Gauteng Division High Court is not such as to empower a judge of that court to make an order to set aside the order of Jordaan J or to grant the Applicants the relief that they seek in their notice of motion. Even if I am wrong in my conclusion that I, presiding in this matter as a state judge, do not have jurisdiction to come to the assistance of the Applicants, the exercise of any such jurisdiction is discretionary. In the circumstances of this matter, considered in the light of the fact that the Applicants still have the remedy of an appeal in their hands, I would be disinclined to exercise any discretion in their favour. This Court may not make an order that attacks the order of Jordaan J. It is not proper for Mr Booysen to support his contention that this Court has jurisdiction to set aside the decision of Jordaan J by relying on Masuku v Minister van Justisie en Andere, 1990 (1) SA 832 AD and all the other authorities he cited in support of that contention. I read the judgment of Masuku v Minister van Justisie en Andere to be meaning that the Court cannot exercise the jurisdiction it does not have; that although it had no

jurisdiction in terms of s 327 of the CPA it may exercise jurisdiction in that matter within the precincts of the rules applicable to interdicts.

[37] For example, in Masuku v Minister van Justisie en Andere, same authority on which Mr Booysen relies for the contention that the High Court has got jurisdiction in this matter, the Court had the following to say with regard to the powers of the Court in terms of s 327 of the Criminal Procedure Act 51 of 1977:

> *"Binne die raamwerk van die strafprosesreg is 'n hof nie beklee met jurisdiksie om die inwerkingtreding van 'n vonnis uit te stel hangende die afhandeling van verrigtinge ingevolge artikel 327 nie. Die Wet bevat heelwat bepalings wat die opskorting van bepaalde strawwe in sekere gegewe omstandighede reël (kyk bv artikels 278, 307, 308, 309 en 321), maar geeneen van hulle kan in verband gebring word met die prosedure van artikel 327 nie. By ontstentenis van statutêre magtiging daartoe, het 'n hof geen inherente jurisdiksie om die inwerkingtreding van 'n vonnis uit te stel nie."*

It is quite clear that where a Court derives its powers from statute it can only exercise its powers within that statutes.

[38] The cases on which Mr Booysen relied cannot be interpreted to mean that this Court, presided over by a single judge, has the jurisdiction to preside over the Applicants' application and decide that the decision of another judge should be declared unlawful, be set aside on the basis that it is null and void ab origine.

[39] I want to assume that the Applicants had anticipated that these proceedings would be heard by a Full Court and that when they contended that this Court has jurisdiction they actually meant the Full Court. They never anticipated that their application would be heard by a single judge. They should have known that a single judge would be incompetent to grant them the relief that they seek, for the reasons set out in this judgment. Nothing prevented them from stopping the proceedings before the matter commenced and approaching the Judge President of this Division for a court consisting of three judges.

[40] Whatever the merits of the Applicants' allegations in the matter may be, these proceedings should not have been brought before a single judge. The application was consequently set up for failure right from the start.

[41] The order that I make herein is as follows:

The application is dismissed with costs.

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PM MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants:	Adv H Booysen
Instructed by:	Julian Knights Attorneys
Counsel for the First, Second and Sixth Respondents:	Adv ZZ Matebese (SC)
Instructed by:	The State Attorney
Counsel for the Third, Fourth and Fifth Respondents:	Adv EB Ndebele
Instructed by:	The State Attorney
Dates heard:	18 June 2019
Date of Judgment:	22 November 2019