REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2014/23316

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

17/10/2014. .....
DATE SIGNATURE

In the matter between:

BOITUMELO TSHIKANE	Applicant
and	
THE MINISTER OF CORRECTIONAL SERVICES	First Respondent
THE AREA COMMISSIONER JOHANNESBURG CORRECTIONAL SERVICES	Second Respondent
THE HEAD OF PRISON JOHANNESBURG MEDIUM B CENTRE	Third Respondent
D H INTERNAL SECURITY JOHANNESBURG MEDIUM C CENTRE	Fourth Respondent
THE HEAD OF CASE MANAGEMENT COMMITTEE JOHANNESBURG B CENTRE	Fifth Respondent

SUMMARY

Prisons – transfer of prisoner in terms of sec 43 of the Correctional Services Act 111 of 1998, as amended, ("*the Correctional Services Act*"), and Regulation 25 framed under the Correctional Services Act – the rights of sentenced prisoners as entrenched in the Constitution of the Republic of South Africa Act 108 of 1996, in particular sec 35(2)(e) – the rule of law and residuum principle – the respondents transferring applicant from Johannesburg Medium B Prison to Baviaanspoort Prison without consulting him and without affording him an opportunity to make representations in regard to transfer – conduct of respondents violating principle of *audi alteram partem* and natural justice – the decision to transfer the applicant accordingly reviewed and set aside.

JUDGMENT

MOSHIDI, J:

[1] This is an application originally brought on urgent basis in which the applicant claimed relief as follows:

> "*That the court grants an order for all the respondents not to intimidate the applicants because of respondent no 5 personal vandettas against the applicant and not to transfer the applicant.*" (*sic*)

There was also a prayer for alternative relief. The application came before my sister, Satchwell J in the urgent court, on 2 July 2014. The learned judge issued an order in the following terms:

> *"1. Pending the finalization of this matter, the Applicant is to be returned forthwith from Baviaanspoort Prison to Johannesburg Medium B Prison and shall remain there.*
>
> *2. The Applicant is incarcerated as a prisoner and is not required to file and serve Heads of Argument.*
>
> *3. The Applicant may file and serve a replying affidavit in Manuscript form on or before Monday 7th July 2014.*
>
> *4. The matter is set down for hearing on the opposed roll on Monday 28th July 2014."*

It was not entirely apparent from the court file what transpired on the latter date. However, the respondents' heads of argument suggested that the matter was not placed on the roll, but enrolled for this week, i.e. 6 October 2014.

INFLUX OF SIMILAR APPLICATIONS

[2] It is, at this stage, opportune to make certain general observations about applications of the nature under consideration. These applications emanate from prisoners serving time in prison pursuant to an assortment of crimes committed. The applications are launched in the motion court, and mostly in the urgent court with increasing frequency. Common in the features of the applications, is the relief for transfer to another prison; resistance against transfer (as in the present matter); paroles; copies of transcripts of

trial records; and access to certain facilities. In all the applications, the applicants appear in person, and without legal representation. The result is that the papers were often prepared in a defective manner, in several respects. In several instances, the founding affidavits were not commissioned at all. The more recent reason advanced for this deficiency is that the prison officials detest the litigation which leads to their refusal to attest the affidavits. It was also not unusual for the applicants to contend that they are lay litigants. In other instances, the applications are not served on the respondents timeously or at all. Where service was effected, the State Attorney sometimes failed to respond until at the hearing. As a result, the proper adjudication of the merits of the matter became compounded. In addition, these kind of applications quite often have to be dealt with on a priority basis, namely the first day of the motion court. The obvious reason for this was that the applicants are escorted by prison warders, and have to return to prison in time. There are therefore, not only security issues involved, but also administrative and cost factors. In many applications of this nature, the applicants often either omitted to provide full details of their transgressions and circumstances, or supply scanty information. This resulted in the court finding it difficult to comprehend fully their plight. It may be that the time had come for the hearing of these applications to be convened in prison. The least of the problems was not exhaustive by any means, as suggested in the order of Satchwell J mentioned above.

THE FACTS OF THE PRESENT MATTER

[3] Briefly stated, the facts of the instant matter were as follows: The applicant is serving a 13 years' imprisonment sentence pursuant to a conviction of armed robbery and the unlawful possession of a firearm and accompanying unlawful ammunition imposed in 2011. He was originally incarcerated at the Johannesburg Medium B Prison, and later, in June 2014, was transferred to the Baviaanspoort Prison. On his version, which appeared to be undisputed, the transfer was carried out without consulting him. He therefore contended that the respondents ignored the *audi alteram partem* principle. The applicant resides at Rockville, Soweto, where he was born and which was near the Johannesburg Prison. He is about 34 years old and single.

THE SOLE ISSUE FOR DETERMINATION

[4] The present application was opposed by the respondents on grounds as set out later below. The sole issue for determination was whether the transfer of the applicant from Johannesburg Medium B Prison to Baviaanspoort Prison was equitable, proper and justified. It will equally be necessary to deal with the applicant's allegations that he was harassed by the fifth respondent with a personal vendetta against him.

SOME LEGAL PRINCIPLES APPLICABLE

[5] Section 43 of the Correction Services Act 111 of 1998 ("*the Correctional Services Act*"), deals with the 'location and transfer of prisoners'. The sec provides as follows:

> "*43(1) A sentenced prisoner must be housed at the prison closest to the place where he or she is to reside after release, with due regard to the availability of accommodation and facilities to meet his or her security requirements with reference to the availability of programmed* (sic).
>
> *(2) The transfer of a prisoner is subject to the same considerations.*
>
> *(3) A prisoner must be examined by the registered nurse or medical officer before his or her transfer. Where such a prisoner is being treated by a medical practitioner, he or she must not be transferred until the prisoner has been discharged from the treatment or the transfer has been approved by the medical officer after consultation with the Head of Prison.*
>
> *(4) The Commissioner may, in consultation with the Director-General of the Department of Welfare, transfer a sentenced child to a reform school as contemplated in the Child Care Act, 1983 (Act No 74 of 1983), and from the date of such transfer, the provisions of section 290 of the Criminal Procedure Act will apply.*" (underlining added)

Regulation 25, under Chapter III, framed under the Correctional Services Act, provides as follows:

> "*(a) When an inmate is transferred the Head of the Correctional Centre or a correctional official authorised by him or her must, subject to paragraph (b) convey the reason for the proposed transfer to the inmate and allow the inmate to make a representation in this regard, which must be recorded in writing, whereafter the Head of the Correctional Centre or the authorised official may take a decision on the proposed transfer.*

(b) If the transfer is for security reasons the Head of the Correctional Centre or the authorised official need not inform the inmate of the proposed transfer, but the inmate must be informed of the reasons as soon as practicable after his or her admission to the place where he or she is transferred to and must be allowed an opportunity to make a representation in this regard as well as an opportunity to notify his or her spouse, but or next of kin and in the manner prescribed by the Order.

(2) If an inmate or cared-for-child is being transferred, his or her medical history file and any prescribed medication must be transferred with him or her.

(3) The correctional official in charge of education and training must be consulted when the transfer of an inmate, who is a learner and involved in an education or training programme or who is involved in a final examination is being considered." (underlining added)

[6] Section 35(2) of the Constitution enjoins, *inter alia*, the rights to every detainee, including every sentenced prisoner, to be informed promptly of the reason for being detained, and to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment. The sec also entrenches the right to communicate with, and be visited by, that person's spouse, or partner, next of kin, chosen religious counsellor, and chosen medical practitioner. These rights, are however, limited by the provisions of sec 36 of the Constitution.[1]

[7] In *Minister of Correctional Services v Kwakwa,*[2] the Court had occasioned to deal with an appeal concerning a new privilege system of prisons in respect of unsentenced prisoners. In para [25] of the judgment, the

[1] See *Constitutional Law of South Africa* by Chaskalson, Kentridge *et al.*
[2] [2002] 2 All SA 242 (A) – also reported at 2002 (4) SA 455 (SCA).

Court referred with approval to the residuum principle contained in the *dictum* in *Goldberg and Others v Minister of Prison and Others,*[3] where Gubbay CJ said the following:

> "*It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties … of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed.*"

The judgment also makes it clear that the principle of legality remains paramount and that although courts will ordinarily not interfere with public powers exercised by institutions such as prison authorities, the exercise of such powers must be in compliance with the Constitution. These institutions, such as the respondents in the present matter, must also act within the parameters of their statutory powers. In regard to the rights of detained persons enshrined in sec 35 of the Constitution, quoted earlier in this judgment, the Court in *Minister of Correctional Services v Kwakwa (supra)*, at para [33], went on to state that:

> "*In section 35 of the Bill of Rights the rights of all detained persons are spelt out in detail. The manner in which we treat our prisoners should not be out of line with the values on which the Constitution is based. Human dignity and the advancement of human rights and freedom and respect for the rule of law are not just hollow phrases. They must be made real.*"

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[3] 1979 (1) SA 14 (A) 39C-D.

The Court also quoted with approval the principle regarding the exercise of public power set out in *Pharmaceutical Manufacturers Association of South Africa and Another: In Ex Parte President of the Republic of South Africa and Others,*[4] where Chaskalson P said:

> *"The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality which is part of that law. The question whether the President acted intra vires or ultra vires in bringing the Act into force when he did is, accordingly, a constitutional matter. The finding that he acted ultra vires is a finding that he acted in a manner that was inconsistent with the Constitution."*

THE RESPONDENTS' CONTENTIONS

[8] In the instant matter indeed concerned, a sentenced inmate, the applicant. In opposing the application, the respondents argued that the applicant was sentenced in August 2011, and has presently served three years and fifty three days only, he will only have served half his sentence in November 2017, and whereafter he will be considered for parole. The sentence of the applicant, in the calculations of the respondents, will expire in 2024 only. In my view, this was about the only negative factor that may count against the applicant. However, in the light of the view I take in the matter, this factor was not insurmountable.

[4] 2000 (2) SA 674 (CC) at 687H-688A.

[9] The respondents also argued that Johannesburg Medium B Prison was significantly overcrowded. As a result, and in order to address such overcrowding, the National Commissioner of the Department of Correctional Services, in consultation with the Regional and Area Commissioners drafted a directive ("*the directive*"). In terms of the directive, the capacity of Johannesburg Prison is 1 300 at the moment. It houses over 3 000 prisoners. The directive suggested that at least 1 500 prisoners should be transferred away before end of June 2014. The transfer plan decision was taken by the Gauteng Regional Management Committee at the meeting on 11 June 2014. It was also argued that Johannesburg Medium B Prison is only an admission Centre, which admits sentenced offenders from some 27 courts in and around Gauteng. The respondents also relied on a recent and yet to be reported judgment of Satchwell J delivered on 13 August 2014 in this Court, in *Kehle Barry Zungu v The Minister of Correctional Services and Others,*[5] ("*the K B Zungu judgment*"), and contended that the applicant was not singled out in the transfer plan.

THE LEGAL PRINCIPLES APPLIED TO THE FACTS

[10] I revert to the facts of the present matter. I took note of the provisions of sec 43(1) of the Correctional Services Act, as amended, that a sentenced offender must be housed a the prison closest to the place where he or she is to reside after release, with due regard to the availability of accommodation and other facilities. The issue of transfer, is therefore a discretionary matter

[5] Case No 23482/2014.

and dependent on certain conditions. However, in this matter what is plain was that there was no evidence presented that the reasons for the transfer of the applicant were conveyed to him in writing by the Head of the Johannesburg Medium B Prison. There was also no evidence that the applicant was given the opportunity to make representations in regard to his transfer, which had to be in writing. These matters were also neither dealt with in the defective answering papers, nor in the respondents' heads of argument. Both these omissions were clearly in contravention of Regulation 25(a) framed under the Correctional Services Act, and quoted in full earlier in this judgment. There was also no evidence, especially in the absence of reasons for the transfer, that the applicant had to be transferred for security reasons. However, even if this was the case, Regulation 25(b) provides that the inmate must be informed of the reasons as soon as practicable after his admission to the place where he or she is transferred to, and must be allowed an opportunity to make a representation in this regard. In addition, in spite of the contention of over-crowdedness at the Johannesburg Medium B Prison, there was equally no evidence that the prison to which the applicant was transferred, i.e. Baviaanspoort, had adequate accommodation for him. The Head of the latter prison was not cited in these proceedings.

[11] In my considerate view, the conduct of the respondents, as outlined in the preceding paragraph, was not in accordance with the Constitution, as well as the legal principles set out above. It certainly was not in accordance with the residuum principle. There was no doubt in my view that the conduct of the respondents was not only in violation of the Regulations set out above, and

rights in sec 35(2) of the Constitution, but was equally in violation of the principles of natural justice, particularly the *audi alteram partem* rule. In this regard, in *Nortjé v Minister van Korrektiewe Dienste*,[6] the appellants challenged their transfer from the general section of the maximum-security unit to the C-max unit of the Pretoria Prison. The reason given for the transfer was the high risk of their escaping from detention, as they had twice attempted to do so. (This was not by a far-stretch of imagination applicable in the instant application.) In the process of transfer, no prior notice was given to the appellants of the intention to transfer them to the C-max unit. In finally upholding the appeal, the Court held that, sec 33 of the Constitution guarantees the right to procedurally fair administrative action. The *audi alteram partem* rule finds application where an administrative decision stands to negatively affect a person's rights ... The Court came to the conclusion that:

> *"It was evident that the audi alteram partem rule was not complied with by the respondents ..."*[7]

On the uncontroverted facts, this was precisely what occurred in the present matter.

[12] It was rather interesting that the directive issued by the respondents, referred to earlier, and at para 14.1 provides as follows:

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[6] [2001] 2 All SA 623 (A).
[7] See para [21] at 629.

> *"The Head of the Prison/Division Head:* ***Operational Services must give a prison an audience*** *before he/she is* ***transferred*** *to another prison. During this interview the prisoner must be especially asked whether he/she has any* ***complaints or requests and whether he or she has checked his/her valuable articles and private items. The audi alteram partem rule must be complied with at all times.***"

As stated above, there was no evidence that this was complied with. The latter quoted part of the directive, did not become "*real*", as referred to in *Minister of Correctional Services v Kwakwa (supra)*. In fact, during closing argument, counsel for the respondents conceded, and quite correctly in my view, that the respondents at no stage consulted the applicant, nor gave him the opportunity to make representations in the whole process of his transfer.

[13] I also found that the argument advanced on behalf of the respondents that the applicant had just served three years and fifty three days of his sentence currently, and that his sentence will expire during 2024, was irrelevant and potentially prejudicial to the applicant. It simply meant that the applicant will be away from the Johannesburg area and his family and next of kin, until then. In addition, it meant that he will be at Baviaanspoort Prison until 2017 when he may be considered for parole. This was untenable, and unjust and inequitable in the circumstances. The facts in the judgment of Satchwell J in the *K B Zungu* judgment, were in my view, somewhat distinguishable from the facts in the present matter. In that case, although the learned judge found no fault with the directive of the respondents referred to above, and the plan to transfer the applicant (Mr Zungu), the applicant was also concerned about the disruption of his computer studies for which he had enrolled at the Johannesburg Medium B Prison. He was sentenced to a

prison term of in excess of 20 years' imprisonment, unlike the applicant in the present matter. Mr Zungu's sentence will expire in the year 2030. For all these reasons, the judgment in the *K B Zungu* judgment, in dismissing the application, can hardly be assailed. In *Du Plooy v Minister of Correctional Services and Others*,[8] the Court dealt with the Department of Correctional Services' refusal to place the applicant on parole on medical grounds. There were no reasons furnished for the refusal. At 621 of the judgment, the Court concluded that:

> "*The decision not to place the applicant on medical parole was, objectively, so irrational and unreasonable and in conflict with the provisions of section 69 of Act 78 of 1959 (the predecessor to the Correctional Services Act), and violative of the provisions of sections 10, 12(1)(e), 27(1)(a) and 35(2)(e) of the Constitution. Further, the decision was unlawful, unreasonable and procedurally unfair. These grounds are sufficient to set aside the decision and more so because of the urgency of this matter since the applicant is terminally ill and requires palliative care.*" (my insertions)

In my view, the same considerations applied in the instant matter regarding the decision taken to transfer the applicant.

FINAL ISSUE FOR DETERMINATION

[14] The final issue for determination was the applicant's assertions that the fifth respondent, i.e. the Head of the Case Management Committee, Johannesburg, B Centre, had a personal vendetta against him in the process leading to the decision to transfer him. The counter-submission by the respondents that the applicant was not singled out and that "*the applicant was*

[8] [2004] 3 All SA 613 (T).

not the only prisoner affected by his transfer", and "*that only a few applications to court were made pursuant to the directive*", was indisputably irrelevant to the main issue for determination. There was no particular answering affidavit by the fifth respondent to counter the allegations of the applicant. His version remained more probable and acceptable on the approach in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.*[9] If, however, I am incorrect in my determination of the merits of the application, I believed that there was yet another reason why the transfer of the applicant was premature in the circumstances. This was that, the applicant produced certain documentation during closing argument. These documents indicated that he had since petitioned the Supreme Court of Appeal for leave to appeal his conviction and sentence. The documentation also revealed that he had since lodged a complaint with Johannesburg Medium B Prison authorities against a search conducted in his cell and in his absence during September 2014. These matters are currently outstanding. The directive issued by the prison authorities prevents a transfer whilst there was an appeal process in place.

CONCLUSION

[15] For all the aforegoing reasons, I concluded that the applicant had made out a case on the probabilities for the relief claimed in the notice of motion. As stated earlier in this judgment, these kind of applications were brought to court on increasing frequency, and the time had arrived to attain some

[9] 1984 (3) SA 623 (A) at 634E-I.

guidance for future adjudication of these matters, if this judgment was so inclined. It was noteworthy that in a separate matter that came before me on the same day i.e. the matter of *Timothy N Mlangeni v The Minister of Correctional Services and Others* (Case Number 25762/2014), a draft order was made an order of court. The order made by consent, provided that:

> "*The applicant shall not be transferred to Mangaung Correctional Centre*", and that, "*should the need to transfer the applicant to any Correctional Centre arise, the respondents undertake to abide with the Correctional Services Act 111 of 1998 and all relevant Regulations and Policies.*"

In this matter the costs ought to follow the result. The respondents' counsel has kindly agreed to forward a copy of this judgment to the applicant at Johannesburg Prison.

ORDER

[16] In the result I make the following order:

1. The interim order made by Satchwell J in order 1 on 2 July 2014 is hereby made final.

2. The decision to transfer the applicant from the Johannesburg Medium B Prison is hereby reviewed and set aside and replaced with the following order:

3. *"The applicant shall remain detained at the Johannesburg Medium B Prison, and not be transferred to Baviaanspoort Prison or any other prison, until the respondents had followed the correct procedures."*

4. The respondents shall, jointly and severally, the one paying the other to be absolved, pay the costs of this application.

5. The Registrar of this Court is requested to send a copy of this judgment to the applicant, Mr Boitumelo Tshikane, PDS No 211292802, Johannesburg Prison, Private Bag X04, Mondeor, 2110.

D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANT	IN PERSON
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DATE OF HEARING	6 OCTOBER 2014
DATE OF JUDGMENT	17 OCTOBER 2014