IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED.

3.12.2015

DATE SIGNATURE

25/11/2015

CASE NO: 81261/2015

and

CASE NO: 80959/2015

In the matter between:

RADOVAN KRECJIR **APPLICANT**

and

THE MINISTER OF CORRECTIONAL SERVICES OF RSA **1st RESPONDENT**

THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES **2ND RESPONDENT**

THE AREA COMMISSIONER: ZONDERWATER MANAGEMENT AREA **3RD RESPONDENT**

THE PRISON HEAD: CORRECTIONAL SERVICES ZONDERWATER MANAGEMENT AREA — 4TH RESPONDENT

THE NATIONAL COMMISSIONER: SOUTH AFRICAN POLICE — 5TH RESPONDENT

THE DIVISIONAL COMMISSIONER, DETECTIVE SERVICES: SOUTH AFRICAN POLICE SERVICE — 6TH RESPONDENT

JUDGMENT: Delivered on **25.11.2015**

RAULINGA J:

INTRODUCTION

[1] Mr Radovan Krecjir, who is the applicant in this matter, is a citizen of the Czech Republic who allegedly escaped from lawful custody in the Czech Republic in 2005. Currently there are extradition proceedings to have him extradited to the Czech Republic.

[2] The applicant is currently incarcerated at the Zonderwater Medium A Correctional Centre as an awaiting trial detainee for various crimes which amongst others include murder, attempted murder and dealing in drugs. On 24 August 2015 the applicant was convicted of kidnapping, dealing in drugs and attempted murder by my brother Lamont J in the Palm Ridge Circuit Court and will be sentenced in due course.

THE TWO URGENT APPLICATIONS

[3] The applicant brought an urgent application under case number 80959/2015 ("the first urgent application") on 7 October 2015 in terms of which relief was sought in the following terms:

"**Part A**

1. That the forms and service are dispensed with in order to hear the matter as one of urgency;

2. That the applicant be afforded the right to consultations with his legal representatives on such terms so as to afford the applicant with the opportunity to instruct his legal representatives in a manner that uphold legal-professional privilege;

3. That the applicant's notebooks and documents which have been confiscated by Correctional Services and/or any other persons, be sealed and that no party may have access thereto until such time as the applicant's legal representatives are provided with the opportunity to inspect same;

4. That the applicant's legal representatives be allowed access to the confiscated documents and notebooks to enable them to determine which aspects the applicant desires to claim privilege over;

5. That the respondents take necessary steps in order to provide the applicant with the following medical treatment:

    5.1 an examination and prescribed treatment by an urologist;
    5.2 an examination and prescribed treatment by an oncologist;
    5.3 an examination and prescribed treatment by a dentist;

5.4 the provision of the following medication and treatment as prescribed by Dr Dikobe (Psychiatrist):

5.4.1 Zoloft;

5.4.2 Xanor;

5.4.3 Dormonoct;

5.4.4 That the applicant be allowed appropriate social interaction with other awaiting trial prisoners and that the respondents take the necessary steps to give effect thereto;

5.5 further psychiatric treatment by Dr Dikobe or any other suitable medical officer.

6. That the respondents return the applicant's television set;

7. That a further report be obtained from the relevant person(s) in order to determine:

7.1 the suitability of providing the applicant with exercise equipment;

7.2 the suitability of access to facilities in order to have contact with the applicant's wife, children and family that are overseas;

8. That the content of this application in so far as it concerns the applicant's personal medical information and all the details of the medical treatment, diagnosis, personal and related information may not be published;

9. That the matter be postponed pending the outcome of matters contained in **Part B**;

10. Costs of suit in respect of **Part A**.

PART B

11. The provision of exercise facilities to the applicant;

12. Access to facilities in order to have contact with the applicant's wife, children and overseas family; and

13. Costs of suit."

[4] The aforesaid urgent application was set down for hearing on Tuesday 13 October 2015, but was subsequently stood down and heard on 14 October 2015 at 14:00.

[5] Following the issue of the first urgent application, a further urgent application was brought under case number 81261/2015 ("the second urgent application") by the applicant on 8 October 2015 in terms of which relief was sought that:

"1. A *rule nisi* is issued calling upon the respondents to show cause on 13 October 2015 at 10:00 or as soon thereafter as the matter may be heard as to why an order in the following terms should not be confirmed as final and that the relief sought as final operates as interim relief pending the return date:

1.1. That the South African Police Service, Correctional Services, their respective personnel and/or agents and/or employees are interdicted from all forms of assault perpetrated against the applicant;

1.2. That the respondents be ordered to pay the costs associated with medical treatment and testing as sought hereunder.

2. Final relief is sought in the following terms:

2.1 That the regular forms and service be dispensed with so as to deal with the matter as one of urgency;

2.2 That the applicant be immediately provided with access to and treatment by a medical specialist;

2.3 That the foresaid treatment include the all required tests for a determination as to the assault of the applicant;

2.4 That the fifth respondent or her duly appointed representatives are ordered to immediately take the applicant to an appropriate facility for the provision of the aforesaid treatments with appropriate security as may be required; and

3. Costs of suit to be determined at the hearing of the return date."

[6] The second urgent application was served on the respondents who appeared at the hearing and filed papers on 9 October 2015 in order to defend the matter.

[7] In the second urgent application the applicant alleged that he had been assaulted by persons under the direction of members of the South African Police Service. The allegations were denied by the respondents who contended that the matter was a fabrication.

[8] The matter was heard by my brother De Vos J, who after the hearing declined to grant the relief of a temporary interdict, however, the relief sought for urgent medical attention was granted.

[9] The order granted was as follows:

"Having regard for the allegations of assault made by the applicant, it is ordered that:

1. The applicant be examined at the Zonderwater Correctional Facility ("Zonderwater") by two medical practitioners, one to be appointed by the applicant, the other by the respondents;

2. The purpose of the examination will be to determine the veracity of the allegations of assault made by the applicant alleged to have taken place at 14:00 on 3 October 2015 at Zonderwater;

3. The applicant is to pay for the costs of his medical practitioner;

4. The aforesaid examination is to take place on Saturday 10 October 2015 between 14:00 and 15:00;

5. The aforesaid medical practitioners are to present the findings of their respective examinations to the Court on or before 13 October 2015;

6. Costs are reserved; and

7. The parties may supplement their papers, if necessary, and may deliver them prior to the hearing of this matter on Tuesday 13 October 2015."

[10] The matter was then postponed and consolidated with the first urgent application which was heard by me on 14 October 2015.

A SYNOPTIC FACTUAL MATRIX

[11] The applicant's application is in relation to a number of complaints which mainly relate to medical treatment which includes psychiatric treatment as prescribed by a Psychiatrist (Dr Dikobe), the right to consult with his legal representatives, the sealing of the documents that were confiscated from him and granting his legal representatives access thereto, return of his TV set and provision of exercise facilities as well as contact with his family.

POINTS *IN LIMINE*

[12] When the matter was called, the respondents raised two points *in limine*. The first point they raised is lack of urgency and the second is lack of utilisation and/or exhaustion of internal remedies.

[13] Regarding lack of urgency the respondents contend that the application is not urgent as it fails to comply with the Rules and Directives of the Court in relation to urgent applications.

13.1 Rule 6(12)(b) of this Court provides as follows:

"In every affidavit or petition filed in support of any application under paragraph (12) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course."

13.2 The applicant is thus required by Rule 6(12) to expressly set out

(i) the circumstances which render the matter urgent and

(ii) the reasons why he cannot obtain proper redress or why compliance with the normal Court Rules will make proper redress impossible.

13.3 In **Luna Meubels Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers 1977 (4) SA 135 (W) at page 137 F;** the Court held as follows:

"Mere lip service to requirements of Rule 6(12)(b) will not do and applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and doing for which the matter must be set down."

13.4 Thus in **Salt and Another v Smith 1991 (2) SA 186 (NM) at para 187** the Court held that:

> *"This Rule entails two requirements namely the circumstances relating to urgency which has to be explicitly set out and secondly reasons why the applicants in this matter could not be afforded substantial redress at a hearing in due course ....*
>
> *Mr Frank conceded that the first requirement has been met but he vigorously argued that the second requirement had not been met .... I agree with Mr Frank that the applicants failed to comply with the requirements of Rule 6(12)(b) and in particular with the second requirement thereof ....*
> *The application by the applicants is therefore refused, on the grounds that the requirements of Rule 6(12)(b) have not been met, with costs."*

13.5 "Urgency" in urgent applications, which are not ex-parte applications under Rule 6(4), involves mainly the abridgement of times prescribed by the rules and, secondly, the departure from established filing and sitting times of the court. **Luna Meubels** *supra.* This entails that the other party may be inconvenienced in that it must attend to the matter within the time frames as dictated by the party seeking relief urgently.

13.6 Further, urgency does not relate only to some threat to some life or liberty, the violation of a person's privacy and dignity in such a

manner that he or she could not be expected to endure the anxiety and embarrassment of a continued violation, may create a degree of urgency which justified the hearing of the application not in the ordinary course. **Prinsloo v RCP Media Ltd t/a Rapport 2003 (4) SA 456 (T) at 462 B-F.**

[14] Whereas the issue of liberty, such as arrest and detention, may trigger an urgent application, it is not in all matters that urgency may arise - this will depend on the circumstances of each individual case. It maybe that seeking relief from court was necessary in order to confirm the allegations of the assault. However, the fact that the medical report is not definitive of the said allegations may entail that such an assault did not take place. Moreover, the findings of the two medical doctors differ on the issue of injuries. As to the allegations that the applicant did not have an opportunity to lodge complaints to the relevant authorities or his complaints were otherwise ignored, these will be dealt with in this judgment herein below. It is also instructive at this stage to mention that the lack of exhaustion of internal remedies might have marred the urgency in this case. This may include other aspects pertaining to this case.

[15] Although I am inclined to accept that the applicant is an arrested and detained person, I am afraid that the circumstances of this case do not qualify it to be treated as an urgent matter. In fact, the said urgency was

plagued by the enrolment of the second application in case no 81261/2015.

LACK OF UTILIZATION AND/OR EXHAUSTION OF INTERNAL REMEDIES

[16] In terms of section 21 of the Correctional Services Act 111 of 1998 ("the Act"), the applicant has recourse to internal remedies with a view to addressing any complaints and/or requests which may arise during the course of his incarceration.

[17] Section 21 of the Act, provides as follows:

> *"(1) Every inmate must on admission and on a daily basis, be given the opportunity of making complaints or requests to the Head of the Correctional Centre or a correctional official authorised to represent such Head of Correctional Centre.*
>
> *(2) The official referred to in subsection (1) must-*
>
> *(a) record all such complaints and requests and steps taken in dealing with them;*
>
> *(b) deal with complaints and requests promptly and inform the inmate of the outcome;*
>
> *(c) ...*
>
> *(3) If an inmate is not satisfied with the response to his or her complaint or request, the inmate may indicate this together*

with the reasons for the dissatisfaction to the Head of the Correctional Centre, who must refer the matter to the National Commissioner.

(4) ...

(5) *If not satisfied with the response of the National Commissioner, the inmate may refer the matter to the Independent Correctional Centre Visitor, who must deal with it in terms of the procedures laid down in section 93."*

[18] The applicant submits that on 4 October 2015 he wrote a letter to the Area Commissioner, the Area Co-ordinator Corrections and the Head Correctional Centre. That on the last page of the aforesaid letter, applicant made reference to "a sensitive" issue which he desired to discuss personally with the Head of the Correctional Centre. The applicant submits further that remedies suggested by the respondents of escalating the matter to the National Commissioner and thereafter the Independent Correctional Centre Visitor would defeat the purpose of the immediacy envisioned in section 21 of the Act. This statement in the words of the applicant is an admission that the internal remedies were not exhausted. The internal remedies as appear in section 21 of the Act must be exhausted as a conjunctive whole and not disjunctively. The reason why such remedies are provided is to ensure that where no administrative division is taken by a particular person or sector, the next rung of decision making

must be pursued. Failure to do this plagues the whole chain of events. There is a duty on the applicant to exhaust this process and state if such complaints were registered and what the outcome was of the various levels of decision making.

[19] Thus in **Masilela and Others vs The Minister of Correctional services and Others NGH, Case No: 63532/2012 and 16995/2013,** in a matter dealing with inmates' dissatisfaction with their transfer, the Court held that:

> *"[13] Should an offender be of the view that his classification is incorrect or that his placement in a particular correctional centre is unreasonable, irrational, or mala fide, the complainants' procedure provided for in section 21 must be followed.*
>
> *[14] An offender may, of course, also follow same route by way of a request to be transferred to another centre. If the Head of the relevant Correctional Centre resists in a manner the inmate regards as unsatisfactory to a complaint or request, an appeal may be directed to the National Commissioner. If the inmate is still dissatisfied with the National Commissioner's response, he has the option to seek the assistance of the Independent Prison Visitor."*

I may add, that there is nothing that prevents the applicant from escalating the matter to the next level of decision making if no response was received from the other levels. This the applicant

failed to do. These challenges being administrative actions, the applicant ought to have brought them in terms of the Administrative Justice Act 3 of 2000.

[20] This application should not have been brought to this Court prior to the exhaustion of the internal remedies available to the applicant. Otherwise, the application should have been brought by way of a review application either in terms of Rule 53 or PAJA. The application fails to meet the prerequisites of urgency.

MEDICAL TREATMENT SOUGHT BY THE APPLCIANT

[21] It is submitted on behalf of the applicant that he is denied or not afforded adequate medical treatment. In particular, applicant alleges that he has an enlarged testicle and other urological complaints and that he has lumps on his body for which it was recommended that he should see an oncologist which has been denied by the State. Further that the applicant is entitled to this right and not even security concerns militate against this right. Although the State has the obligation to provide medical treatment to the applicant *ex lege*, the applicant is willing to pay for the services. Applicant makes a plethora of other allegations on this aspect.

[22] Section 27(1)(a) of the Constitution Act 108 of 1996 ("the Constitution') provides that:

"Everyone has the right to have access to-

(a) *Health care services, including reproductive health care."*

[23] Section 12(1) of the Act provides:

> *"The Department must provide, within its available resources, adequate health care services, based on the principles of primary health care, in order to allow every inmate to lead a healthy life."*

Section 12(2)(a:

> *"Every inmate has the right to adequate medical treatment but no inmate is entitled to cosmetic medical treatment at State expense."*

Section 12(2)(b):

> *"Medical treatment must be provided by a correctional medical practitioner, medical practitioners or by a specialist or health care institution or person or institution identified by such correctional medical practitioner except where the medical treatment is provided by a medical practitioner in terms of subsection (3)."*

Section 12(3):

> *"Every inmate may be visited and examined by a medical practitioner of his or her choice and, subject to the permission of the Head of the Correctional Centre, may be treated by such practitioner, in which event the inmate is personally liable for the costs of any such consultation, examination, service or treatment."*

Section 12(4)(a):

> *"Every inmate should be encouraged to undergo medical treatment necessary for the maintenance or recovery of his or her health."*

Regulation 7(1)(a):

> *"Primary health care must be available in a correctional centre at least on the same level as that rendered by the State to members of the community."*

Regulation 7(2):

> *"The services of a correctional medical practitioner and a dental practitioner must be available at every correctional centre."*

Regulation 7(3):

> *"The prison's correctional medical practitioner is responsible for the general medical treatment of inmates and must treat an inmate referred to him or her as often as may be necessary."*

[24] In replication to the averments of the applicant, the respondents submit that:

[a] In regard to the treatment by urologist and/or oncologist, on 3 July 2015, the applicant was seen by a Correctional Centre sessional doctor, Doctor Manama, in relation to these complaints. The doctor wrote a referral letter which was meant for the attention of

any practitioner of the applicant's choice. The applicant's lawyers approached Lieutenant Colonel Gininda the ("investigating officer") about the referral letter. For security reasons, the investigating officer requested the details of the medical practitioner, but to no avail. As a result the referral process stalled pending the provision of such particulars.

[b] Concerning the issue of 16 September 2015, when Doctor Dikobe prescribed medication and recommended in a letter to the Head of the Correctional Centre that the applicant be moved to a facility where he can interact with other awaiting trial inmates, the respondents submit that Dr Dikobe attended to complaints in relation to depression and also the transfer of the applicant to a facility where he can interact with other detainees. The respondents further submit that whilst the Correctional Centre Management was busy considering Dr Dikobe's recommendation in relation to the conditions of incarceration, the applicant became involved in an escape plan. It was therefore not advisable to transfer the applicant since there is no other centre that has the necessary capacity to contain the risk posed by the applicant. Zonderwater Medium A Correctional Centre is the most secure centre with adequate resources and security measures to contain the security risk posed by the applicant. Dr Dikobe's prescription

was given directly to the applicant who undertook to pass it to his family for them to obtain the prescribed medication for him.

[c] With regard to dental and general medical treatment, the respondents submit that the applicant was attended to by dentists on 25 June 2015. No new dental related complaints have been reported by the applicant which has not been attended to. All known complaints that require a doctor's attention, which were registered by the applicant to the nursing staff, were referred to medical doctors.

[25] It seems to me that there is no dispute between the applicant and the respondents that the applicant is entitled to consultation, examination, services or treatment by a medical practitioner of the state or a medical practitioner of his own choice. It can be confirmed that the parties are *ad idem* that there must be compliance with the provision of the Constitution and the Act that the applicant must be provided with adequate health care services within the Departments available resources. They also agree that where the applicant is examined and treated by a medical practitioner of his own choice, he will be personally liable for the costs. The difference lies in the substance and circumstances under which the treatment must take place.

[26] In my view, the applicant has been receiving adequate medical treatment by state medical doctors. On 3 July 2015 the applicant was seen by a Correctional Centre sessional doctor, Doctor Manama, in relation to his allegations of an enlarged testicle and other urological complainants. The investigating officer requested details of the applicant's medical practitioner to enable the Police Service to verify the registration of such medical practitioner but in vain. The application in this regards falls to be dismissed.

[27] On 16 September 2015, the applicant was seen by Dr Dikobe who prescribed medication and recommended that applicant be moved to a facility where he can interact with other awaiting trial inmates. When the Correctional Centre Management was busy considering Dr Dikobe's recommendations in relation to his incarceration, the applicant became involved in an escape plan. The respondents had no alternative, but to abandon their endeavours to transfer him. That transfer would have meant transfer within Zonderwater Medium A Correctional Centre which is considered the most secure centre with adequate resources and security measures. Therefore the applicant spoiled his own broth and did it at his own peril.

[28] Concerning dental and general medical treatment, the applicant was attended to by dentists on 25 June 2015 and 17 July 2015 respectively. There are no new dental related medical complaints that have been

reported by the applicant which have not been attended to. As submitted by the respondents, all known complaints that require a doctor's attention which were registered by the nursing staff were referred to medical doctors. There is nothing compelling that requires the granting of this relief on an urgent basis.

CONFISCATED DOCUMENTS

[29] In his notice of motion, the applicant seeks relief that the notebooks and documents which have been confiscated by Correctional Services and/or any other persons, be sealed and that no party may have access thereto until such time as the applicant's legal representatives are provided with the opportunity to inspect same. Further, that the applicant's legal representatives be allowed access to the confiscated documents and notebooks to enable them to determine which aspects the applicant desires to claim privilege over. However, the applicant does not adequately traverse this issue in his affidavit and heads of argument.

[30] The events that led to the confiscation of the said documents are that on 25 September 2015, the state authorities received information to the effect that the applicant and other inmates were planning to escape from custody. In the light of the seriousness of this matter, an arrangement was made to conduct a massive search in the Correctional Centre which was conducted on 26 September 2015. During the search the following illegal items were discovered in the applicant's cell:

- 1x Pocket knife;
- 1x 9mm pistol;
- 2x Firearm magazines (each of them loaded with 15 rounds of ammunition). One of these magazines was loaded on the firearm with one live ammunition already in the firearm chamber (ready to be fired);
- 4x Cell phones;
- 2x Hacksaw blades;
- 6x Cell phone sim cards;
- 8x Memory sticks;
- 1x Screw driver; and
- Cable ties and 2x double sided tapes.

[31] A stun gun was also discovered at the kitchen area adjacent to the applicant's cell to which only the applicant has access (the key to this place is said to be kept by the applicant). A diary was confiscated from the applicant which upon perusal was found to contain notes and/or information either linked to the escape plan/or other illicit criminal activities. (Bundle of documents: Answering Affidavit page 114 para 10.23.)

[32] On 27 September 2015, during a further search a note book was discovered and confiscated from the applicant which upon inspection was found to contain a plan of the Correctional Centre, pictures of the

Correctional Centre, a marked area where a helicopter would land and names of other inmates. (Bundle of documents: Answering Affidavit page 114 – 115 para 10.24.)

The aforesaid documents together with the rest of the contra-band referred above, were handed over to the South African Police Service and are currently the subject of a police investigation that is under way. (Bundle of documents: Answering Affidavit page 115 para 10.25.)

[33] In the first place, the applicant may not demand the return of the documents spending the finalization of the investigation in relation to the escape and the contra-band found in possession of the applicant. This seems to me to be a very serious issue that requires an intensive investigation. If the documents are sealed and privileged that will hamstring the police investigations which will jeopardise progress in the finalisation of the case. Secondly, the horse has already bolted in that the police have already had sight into the documents for purposes of the investigation. Thirdly, the applicant does not clearly describe or identify the contents of the said documents, which as the author thereof must know about the extent of their contents. This court is therefore not competent to issue an order in accordance with the relief sought.

RIGHT TO CONSULT WITH LEGAL REPRESENTATIVES

[34] The applicant contends that on 2 October 2015, his legal representatives attended the facility at Zonderwater and commenced consulting with him at 11:00. He was only permitted to see his legal representatives for an

hour which was continuously interrupted by the prison guards. During consultation there were prison warders standing immediately behind him within earshot as he was not afforded private consultation with his lawyers. When the lawyers objected, they were informed that the facilities do not allow for such. The applicant had to consult under protest as he had no other option. The consultations continued under constant pressure for the lawyers were told to leave as the time was up. These allegations are confirmed by applicant's attorneys, who were present when this happened.

[35] Before legal professional privilege can be claimed, the communication in question must have been made to a legal adviser acting in a professional capacity, in confidence, for the purpose of pending litigation for the purpose of obtaining professional advice. The client must claim the privilege and the lawyer can claim the privilege on behalf of his client once the latter has made an informed decision. **Principles of Evidence, Third Edition; Schwikkard, Van der Merwe, Juta**, page 147, para 10.3.2.

[36] Section 17(2) of the Act provides:

> *"The minister may, by regulation, impose restrictions on the manner in which such consultations are conducted if such restrictions are necessary for the safe custody of inmates, but legal confidentiality must be respected."*

and Regulation 12(c) to the Act provides:

"The consultation must take place in sight, but out of earshot of Correctional officials.

[37] Section 35(3)(b) of the Constitution states that:

"Every accused person has the right to a fair trial, which included the right to have adequate time and facilities to prepare a defence."

[38] The respondents submit that all the allegations made by the applicant in relation to the right to consult with legal representatives are inaccurate and misconceived. Further that the request made by the legal representatives to be afforded privacy was complied with and that their officials were not within earshot of the consultations.

[39] I part ways with the respondents on this aspect, in that the allegations the applicant makes are reflected in Eksteen's confirmatory affidavit (John Eksteen is of the applicant's attorneys). The allegations are also confirmed by Jean-Pierre Venter of the applicant's attorneys. The respondents do not give a detailed explanation of what transpired. They only offer a scanty allegation that the applicant's contention is founded on a single baseless allegation to the effect that on 2 October 2015, his consultation was constantly interrupted. The respondents do not seem to dispute the restrictions of consultation time. This is an inadvertent admission of the infringement of Regulation 12(2)(b) which prohibits restriction of time to consult, except in exceptional circumstances. Section 35(3)(b) of the Constitution guarantees the applicant's right to

adequate time for preparation of his defence in order for the fair trial standard to be met.

[40] *In casu*, the applicant was consulting with his legal representatives who were acting in their professional capacity, in confidence, for the purpose of pending litigation or for the purpose of obtaining professional advice. Although the respondents' officials had to be within sight of the consultations and not within earshot, they were not entitled to interrupt the said consultation. The respondents therefore, might have infringed the applicant's right by interrupting and restricting the consultation time.

[41] Having said this, I am minded to refer to an important dictum in **Gardener v East London Transitional Local Council and Others 1996 (3) SA (E) at 1160**, in which the court observed that:

> *"Fairness is a relative concept. The meaning to be attached to procedural fair administrative action must therefore, be determined within the particular framework of the act in question viewed in the light of the relevant circumstances. The procedure must be fair not only to the holder of the right affected by the administrative act, but also to the Executive or administration acting in the public interests."*

[42] Without fear of contradicting my previous assertions in paragraph [40] above, I can merely say that the applicant is not an ordinary person to deal with. He does not make the work of the state officials easy at all. While he must be granted facilities and time to consult, this must be done with great caution. His rights may have to be limited viewed in the light of

the circumstances in which the state officials find themselves. They sit between a hard place and a rock. These rights must be compared and balanced carefully. Moreover, the applicant did not exhaust the internal remedies and as a consequence I cannot grant this relief.

RETURN OF APPLICANT'S TELEVISION AND EXERCISE EQUIPMENT

[43] The applicant bemourns the fact that a television set was removed from his cell and that he is denied the right to exercise. Applicant contends that in present circumstances he is detained as an awaiting sentence inmate which afford him greater rights and privileges than that of a sentenced inmate.

[44] The television set and the gym equipment were taken away from the applicant's cell by the police for security reasons. The gym equipment is to be used as an exhibit and relating to the attempt to escape. It is prudent to mention, as submitted by the respondents, that on 13 October 2015 at about 09:00 a Nokia cell phone, seven (7) cell phone batteries and two (2) cell phone sim cards were discovered during a search that was conducted by the officials in the applicant's cell. The applicant misused the privilege that was granted to him to procure and keep the gym equipment in that the firearm, magazines, ammunition were found hidden in his gym bicycle. Further to that, a frying pan which was confiscated on 26 September 2015 and returned to him on 30 September 2015 was used by him to hide contra-band. In any event, the applicant is entitled to at least one hour exercise per day.

[45] It seems to me that the applicant compromises any privilege that is granted to him to procure and keep equipment's or items in his cell. The locking away of the television set is part of the proactive measurers to prevent any further risks.

ACCESS TO FAMILY

[46] It is submitted by the applicant that he should be afforded facilities in order to have contact with his wife, children and family overseas. The applicant offers to provide at his cost, a computer to the Correctional Centre for access to his family over Skype in order to give effect to Dr Dikobe's recommendation for social interaction.

[47] The respondents' submission on this issue is that applicant has a right to keep contact with his family members irrespective of where they come from. They also submit that the applicant gets visits and is allowed to make calls.

[48] It is my considered view that the applicant cannot be granted access to family over Skype considering his past and current conduct. The applicant has proven himself as someone very skilful and resourceful in circumventing security measures and capable of hiding contra-band anywhere.

PUBLISHING OF APPLICANT'S MEDICAL DETAILS

[49] I agree with the applicant that his personal medical information may not be published by the media. However, the media is not before me and I cannot make such an order.

ALLEGATIONS OF ASSAULT

[50] The gravamen of the contentions of the applicant in this regard is that the South African Police Service, Correctional Services, the respective personnel and/or agents and/or employees are interdicted from all forms of assault perpetrated against the applicant. Further that the applicant be immediately provided with access to and treatment by a medical specialist.

[51] The respondents submit that the applicant by virtue of section 21(1) and (2)(c) of the Act, is entitled to immediate medical attention if there is any complaint of alleged assault. Further, that the applicant failed to immediately report the alleged assault of 3 October 2015 when he was handed back to his legal representatives, after he was removed for a short time for investigations in his cell.

[52] On the 9th October 2015, De Vos J ordered that the applicant be examined at Zonderwater by two medical practitioners, one to be appointed by the applicant, the other by the respondents. The purpose of the examination was to determine the veracity of the allegations of assault made by the applicant alleged to have taken place at 14:00 on 3 October 2015 at Zonderwater.

[53] After the examination on 10 October 2015, the two doctors were *ad idem* in their respective reports that there was a small mark on the wrist of the applicant. However, Dr Lombard appointed by the applicant, noted that normal readings of the tests used to check for electrical shocks were to be expected as the tests were administered outside the time frame that would allow for abnormal readings to be detected.

[54] There is no evidence of injuries caused by a stun gun. This is confirmed by the findings of the two doctors that no assault occurred. I consider the findings as a confirmation of the true state of affairs. This, therefore, dispenses with the need to provide access to and treatment by a medical specialist. The relief sought must be dismissed.

CONCLUSION

[55] The drafters of the Constitution could not have anticipated that the right to fair administration should be stretched to such lengths as to undermine the foundation upon which a competent and civilised administration is structured. In all democracies individual rights are limited to the extent that those rights encroach upon the rights of others or exceed the bounds of reasonableness where public interest and public policy would feature significantly. Good government finds it ratiocination in public policy and interest. It would consequently be unrealistic and illusory to expect any government to function effectively without the slightest intimation on the individuals' right to fair administration.

In given circumstances public policy and public interest will hold sway over the rights of individuals in order to ensure effective governance. **Deacon v Controller of Customs and Excise 1999 (2) SA 905 (SECLD).**

See also: **Gardener v East London Transitional Local Council and Others** *supra.*

[56] Given the circumstances in this case, public policy and public interest must hold sway over the applicant's rights in order to ensure effective administration of the facilities of the respondents. The applicant's application falls to be dismissed.

[57] **Accordingly I make the following order:**

(1) The matter is not urgent.
(2) The application is dismissed with costs.
(3) Costs are to include the costs of two counsel.
(4) The second application is dismissed.
(5) There is no order as to costs in the second application.
(6) The order in (5) above only pertains to the reserved costs of 9 October 2015.

TJ RAULINGA
JUDGE OF THE HIGH COURT

APPEARANCES

Heard on	:	09 October 2015
For Applicant	:	*Adv L Morland*
	:	BDK Attorneys c/o Jacobson & Levy Inc
For Respondents	:	*Adv MTK Moerane SC*
		Adv EB Ndebele
Instructed by	:	State Attorney Pretoria

/pfm