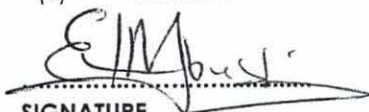


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 14674/18

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	
SIGNATURE	DATE 26/3/2018

26/3/18

In the matter between:

NGOATO THOMO MICHAEL

APPLICANT

VS

MINISTER OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT

1st RESPONDENT

HEAD OF PRISON, KGOSI MAMPURU II

CORRECTIONAL CENTRE

2ND RESPONDENT

JUDGMENT

KUBUSHI J

[1] The purpose of this application is to seek an order reviewing and setting aside the decision of the second respondent, the Head of Prison, Kgosi Mampuru II Correctional Centre, to place the applicant, Mr Thomo Michael Ngoato, in a single cell or segregated from other prisoners and to direct the 2nd respondent to place the applicant in a communal cell.

[2] The matter was placed before me in the urgent court. The respondents have raised issues with urgency contending that the matter is not urgent. The application is, in my view, inherently urgent because the applicant's right of freedom has been curtailed by his incarceration in a single cell.

[3] In his founding papers, the applicant relies on section 30 of the Correctional Services Act 111 of 1998 ("the Act). Section 30 of the Act provides for the segregation of prisoners and may entail detention in a single cell. The applicant contents in his founding affidavit that he has been placed in a single cell in terms of section 30, that is, he has been segregated. The respondents concede, in their answering affidavit, that the applicant is detained in a single cell but argues that such detention is pursuant to the provisions of section 7 of the Act and not section 30 as claimed by the applicant. Section 7 of the Act provides for the accommodation of prisoners at a prison facility. This necessitated the applicant to change his stance in his replying affidavit and base his case on the provisions of section 7 of the Act. The respondents' counsel argues for the dismissal of the application on the ground that all the necessary allegations upon which the applicant relies must appear in

the applicant's founding affidavit failing which the applicant's case should be dismissed. Counsel further submits that if the replying affidavit is accepted, the respondents will be prejudiced in that they will not have an opportunity to respond to issues raised in the replying affidavit.

[4] It is trite that all the necessary allegations upon which the application relies must appear in the founding affidavit, as the applicant will not generally be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit. This is, however, not an absolute rule, for the court has discretion to allow new matters in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits. Thus, a distinction must be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when her/his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of further ground for relief sought by the applicant. In the latter type of case the court would obviously more readily allow an applicant in her/his replying affidavit to utilize and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom. The court will however not allow the introduction of new matter if the new matter sought to be introduced amounts to an abandonment of the existing claim and the substitution therefor of a fresh and completely different claim based on a different cause of

action. Nor will the court permit an applicant to make a case in reply when no case at all was made in the original application.¹

[5] It is said that the right to personal freedom is so fundamental that a detainee should be allowed to seek in motion proceedings an order for her/his release based on a founding affidavit in which she/he alleges that she/he is being held by the respondent, notwithstanding the general requirement that an application must disclose a complete case in the founding affidavit and the restriction on the number of sets of affidavits usually accepted in motion proceedings.²

[6] On the basis of the principles of law enunciated above, I am inclined to allow the applicant's case as expounded in the replying affidavit. It is clear from the reading of the replying affidavit that the applicant was not aware that the section applicable in the circumstances of his case was section 7 and not section 30 of the Act. On his request to be removed from a single cell, the second respondent disapproved the request without stating reasons and without making the applicant aware that he was detained in terms of section 7. The applicant was made aware of the application of section 7 on 7 March 2018 a day after the application was launched. The respondents will not be prejudiced, I think. Section 7 was raised by the respondents in their answering affidavit and they have comprehensively dealt with it therein.

¹ See Erasmus: Superior Court Practice vol2 page D1-65 – D1-66.

² See Minister van Wet en Orde v Matshoba 1990 (1) SA 280 (A) at 286C.

[7] I turn now to the merits of the application.

[8] The applicant is an awaiting trial prisoner currently incarcerated at the Remand Centre in the Kgosi Mampuru II Correctional Centre ("the Correctional Centre"). He was previously an employee of the first respondent. He was arrested on allegations of murder on 31 January 2018. At the time of the hearing of this application I was informed that his bail application was scheduled to be heard on 16 March 2018, which was the following day. As I was to reserve judgment in this matter I requested that I be informed about the outcome of the bail application. I was later informed that the bail application did not proceed. The applicant has another unrelated pending criminal case of dealing in drugs as contemplated in the Drug and Drug Trafficking Act 140 of 1992. He has been granted bail in respect of this charge and was due to make his appearance on 16 March 2018 at the Cullinan Magistrate Court.

[9] The applicant was arrested together with two co-accused persons, namely, Mr Paulos Fourie and Mr Thato Maringa. The two are accused number 2 and accused number 3, respectively, in the murder charge. Mr Fourie and Mr Maringa are also incarcerated at the Correctional Centre.

[10] The applicant and the two co-accused persons were initially detained at Bronkhorstpruit Police Station before they were transferred to the Correctional Centre on 12 February 2018. Upon arrival at the Correctional Centre they were all admitted and

accommodated in a communal cell known as admission cell where they spent the night. The following day, 13 February 2018, they were accommodated at the G3/1 section of the Correctional Centre where they spent the night. On 14 February 2018 they were assessed and based on the assessment the applicant was accommodated in a single cell.

[11] According to the respondents, as part of the process to admit an offender to the Correctional Centre, the prison officials conduct a classification and assessment process. In terms of the assessment tool used, all remand detainees with scores between 17 and 21 are regarded as High Risk detainees and are treated differently from other inmates for security purposes. Immediately after profiling an awaiting trial detainee a decision will be taken whether to accommodate him either in a single/separate cell or in the communal cell.

[12] The applicant's score rating when assessed came out at 20 which indicated that he was a High Risk detainee qualifying to be accommodated in the environment regulated by section 7 (2) (d) of the Act as amended by section 6 of the Correctional Services Amendment Act 25 of 2008. All inmates, including the applicant, accommodated in terms of section 7 (2) (d) of the Act are not treated differently from other awaiting trial detainees except that they are placed in a single cell because of their High Risk profile.

[13] The respondents contend that the applicant has been lawfully placed in a single cell in terms of section 7 (2) (d) read with (e) of the Act. It should be mentioned that subsection (2) (e) was only brought into the equation by the respondents in their heads of argument. It

was not raised in their answering affidavit. But for the decision I come to, I find it not necessary to deal with subsection 2 (e) of the Act in this judgment.

[14] It is the contention of the applicant that: firstly, the 2nd respondent does not have the power to place or hold the applicant in a single cell in the circumstances of this case; secondly, if the 2nd respondent has the power he claims to have, then in that regard, the 2nd respondent has exercised the powers arbitrarily, capriciously and in a procedurally unfair manner. In essence the applicant's complaint is that the respondents' interpretation of section 7 (2) (d) read with section 7 (2) (e) of the Act is fallacious as it does not take into account the mischief that the legislature sought to address in promulgating that subsection. The correct reading of the subsection, according to applicant, is that the provision empowers the National Commissioner to classify inmates in terms of age group, health or risk categories. This reading is made clear by the provisions of section 7 (2) (e) of the Act which empowers the National Commissioner to accommodate inmates in single or communal cells depending on the availability of accommodation.

[15] The salient provisions of the subsections in issue are the following:

"Section 7 Accommodation

(1) ...

(2) (a) ...

(d) The National Commissioner may detain inmates of specific age, health or security risk categories separately.

(e) The National Commissioner may accommodate inmates in single or communal cells depending on the availability of accommodation.

(f) ...”

[16] In terms of section 6 of the Act, on admission the National Commissioner must make a preliminary security classification of the inmate. The security classification of inmates is provided for in section 29 of the Act. In terms of this section security classification is determined by the extent to which the inmate presents a security risk and so as to determine the correctional centre or part of a correctional centre in which he or she is to be detained. This would mean that once an inmate is classified as a security risk the National Commissioner must determine the part of a correctional centre in which such inmate is to be accommodated. According to the second respondent, awaiting trial inmates of the profile of the applicant are accommodated in single/separate cells.

[17] I am in agreement with the submission by the applicant’s counsel that the provision of section 7 (2) (d) of the Act empowers the National Commissioner to classify inmates in terms of age group, health or risk categories. But, as far as risk is concerned, section 7 (2) (d) of the Act must be read together with section 29 of the Act which authorises the National Commissioner to determine the part of a correctional centre in which to accommodate inmates once they have been classified as security risk. It appears from the assessment tool that there are different degrees of classification – high, medium and low. It

goes without saying that the National Commissioner has to determine the part of the correctional centre in which high, medium or low risk classified inmates have to be accommodated. In this instance, the second respondent's evidence is that inmates who have been assessed and classified as High Risk are accommodated in single cells. That to me is the part of the Correctional Centre where High Risk inmates are accommodated. It might be that other categories of inmates are placed in communal cells but High Risk inmates are accommodated in single cells. I hold therefore that section 7 (2) (d) read with section 29 of the Act empowers the National Commissioner or her/his delegate, in this instance the 2nd respondent, to detain an inmate in a single cell.

[18] I, however, have to agree, as argued by the applicant, that the power was not exercised rationally, lawfully and is not procedurally fair. I say so on the basis of the grounds raised by the applicant in his papers. Some of the factors considered when assessing the applicant were not administered correctly. For instance:

18.1 Firstly, the applicant has been erroneously rated as an inmate facing more than two charges mentioned in Schedule 1 of the Criminal Procedure Act 51 of 1977. It is clear from the evidence that the applicant is facing only one charge mentioned in Schedule 1, that of murder. The other charge of dealing in drugs is a Schedule 2 charge.

18.2 Secondly, the applicant has been erroneously rated as a member of a gang because he has tattoos on his body. Whilst conceding that he has tattoos on

his body, the applicant has vehemently denied that he is affiliated to any gang, whether a street gang or prison gang.

[19] Having found in favour of the applicant to have the decision to place him in a single cell reviewed and set aside, the applicant further seeks an order directing the second respondent to place him in a communal cell. The implication is that I must substitute the 2nd respondent's decision with my decision.

[20] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & Another*,³ the following remarks were made:

"The administrative review context of section 8 (1) of PAJA and the wording under subsection 1 (c) (ii) (aa) make it perspicuous that substitution remains an extraordinary remedy. Remittal still almost always the prudent and proper course . . . a court considering what constitutes exceptional circumstances must be guided by an approach that is consonant with the Constitution. Indeed, the idea that courts ought to recognise their own limitations still rings true. It is informed not only by the deference courts have to afford an administrator but also by the appreciation that courts are ordinarily not vested with the skills and expertise required of an administrator."

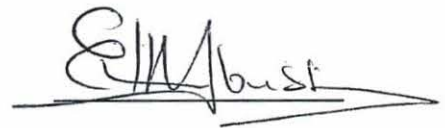
[21] In order for the applicant to be afforded the relief he seeks he must first comply with the requirements of section 8 (1) (c) (ii) (aa) of PAJA which requires the applicant to indicate that exceptional circumstances exist to justify the substitution of the administrative action

³ (2015) ZACC 22 par 42.

taken. The applicant has not, in the papers before me, made out a case for exceptional circumstances and can as such not be granted the relief he seeks. The matter has to be remitted to the second respondent for reconsideration.

[22] I make the following order –

1. The decision of the Head Prison, Kgosi Mampuru II Correctional Centre to place the applicant in a single cell is reviewed and set aside.
2. The matter is remitted to the Head Prison, Kgosi Mampuru II Correctional Centre to reassess the applicant for classification in terms of section 29 of the Correctional Services Act 111 of 1998 as amended.
3. The respondents are ordered to pay the applicant's costs jointly and severally the one paying the other to be absolved.



E. M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE	: 15 MARCH 2018
DATE OF JUDGMENT	: 26 MARCH 2018
APPLICANT'S COUNSEL	: ADV. P.R MSAULE
APPLICANT'S ATTORNEY	: MOKGARA ATTORNEYS
RESPONDENT'S COUNSEL	: ADV. S. MOLOMBO
RESPONDENT'S ATTORNEY	: STATE ATTORNEY