

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

CASE NO: 86997/18

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

Date: 20/2/2020 Signature: *[Handwritten Signature]*

In the matter between:

**MAKHEHLA LUCAS MAHLANGU**

**DUMISANI MUNDIDA**

and

**THE MINISTER OF JUSTICE AND  
CORRECTIONAL SERVICES**

**THE NATIONAL COMMISSIONER DEPARTMENT  
OF CORRECTIONAL SERVICES**

**THE PROVINCIAL COMMISSIONER OF  
CORRECTIONAL SERVICES (GAUTENG)**

**AREA MANAGER, KGOSI MAMPURU II**

**THE HEAD OF PRISON, KGOSI MAMPURU II  
CORRECTIONAL CENTRE**

**FIRST APPLICANT**

**SECOND APPLICANT**

**FIRST RESPONDENT**

**SECOND RESPONDENT**

**THIRD RESPONDENT**

**FOURTH RESPONDENT**

**FIFTH RESPONDENT**

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## J U D G M E N T

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**Van der Shyff, J:**

### **Introduction**

- [1] This is an application in terms of Rule 53 of the Uniform Rules of Court, as well as the Promotion of Administrative Justice Act, No 3 of 2000, hereafter PAJA, for an order reviewing and setting aside the decision of the fifth respondent's delegated official finding the applicants guilty of a disciplinary offence and the subsequent confiscation of computer equipment. In the alternative, the applicants requested the Court to refer the matter back for reconsideration.
- [2] At the outset, I have been informed from the Bar, that the first applicant has died since the application was launched. Counsel for the respondents submitted that the first applicant had to be substituted with the executor of his deceased estate. In the view I take of this matter, it would not serve any purpose to delay the matter any further by ordering a stay of the proceedings in regard to the first applicant for such substitution, and I shall accordingly deal with the application of both applicants.

### **Point in limine – Condonation application**

- [3] It is common cause that the respondents failed to file their answering affidavit in time and the matter was enrolled on the unopposed motion roll for adjudication on 6 June 2019.
- [4] On the said date, counsel for the respondent appeared in Court and asked for an indulgence. The matter was postponed *sine die*, and the following order was made:
- a. The respondents are to deliver their opposing affidavits and an application for condonation by 21 June 2019;
  - b. The applicants are to deliver a replying affidavit, if any, by 8 July 2019;

c. The respondents to pay the costs of the postponement on an attorney and client basis.

- [5] The respondents filed their answering affidavit on 6 August 2019 without filing an application for condonation.
- [6] The opposed application was set down for hearing on the opposed motion roll on 30 January 2020 but postponed to 7 February 2020 to enable counsel for the respondents to obtain the signed affidavit in support of the condonation application.
- [7] In court, when the order was made, counsel for the applicants, requested that the wasted costs must be paid by the respondents on an attorney and client scale. Counsel for the respondents argued that the Court should first consider the condonation application before the scale of the cost order is determined.
- [8] As a result, the matter was postponed to 7 February 2020 and costs were reserved to be determined simultaneous with the condonation application. I emphasised that the cost order was only reserved for the purpose of determining the appropriate scale on which the respondents are to pay the wasted costs occasioned by the postponement.
- [9] On 31 January 2020 the respondents filed a condonation application. In order to avoid confusion, the parties will be referred to as in the main application.
- [10] The respondents' case pertaining to the late filing of the answering affidavit is set out as follows: Initially no answering affidavit was filed because the respondent's legal team was labouring under the impression that the matter may be settled. They wanted to avoid incurring the unnecessary costs. The notion that a settlement might be reached was premised on the fact that the Office of the State Attorney was informed that applicants wrote to the fifth respondent requesting that their computers be returned to their families. While the request was considered counsel was requested by the State Attorney to await the outcome of this request as it had the potential of settling the matter.



- [11] After the Court order of 6 June 2019, counsel consulted on 14 June 2019 and it became apparent that there was still information outstanding that was needed to draft the answering affidavit. It is not stated with whom counsel consulted and whether the deponent to this affidavit was part of the consultation.
- [12] The outstanding information was delivered to counsel on 24 June 2019, but counsel was attending proceedings in Port Elizabeth at the time. I pause to note that two advocates are appearing on behalf of the respondents and it is not explained which counsel was in Port Elizabeth and why the remaining counsel could not attend to the drafting of the answering affidavit.
- [13] The answering affidavit was then sent to the Office of the State Attorney on 27 June 2019. Counsel enquired about the whereabouts of the answering affidavit on 26 July 2019 and it is evident that the answering affidavit was commissioned on 26 July 2019. It was served on the applicants' legal representatives on 6 August 2019.
- [14] The respondents contend that the delay was not excessive and that a reasonable explanation was provided for the Court to consider condoning the delay. They additionally contend that the parties have filed all the papers, that the matter is ripe for hearing and that the respondent has a reasonable prospect of success in the review.
- [15] It must be stated from the onset that the bulk of the affidavit consists of hearsay evidence that is not verified by any confirmatory affidavit. The affidavit was deposed to by Mr Mathews Tibane Moleki, the head of Kgosi Mampuru II Correctional Facility, but the explanation primarily deals with actions and omissions of the respondents' legal team. I fail to see how the information can fall within the deponent's personal knowledge.
- [16] The applicants oppose the condonation application. They emphasise that the date for the filing of both an answering affidavit and a condonation application was set by the Court. Not only did the respondents fail to file the answering affidavit within the time stated in the Court order, they also failed to file a condonation application.

- [17] The applicants also contend that the respondents have failed to place sufficient facts before the Court to condone their omissions and that the applicants have been substantially prejudiced by the respondents' failure to act timeously.
- [18] In my view, the respondents not only had to apply for condonation for the late filing of the answering affidavit, they also had to apply to the Court to condone the late filing of the condonation application. No such application was launched, and the Court is still in the dark as to why the condonation application was not filed in accordance with the time period prescribed in the Court order of 6 June 2019.
- [19] However, the parties agreed that the application could be postponed in order to afford the respondents the opportunity to file the condonation application. The only issue remaining is the scale of the costs order regarding the wasted costs occasioned by the postponement granted on 30 January 2020, and the question as to whether the late filing of the respondents' answering affidavit must be condoned.
- [20] The respondents' lackadaisical approach to the condonation application affects the scale of the cost order that I am to make pertaining to the wasted costs occasioned by the postponement. When the matter was postponed and the issue of costs was argued, counsel for the respondents argued that the explanation that will be provided might sway the court not to make a punitive cost order. The fact that no explanation at all was provided for the omission to file a condonation application before or on the date ordered by the Court, however, is conduct that cannot be tolerated and calls for a punitive cost order. For this reason alone, I am of the view that the applicants' wasted costs occasioned by the postponement, must be borne by the respondents on an attorney and client scale.
- [21] As for the condonation application itself, it is trite that the court may, on good cause shown, condone any non-compliance with the Uniform Rules of Court. The court's wide discretion is fenced in by the requirement that good cause must exist for the court to exercise the discretion to condone non-compliance. It is trite that the reason for the delay and the defaulting party's prospects of success are factors that the court has to take into consideration when the condonation application is considered.



- [22] The applicants might have been prejudiced by the delay brought about by the respondents' omission to file their documents timeously, but the condonation of the late filing of the answering affidavit *per se* will not lead to any additional prejudice.
- [23] As for the reasons for the delay I have no doubt that the cause of the delay must be attributed to the respondents' legal team. If the hearsay evidence is disregarded, no reason is put forward explaining why the delay occurred. The mere fact that the affidavit primarily consists of hearsay evidence is however in itself an indication of the attitude and approach with which this condonation application has been dealt with, and this in turn implicates only the respondents' legal team.
- [24] However, it was emphasised in *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) at 307C-308A, that the court's discretion must be exercised having regard to the merits of the matter as a whole.
- [25] The Constitutional Court in *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) at 43G-44A held that lateness is not the only consideration in determining whether an application for condonation should be granted. The fundamental question is whether it is in the interest of justice to grant it, and in this regard the respondents' prospects of success and the importance of the issue to be determined, are relevant factors.
- [26] The parties were consequently directed to address the merits of the main application.

#### **Facts underpinning the review application**

- [27] It is an undisputed fact that the applicants were subjected to two disciplinary hearings, respectively held on 5 October 2018 and 10 October 2018, on the same charges, and the same charge sheet, the two hearings being presided over by the same presiding officer. They were found not guilty in the first, and guilty in the second disciplinary hearing. As a result, certain penalties were imposed, to which I shall revert.

- [28] The applicants were incarcerated at the Zonderwater Correctional Centre. They were transferred to Kgosi Mampuru II Prison during October and November 2017. On 5 August 2018 their cells were raided, and the fifth respondent's officials confiscated certain electronic devices, which included a laptop and external hard drives.
- [29] After the seizure, no immediate steps were taken against the applicants. Two months later they were summonsed to attend an informal disciplinary hearing. On 5 October 2018 they attended an informal disciplinary inquiry. They were charged with having been in possession of unauthorised items. They pleaded not guilty. The first applicant's version was accepted by the presiding officer. He stated that he went to the reception officer accompanied by the correctional officer, to collect his laptop. The laptop was handed over to him "as he produced documents that he is studying." On both the applicants' and the respondents' papers filed of record, the applicants' version is set out that they previously obtained permission to possess the confiscated items from the Head of Prison of Zonderwater Correctional Centre. Both applicants were acquitted on the charge.
- [30] After the 5 October 2018 new information became known to the respondents. It became apparent that no such permission had been granted to the applicants. As a result, it was deemed necessary to conduct the second disciplinary hearing, which was held on 10 October 2018. As I have alluded to, the exact same charges were preferred against the applicants and the same presiding officer presided in the hearing.
- [31] The applicants state in their founding affidavit that no new evidence was adduced at the hearing. It is however, evident from record of proceedings filed by the respondents, that *viva voce* evidence was led – at least in relation to the charge against the first applicant. The minutes of the disciplinary hearing of the second applicant indicates that documentary evidence was considered.
- [32] The respondents contend that the decision of 10 October 2018 is lawful, reasonable and rational and there is no basis for setting it aside. The applicants raised a number



of grounds to the effect that the second disciplinary hearing was procedurally and substantively flawed.

- [33] I am of the view that the crisp issue requiring determination is whether the second disciplinary enquiry constituted just administrative action in the circumstances as alluded to above. In view of the common cause facts it is necessary to determine whether the principle of *res judicata*, or *autrefois acquit* applies to administrative proceedings. It is trite that the principle of *res judicata* fulfils the same role in civil proceedings than the principle of *autrefois acquit* in criminal cases.
- [34] Respondents' counsel referred me to case law, in support of the submission that the issue of 'double jeopardy' does not find application in disciplinary hearings. Both cases dealt with disciplinary hearings held in the context of labour relations. The first case referred to, is *BMW (South Africa) (Pty) Ltd v L van der Walt* (JA 10/99) [1999] ZALAC 28 (18 November 1999). Counsel referred me to a portion of the judgment where it is stated "*Whether or not a second disciplinary inquiry may be opened against an employee would, I consider, depend on whether it is, in all the circumstances, fair to do so ...*"
- [35] I am of the view that the current matter is distinguishable from *BMW* in that a new charge was levelled against the employee at the subsequent disciplinary enquiry, although it was substantiated by the same underlying facts.
- [36] Cognisance must also be taken of the fact that Conradie JA stated in the *BMW*-case (para 12) that the principles of *autrefois acquit* and *res judicata* are public policy rules, and in labour law "*fairness and fairness alone*" is the yardstick. He stated, however, that "*it would probably not be considered to be fair to hold more than one disciplinary enquiry save in rather exceptional circumstances.*"
- [37] The second case I was referred to, is *Branford v Metrorail Services (Durban) and Others* (DA 19/2002) [2003] ZALAC 16 (13 November 2003)). This case is distinguishable because the court *a quo* found that there was only one disciplinary hearing where proper charges were brought against the employee. This disciplinary hearing was preceded by a mere discussion between the employee and the line



manager which resulted in a verbal warning. No charges were proffered against the employee during the discussion. In the present matter formal charges, contained in the same charge sheet that was subsequently used at the second hearing, were put to the applicants. Although the respondents contend that the first disciplinary hearing was merely an informal hearing as opposed to the second, a formal hearing, I fail to see the difference on the papers as filed. In both instances the same charge sheet was used, the same presiding officer presided, and a record of each proceedings was kept.

- [38] The cases referred to are also distinguishable from the disciplinary enquiry now under discussion, in that the context within which the disciplinary actions were taken, namely the employer-employee relationships regulated by contract, was the subject matter of the case law referred to, as opposed to an inmate-correctional authority relationship that existed here. I am of the view that "public policy rules" are of significant importance where the relationship between inmates and officials in correctional facilities is concerned, quite different from employees who have some bargaining power, whereas inmates are exposed to procedural abuse.
  
- [39] I was not referred to any other case law on this specific point. I could also not find any national case law dealing with this specific issue. *Coke-Wallis v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1 provides a perspective from foreign law regarding the application of the principle of *res judicata* in disciplinary proceedings not relating to employer-employee relations. I am alive to the fact that foreign law must be considered with circumspection, but I found the case informative since it deals with the relevance and application of the principles of *autrefois acquit* and *res judicata* in the context of successive proceedings before a regulatory or disciplinary tribunal.
  
- [40] In *Coke-Wallis* an accountant from Jersey was convicted of failing to comply with a directive of the Jersey Financial Services Commission. The Institute of Chartered Accountants brought a complaint against the appellant that he was liable to disciplinary action under the Institute's rules in that he had committed an act or default liable to bring discredit on himself, the Institute or the profession. Under the

Institute's rules, a conviction outside England and Wales was conclusive evidence of such an act or default if it corresponded to one which was indictable in England and Wales. The disciplinary action was dismissed on the grounds that the offence did not correspond with any indictable offence in England or Wales. The Institute brought a second complaint, relying on the conduct that led to the conviction in Jersey. The tribunal held that the second complaint could be brought as the two complaints did not allege the same thing, and the appellant applied for judicial review.

- [41] The court emphasised that the appeal is concerned only with the instance where there have been two successive sets of disciplinary proceedings, and not where either set of proceedings was either civil or criminal. The court found the first enquiry's decision to be final, and on the merits, held that the principle of *res judicata* applied.
  
- [42] For current purposes it is relevant to take note of the fact that several penalties can be imposed subsequent to disciplinary proceedings being held in correctional facilities, and as a result a prisoner has an interest that penalties are not imposed arbitrarily. It is important to maintain good order inside prisons and transgressions must be addressed in an effective and fair manner. It is likewise important to realise that the imposition of penalties is not comparable to a criminal conviction, although it can affect a prisoner's already limited freedom of movement and the loss of gratuity and other benefits for a period of time.
  
- [43] Despite the unique environment within which prisoners find themselves, a prisoner is not isolated from constitutional protection and prison disciplinary proceedings must be governed by a mutual accommodation of institutional needs and generally applicable constitutional requirements. The fact that a person is incarcerated does not remove him or her from the right to require just administrative action.
  
- [44] In the current matter the applicants' first disciplinary enquiry was held two months after their electronic equipment was confiscated. Incidentally, this happened around the same time they instituted urgent court proceedings to recover the confiscated



items. I pause to note that the urgent application was struck from the roll for want of urgency. It is evident from the record of proceedings that no witnesses were called, and no evidence adduced, except for their own version of events. Instead of remanding the disciplinary hearing to obtain further evidence, the presiding officer found the applicants not guilty of the charge put to them. Five days later, at the second hearing, evidence was presented, and the applicants were found guilty of exactly the same charge. They were subsequently penalised.

- [45] No explanation is proffered as to why the evidence that was produced five days after the first disciplinary hearing was not presented at the first.
  
- [46] The respondents argued that they could not institute a judicial review of their own decision, and as a result it was only fair that the respondents held the second disciplinary enquiry. If cognisance is taken of section 23 of the Correctional Services act No 111 of 1998 (the Act), it is evident that a host of disciplinary infringements are listed. Section 23 (1)(a) reads – "An inmate commits a disciplinary infringement if he or she – replies dishonestly to legitimate questions put by a correctional official or other person employed at a correctional centre." In the event that it was found that the applicants were dishonest in their defence pertaining to the disciplinary charges, this subsection could be utilised to address the subsequent infringement.
  
- [47] The principle of *res judicata* is rooted in two important Latin maxims "*interest reipublicae ut sit finis litium*" and "*nemo debet bis vexari pro una et eadem causa*". These maxims articulate the principles that there should be finality in litigation and that no person should be tried twice for the same cause. These are fundamental principles in law, and not mere public policy rules. Section 22 of the Act expressly provides that an inmate can be subjected to a disciplinary hearing and charged with a criminal offence in a court of law. The legislature was thus aware of the notion of *res judicata* and excluded it statutorily. However, the legislature did not provide that an inmate can be subjected to successive disciplinary hearings relating to the same charges.
  
- [48] For all these reasons, I am of the view that the second disciplinary hearing does not constitute just administrative action.

- [49] The respondents averred that the applicants did not exhaust their internal remedies in that they did not approach the Area Commissioner for reviewing the proceedings. Section 24(7)(a) of the Act provides that proceedings resulting in any penalty other than a penalty contemplated in subsection 5(d), must be referred for review to the National Commissioner at the request of the inmate. The National Commissioner may confirm or set aside the penalty and substitute an appropriate order.
- [50] The applicants' case is that they did approach the National Commissioner. They were merely informed by the senior legal admin officer of the Department of Correctional Services that the Head of the Correctional Centre upheld the decision of the disciplinary hearing. The applicants were also informed that they had failed to refer the matter to the Area Commission within two working days after receipt of the decision. I pause to note that it has not been indicated where this procedure is prescribed. The Act provides that the matter had to be referred to the National Commissioner. Since the matter was referred to the National Commissioner the applicants thereby exhausted their internal remedy. In addition, no evidence was furnished that the applicants were informed that they had to refer the matter to the Area Commissioner within two days after being informed of the decision of the disciplinary hearing.
- [51] In the result, the application for condonation for the late filing of the answering affidavit is dismissed.
- [52] The question is now whether the Court must impose its own decision or refer the matter back to the National Commissioner to make an appropriate order.
- [53] As for the finding of guilty and the imposing of penalties, I am of the view that it would serve no purpose to refer the matter back to the National Commissioner. The second disciplinary hearing needs to be set aside in totality. This in itself is an exceptional circumstance which allows the court to correct the order of the presiding officer of the disciplinary hearing by finding that the matter has become *res judicata* and the same charges cannot be heard again.



- [54] I am however not of the view that it would be prudent for this Court to order that the confiscated equipment be returned to the applicants. This decision must be taken by the respondents after considering whether the applicants have met the requirement set by the respondents.
- [55] It was argued by counsel on behalf of the second applicant that the request is not that the equipment be returned to the inmates, but to their families. This is, however, not the case made out in the applicants' founding affidavit. This Court is not prepared to venture in the domain of the administration in this regard. The applicants, or their successors, must utilise the processes in place to apply for the utilisation or return of the electronic equipment.
- [56] As to costs, it is common cause that the applicants approached the court for relief in two parts, namely the setting aside of the decision of 10 October 2018 and the return of the articles confiscated by the respondents. The application was effectively decided on the applicants' papers since the late filing of the answering affidavit was not condoned. Despite the fact that prayer 2 contained in the notice of motion is not granted, the applicants were successful in obtaining the most important component of the relief sought. I am of the view that the general rule that costs to follow suit applies. I am not satisfied that a punitive costs order is justified.
- [57] Counsel for the applicants requested that an order that costs of two counsel be paid in the event that the applicant succeeds with the application. The applicants were represented only by advocate Kellerman SC and the second counsel only appeared the final day when the motion was argued. The complexity of the matter is not such that it warranted the appointment of two counsel.

## ORDER

As a result, the following order is made:

- [1] The respondents are to pay the wasted costs occasioned by the postponement of this matter, on an attorney and client scale, jointly and severally, the one paying the other to be absolved;

- [2] The proceedings before and decision of the third respondent's delegated official, dated 10 October 2018, are reviewed and set aside.
- [3] The respondents are to pay the costs of this application jointly and severally, the one paying the other to be absolved.



E van der Schyff

Judge of the High Court, Gauteng Division, Pretoria

Counsel for the applicants:

Adv Kellerman SC

Instructed by:

Julian Knight and Associates Inc.

Counsel for the respondent:

Adv Mpahlele SC with Advocate Leopeng

Instructed by:

The State Attorney

Date of the hearing:

7 February 2020

Delivered:

20 February 2020