**IN THE HIGH COURT OF SOUTH AFRICA**
**(EASTERN CAPE DIVISION – PORT ELIZABETH)**

**CASE NO: 1848/2012**
**DATE HEARD: 29/11/2012**
**DATE DELIVERED: 18/12/2012**

In the matter between

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| **LUCIANO METH** | **APPLICANT** |
| and | |
| **THE MINISTER OF CORRECTIONAL SERVICES** | **1ST RESPONDENT** |
| **THECOMMISSIONER OF CORRECTIONAL SERVICES** | **2ND RESPONDENT** |

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**JUDGMENT**

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**ROBERSON J:-**

[1] The applicant was formerly a sentenced inmate at St. Alban's Correctional Centre, Port Elizabeth. While still serving his sentence, he instituted an action in the High Court against the respondents for payment of damages arising from (a) malicious prosecution and (b) the unlawful imposition of various penalties for alleged theft.

[2] Following a trial, his claim was dismissed with costs. The court *a quo* granted him leave to appeal to the full bench of this division. The respondents indicated that they were not prepared to waive security for their costs of appeal, and these costs have been fixed by the Registrar in the sum of R40 000.00. The applicant now applies, in terms of Rule 49 (13), to be released from providing security for the respondents' costs of appeal. The respondents opposed the application.

[3] In *Giddey NO v Barnard and Partners* 2007 (5) SA 525 (CC), O'Regan J, in dealing with the exercise of a court's discretion in terms of s 13 of the Companies Act 61 of 1973, said the following at paragraph [30]:

> "In my view there can be no doubt that in exercising its discretion in terms of s 13, a court must bear in mind the provisions of s 34[1] and weigh them in the light of other factors laid before it. ……………………………. On one side of the scale must be weighed the potential injustice to the plaintiff or applicant if it is prevented from pursuing a legitimate claim. This incorporates a recognition of the importance of the right of access to courts. On the other side of the scale must be placed the potential injustice to the defendant if it succeeds in its defence but cannot recover its costs. Relevant considerations in performing this balancing exercise will include the likelihood that the effect of an order to furnish security will be to terminate the plaintiff's action; the attempts the plaintiff has made to find financial assistance from its shareholders or creditors; the question whether it is the conduct of the defendant that has caused the financial difficulties of the plaintiff; as well as the nature of the plaintiff's action."

[1] S 34 of the Constitution which provides: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

In my view, the first and fourth of these considerations are relevant to the present matter.

[4] The applicant set out in some detail his personal history and his present financial circumstances. Since 1989 he has been convicted of numerous offences and has served a number of prison terms. In 2005 he was sentenced to 10 years' imprisonment for theft, and was released on parole on 31 August 2010. Since his release he has only had casual employment, stating that since April 2012 he is fortunate if he works two days a week, earning R100.00 a day. He has no assets, other than personal items of no commercial value. He lives with his partner, their son born in 2002, and his partner's two brothers, one of whom has cancer and the other is mentally disturbed. His partner is the only income earner in the household, earning a gross salary of a little over R5 000.00. She owns the property in which they all live. The applicant's attorneys have acted from the outset without financial cover. Clearly the applicant cannot afford to pay the required security. The deponent to the answering affidavit seemed to suggest that his partner could assist him in raising the funds, because she owns immovable property. There is no merit in this suggestion. If the applicant is not released from providing security, his appeal will be terminated.

[5] The applicant is of the view that he has a reasonable prospect of success on appeal. In dealing with this aspect, I shall only deal with his claim arising from the alleged unlawful imposition of penalties.

[6] His particulars of claim in the action were attached to his affidavit. After alleging that two Correctional Services members had laid a charge of theft against him at the Kabega Park Police Station, he set out the elements of a claim for malicious prosecution. He went on to allege as follows:

"12

12.1 The first and second defendants, alternatively members in the employ of the Department of Correctional Services:

12.1.1 Acted wrongfully and unlawfully in failing to hold a disciplinary enquiry as provided for in section 24(1) of the Act[2] read together with section 24(2) or 24(4) of the Act; and

12.1.2 Acted wrongfully and unlawfully in sanctioning the plaintiff to penalties, the details of which are more fully set out herebelow, which exceeded the penalties that the defendants may have imposed as provided for in terms of section 24(3) or in the alternative, section 24(5) of the Act.

13 As a consequence of the criminal charge of theft being laid against the Plaintiff, the Plaintiff;

13.1 Was not allowed contact visits for a period of four (4) months;

13.2 Was not allowed to proceed to study for a grade 12 qualification in 2009 although he had already registered to do so;

[2] Correctional Services Act 111 of 1998

13.3 Was not allowed to participate in any sporting activity, specifically, rugby although the Plaintiff had already been selected to represent St. Albans management area;

13.4 Lost his duty in the St. Albans Medium B kitchen as a food handler although he has a Diploma in Professional Catering from Intec College.

13.5 Was not allowed to continue to study for a further catering diploma with Bosasa;

13.6 Forfeited the R70,00 (SEVENTY RAND) per month allowance which food handlers are paid and any subsequent increases in those allowanced to which he may have become entitled.

13.7 Was demoted from A-group status to B-group status for a period of four months;

13.8 Was moved from a cell within which kitchen staff are housed to a communal cell with the loss of attendant privileges, inter alia, certain extra freedom of movement, easier access to telephone facilities, opportunities to obtain extra food, the use of superior ablution facilities and being housed in a cell unit with fewer co-offenders."

[7] In their plea, the respondents admitted that the charge of theft had been withdrawn against the applicant but denied the other allegations relating to malicious prosecution. They admitted that the applicant was not subjected to the internal disciplinary procedures as provided for in s 24 of the Correctional Services Act 111 of 1998 (the Act), for the reason that the offence committed by the applicant was discovered by members of the South African Police Services, who conducted their own investigations. In the minutes of the Rule 37 conference it was recorded that "The Defendants were not obliged in terms of the Act to hold an internal hearing." The respondents further admitted that all

the "privileges" set out by the applicant in his particulars of claim had been withdrawn, because he had committed an offence.

[8] S 24 of the Act provides as follows:

**24 Procedures and penalties**

(1) Disciplinary hearings must be fair and may be conducted either by a disciplinary official, a Head of the Correctional Centre or an authorised official.

[Sub-s. (1) substituted by s. 12 of Act 32 of 2001.]

(2) *(a)* A hearing before a Head of the Correctional Centre or the authorised official must be conducted informally and without representation.

[Para. *(a)* substituted by s. 18 *(a)* of Act 25 of 2008.]

*(b)* At such hearing the inmate must be informed of the allegation against him or her, whereupon the inmate has the right to refute the allegation.

*(c)* The proceedings of a hearing contemplated in paragraph *(a)* must be recorded in writing by a correctional official.

[Sub-s. (2) substituted by s. 12 of Act 32 of 2001.]

(3) Where the hearing takes place before the Head of the Correctional Centre or the authorised official, the following penalties may be imposed severally or in the alternative:

*(a)* A reprimand;

*(b)* a loss of gratuity for a period not exceeding one month;

*(c)* restriction of amenities for a period not exceeding seven days.

[Sub-s. (3) substituted by s. 12 of Act 32 of 2001.]

(4) At a hearing before a disciplinary official an inmate-

*(a)* must be informed of the allegation in writing;

*(b)* has the right to be present throughout the hearing, but the disciplinary official may order that the accused inmate be removed and that the hearing continue in his or her absence if, during the hearing, the accused inmate acts in such a way as to make the continuation of the hearing in his or her presence impracticable;

*(c)* has the right to be heard, to cross-examine and to call witnesses;

*(d)* has the right to be represented by a legal practitioner of his or her choice at his or her own expense, unless a request to be represented by a particular legal practitioner would cause an unreasonable delay in the finalisation of the hearing in which case the inmate may be instructed to obtain the services of another legal practitioner; and

*(e)* has the right to be given reasons for the decision.

[Sub-s. (4) substituted by s. 12 of Act 32 of 2001 and amended by s. 18 *(b)* of Act 25 of 2008.]

> (5) Where the hearing takes place before a disciplinary official, the following penalties may be imposed severally or in the alternative:
> *(a)* a reprimand;
> *(b)* a loss of gratuity for a period not exceeding two months;
> *(c)* restriction of amenities not exceeding 42 days;
> *(d)* in the case of serious or repeated infringements, segregation in order to undergo specific programmes aimed at correcting his or her behaviour, with a loss of gratuity and restriction of amenities as contemplated in paragraphs *(b)* and *(c)*.
> [Para. *(d)* substituted by s. 18 *(c)* of Act 25 of 2008.]
> (6) The penalties referred to in subsections (3) and (5) may be suspended for such period and on such conditions as the presiding official deems fit.
> (7) *(a)* At the request of the inmate proceedings resulting in any penalty other than a penalty contemplated in subsection 5 *(d)* must be referred for review to the National Commissioner.
> *(b)* The National Commissioner may confirm or set aside the penalty and substitute an appropriate order for it.
> [Sub-s. (7) substituted by s. 18 *(d)* of Act 25 of 2008.]

[9] The court a *quo* found that an informal disciplinary enquiry as envisaged in s 24 (2) of the Act had been held. In support of this finding it relied on the evidence of the respondents' witnesses that the applicant had been called into the office of the acting head of the correctional centre, had been questioned about the alleged theft, had admitted guilt, and had apologised.

[10] It appears that this finding was contrary to what was pleaded by the respondents, namely that no disciplinary enquiry had been held. In my view, there is a reasonable prospect that a court of appeal might decide that there was never an intention to hold a disciplinary enquiry and that therefore no enquiry was in fact held. It would follow that, if no enquiry was held, the imposition of penalties was unlawful.

[11] With regard to the penalties which were imposed, the court *a quo* said the following:

> "The provisions of section 24(3) are clear and unambiguous. The head of prison has a discretion in imposing a penalty. The penalty imposed in this case was to remove the plaintiff, as a security measure, from the kitchen to a communal cell. The other losses are either a consequence of this penalty or they apply as a result of the fact that the plaintiff was found to have a further charge. The decision of the defendants' officials was that the plaintiff could not remain in the kitchen; he had a further charge and it would have been a security risk to have him continue staying and working in the kitchen. I do not hold the view that the said decision of the head of prison was not justified. There is no evidence that the penalty itself was improper and disproportionate. The plaintiff's contention is that the head of prison should have limited himself to the penalties provided in the Act. I cannot find that the head of prison exercised his discretion unreasonably in the circumstances."

[12] It appears from this passage that the court *a quo* accepted that penalties had been imposed in terms of s 24 (3) of the Act. In my view, there is a reasonable prospect that a court of appeal would find that s 24 (3) does not authorise an official to impose penalties beyond those which are prescribed.

[13] In addition to the prospect of success on appeal, I have had regard to the nature of the applicant's action. It involves an organ of state and the manner in which inmates are subjected to procedures which materially affect their conditions while serving their sentences. There is therefore a public interest element in the action, which is a factor I may take into account. (See *Alam v Minister of Home Affairs* 2012 (5) SA 626 (ECP) at 633E-F.) In my view this public interest element is critically highlighted by certain views expressed by the deponent to the respondents' answering affidavit. She is a Deputy Director in

the Legal Services section of the Department of Correctional Services. With regard to the penalties imposed on the applicant, she stated the following:

> "In addition, in relation to the claim by the Applicant, that the punishment that was metered (sic) out to him was in excess to (sic) that prescribed in the Act, it is clear from the reading of Section 24, that the Section allows for punishment in excess to that which is allowed in the Act. Accordingly the applicant suffered no prejudice in relation to the conduct of the officials of the Respondents."

And further:

> "I would like to further state that despite the fact that no formal proceedings were held in terms of Section 24, from the evidence and from what is pleaded by the Respondent, there was compliance with the requirements of the said Section, and in respect of the withdrawal of privileges, it is important to note that Section 24 (3) of the Correctional Services Act 1998, Act 111 of 1998 is permissive of a sanction more than the sanction that is listed in that Section. The Head of Correctional Center has a discretion to impose the sanctions that are listed in the Section, or even more depending on the circumstances of the case."

[14] If the above is her interpretation of s 24 (3) of the Act, and she represents the view of the respondents, then there is cause for concern. While s 24 (3) gives an official a discretion as to which of the prescribed penalties he or she may impose, and in what combination, it does not permit an official to exceed the limits of the prescribed penal jurisdiction. To exceed those limits would be illegal. Implementation of the deponent's (and apparently the respondents') interpretation would result in a serious infringement of inmates' rights.

[15] I am aware that in the event of the appeal being unsuccessful, the respondents will not be able to recover their costs. This is an important consideration which must be weighed together with all the other circumstances. However, having weighed all the relevant factors, I am of the view that the applicant should not be denied his opportunity to have his dispute further determined by a court.

[16] The applicant submitted that he should be awarded his costs in the event of the application succeeding. I prefer to order that the costs of the application should be costs in the appeal.

[17] The following order is made:

[17.1] The applicant is released from furnishing security for the respondents' costs of an appeal to be prosecuted by the applicant to the Eastern Cape High Court, Grahamstown, under case number CA 68/2012.

[17.2] The costs of the application are to be costs in the appeal.

**J M ROBERSON**
**JUDGE OF THE HIGH COURT**

**Appearances:**

**For the Applicant: Adv A Rawjee, instructed by James Philipson Attorneys, Port Elizabeth.**

**For the Defendant: Adv Adv M Nobatana, instructed by State Attorney, Port Elizabeth**