



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

CASE NO: 1067\2016

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

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DATE

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SIGNATURE

In the matter between:

TUMELO MAPODILE

Applicant

And

THE MINISTER OF CORRECTIONAL SERVICES

1st Respondent

**THE AREA COMMISSIONER FOR CORRECTIONAL
SERVICES (JOHANNESBURG MANAGEMENT AREA)**

2nd Respondent

THE HEAD OF JOHANNESBURG PRISON MEDIUM B

3rd Respondent

THE HEAD OF SECURITY (MEDIUM B)

4th Respondent

J U D G M E N T

MABESELE, J:

[1] The Applicant is currently serving sentence in the Johannesburg Medium 'B' Correctional Centre, popularly known as 'Sun City'. He is gay.

[2] On the 06th April 2016 he brought an urgent application to this Court, seeking an order, directing the Respondents, in particular the Third and Fourth Respondents, to accommodate him in a single cell or in the same cell with inmates of the same sexual orientation.

[3] The application was not formally opposed. The Respondents failed to file opposing papers despite the fact that the application was served on them on the 30th March 2016 through the office of the State Attorney, Johannesburg.

[4] After I had read the papers and considered the matter as well as the submissions made by Mr Reggy Pooe from the office of the State Attorney I granted order dated 06 April 2016, directing the Respondents to accommodate the Applicant in a single cell or in one cell with inmates of the same sexual orientation.

[5] I undertook to provide reasons later which I now provide.

[6] The legitimate complaint of the Applicant was that he was accommodated in one cell with inmates of different sexual orientation. The inmates regarded him as a woman and continuously harassed him. He had raised this matter with the prison authorities on numerous occasions and had provided them

with a letter from the medical doctor, recommending that he be accommodated either in a single cell or in a cell with inmates of the same sexual orientation.

[7] The letter forms part of the papers. It reads as follows:

“The Unit Manager

Section B

Johannesburg Prison

Medium B

Re: Mr T.Mapodile

Dear Sir

The above is presently under my treatment. Due to his gay orientation he is being harassed in this section by inmates. Could he be placed in a single cell or share cell with inmates of the same sexual orientation if possible, please.

Thanking you

R.C Wrinbarnn”

[8] The complaint of the Applicant and the recommendations of the medical doctor fell into deaf ears. It was for this reason that the Applicant approached this Court for protection.

[9] Mr Poee advised me that accommodation was available for the Applicant in the cell which was occupied by two inmates of the same sexual orientation provided the Applicant was prepared to sleep on the floor as there are insufficient beds in that cell. The Applicant did not have difficulties sleeping on the floor. The Applicant pointed out that he had been sleeping on the floor in the cell wherein he was accommodated.

[10] Mr Poee brought to my attention that due to overcrowding in the Johannesburg Medium 'B' Correctional Centre, it is not always possible for the prison authorities to accommodate gay people in separate cells.

[11] Mr Poee initially requested that the matter be postponed to Thursday of that week of urgent Court to afford him an opportunity to investigate the reasons for the prison authorities not to address the complaint of the Applicant and the recommendations of the medical doctor. I refused to postpone the matter due to continuous harassment and humiliation of the Applicant by the inmates and the unwillingness by the prison authorities to address the legitimate complaint of the Applicant.

[12] Gays and lesbians had been part our society for many years. They are not associated with a particular race as perceived by some members of our society. African people, particularly Basotho, guided by their forefathers, had been using the word 'tarasi' for many years to describe gay or lesbian.

[13] There had not been any controversy around the issue of homosexuality in the community of Basotho. They always discouraged homophobia and had accorded respect to gays and lesbians.

[14] The point is that the era before democracy which preferred Christianity from other religions promoted stereotype societal behaviour which denied gays and lesbians freedom of expression which includes freedom to express feelings. Their integrity was not accepted. They were subjected to emotional torture to say the least and were forced to subordinate themselves to the societal norms and values and cultural practices which only recognised heterosexuality and widely accepted definition of 'man', 'woman' and 'spouse' as explained in the bible¹

[15] Cameron JA, in *Fourie and Another v Minister of Home Affairs and Others*² explains the hardships which gays and lesbians are still going through in our society, as follows:

“ The sting of the past and continuing discrimination against both gays and lesbians” lies in the message it conveys, namely, that viewed as individuals or in their same-sex relationships, they “ do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships.” This, “denies to gays and lesbians that

¹ Genesis 2: 21-25 reads: “And while he was asleep he took out one of the man’s ribs and close up the flesh. He formed a woman out of the rib and brought her to him. Then the man said: ‘At last here is one of my own kind-bone taken from my bone, and flesh from my flesh. Woman is her name because she was taken out of man’. That is why a man leaves his father and mother and is united with his wife, and they become one”

² 2005(3) SA 429 (SCA) at 439-C

which is foundational to our Constitution and the concepts of equality and dignity” namely that “all persons have the same inherent worth and dignity,” whatever their other differences may be’

[16] He stated that cases have established that gays and lesbians are a permanent minority in society who have suffered patterns of disadvantages and are consequently exclusively reliant on the Bill of Rights for their protection.

[17] These views are shared by Sachs J, in the matter of *Lesbian and Gay Equality Project V Minister of Home Affairs*³, stating that our Constitution⁴ acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.

[18] Sachs J added that a democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are.

[19] He pointed out previously that people were subjected to extensive prejudice⁵ because of what they were or what they were perceived to be, not because of what they did. The result was that a significant group, because of its sexual non-conformity, was persecuted and marginalised.

³ 2006(1) SA 524(CC) at 549-F

⁴ The Constitution of the Republic of South Africa Act, 108 of 1996

⁵ National Coalition for Gay and Lesbian Equality v Minister of Justice and Others 1998(12) BCLR 1517 at 1521-G

[20] The Constitution, in its founding provisions, describes the Republic of South Africa as one, sovereign, democratic state founded, *inter alia*, on human dignity, the achievement of equality and the advancement of human rights and freedoms. It is the supreme law of the Republic. Law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.

[21] The Bill of Rights is the cornerstone of democracy in South Africa⁶. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedoms.

[22] Section 10 of the Constitution provides that:

'Everyone has inherent dignity and the right to have their dignity respected and protected'

[23] O'Regan J, in *Dawood, Shalabi and Thomas V Minister of Home Affairs*⁷ states clearly that section 10 makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected.

[24] With the view to comply with and to promote the spirit and objects of the Bill of Rights the Minister of Correctional Services has, rightly, under section 134 of the Correctional Services Act⁸ made the regulations in the Schedule which commenced on 31 July 2004. Chapter two of the regulations address

⁶ Section 7 of the Constitution

⁷ 2000(3) SA 936 (CC) at 962-B

⁸ Act 117 of 1998

human dignity under the heading: 'Custody of all prisoners under conditions of human dignity'

[25] The regulations protect, *inter alia*, the dignity and privacy of certain categories of the prisoners except gay people.

[26] Regulation 2 (f) provides:

"Whenever separate correctional centre for males and females are established on the same site or on separate sites but in proximity of each other, or whenever separate sections of a correctional centre are available for the reception of male or female inmates, the following requirements must be observed:

- (i) The locks of the doors and gates of the correctional centre or section for males and those correctional centre or section for females must not correspond.*
- (ii) The keys of a correctional centre or section for females must be permanently in the possession of a female correctional official.*
- (iii) Any male person visiting a correctional centre or section for females must be accompanied by a female correctional official during the full period of visit"*

[27] It is apparent that male inmates are kept separate from female inmates.

[28] Regulation 2(h) provides that inmates between the ages of 18 and 21 years must be detained separately from inmates who are over the age of 21 years.

[29] Regulation 2 (i) makes provision for inmates suffering from mental or chronic illness or whose health status will be affected detrimentally or whose health poses a threat to other inmates if detained in a communal cell to be detained separately on request of the correctional medical practitioner.

[30] Gays who are in custody are part of the community of prisoners which include categories of prisoners mentioned in regulations (2) (f, h and i) and whose right to dignity, to privacy and to health care are protected due to their peculiar status.

[31] It is beyond debate that gays, too, have their own peculiar status. Therefore they are entitled to the same protection which is afforded to the categories of prisoners mentioned above. Such protection should not be limited to dignity and privacy but should include equality.⁹

[32] The prison authorities are obliged to protect these rights and must not create an impression to the prison community and to gay people in particular, as in the present case, that elevating gays to the same level with the categories of prisoners mentioned in regulation (2) and accommodating them in separate cells is a favour.

⁹ Section 9(3) of the Constitution prohibits unfair discrimination directly or indirectly against anyone on the grounds of sexual orientation, amongst others.

[33] For these reasons, I granted order dated 06 April 2016.

M.M MABESELE
(Judge of Gauteng Local Division)

Appearances for the Applicant : In person

Appearance for the Respondent : State Attorney, Johannesburg