



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

Saakno / Case number: **596/2015**
Datum aangehoor / Date heard: **01 / 02 / 2017**
Datum beskikbaar / Date available: **31 / 03 / 2017**

In the matter between:

MARTIN DIPPENAAR

Applicant

and

THE MINISTER OF CORRECTIONAL SERVICES

1ST Respondent

**THE PROVINCIAL COMMISSIONER:
CORRECTIONAL SERVICES:
FREE STATE & NORTHERN CAPE**

2nd Respondent

**THE AREA COMMISSIONER:
CORRECTIONAL SERVICE:
UPINGTON**

3rd Respondent

THE HEAD OF THE CENTRE:

4th Respondent

CORRECTIONAL SERVICE: UPINGTON

**THE CHAIRPERSON: CASE MANAGEMENT
COMMITTEE: CORRECTIONAL SERVICES:
UPINGTON**

5th Respondent

Coram: Lever AJ et Snyders AJ

JUDGMENT

SNYDERS, AJ

- [1] This is a review lodged by the Applicant in terms of the Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA) for the review and setting aside of the decision by the Respondents to transfer the Applicant from the Correctional Centre: Upington to the Correctional Centre: Tswelopele.
- [2] It was not disputed that PAJA is applicable and that the application had been timeously lodged in terms thereof.
- [3] The Applicant is Martin Dippenaar who is currently a sentenced prisoner incarcerated at the Correctional Services in Upington after being sentenced to a 20 year

prison sentence. The Respondents are the Minister of Correctional Services, the Provincial Commissioner of Correctional Services for the Free State & Northern Cape, the Area Commissioner of Correctional Services for Upington, the Head of the Centre for Correctional Services for Upington and the Chairperson of the Case Management Committee for Correctional Services for Upington.

- [4] The Applicant approached the court on an urgent basis on 27 February 2015 for interim relief interdicting the Appellant's transfer pending the outcome of this review application.
- [5] The crisp issue in the present review is whether the decision by the respondents to transfer the applicant from the Correctional Services Centre in Upington to Tswelopele Correctional Services in Kimberley was procedurally and substantively unfair.
- [6] The applicant was first incarcerated in the Correctional Services Centre in Kuruman before being transferred to the Correctional Services Centre in Upington in 2010. There is a dispute between the applicant and respondent as to the reason for the transfer. However, based on the

surrounding circumstances that will be highlighted below, I am of the view that nothing turns on this.

[7] The applicant was informed during February 2015 of the impending transfer by "word of mouth". The respondent avers that the decision was relayed to applicant on 5 or 6 February 2015. The applicant submits the decision was received on 12 February 2015. The documents provided by the applicant, in particular the letter by his attorneys to the respondent dated 12 February 2015, tends to support the applicant's version. The evidence on this aspect put up by the respondents is neither persuasive nor convincing.

[8] As stated, the applicant's attorneys address a letter to 3rd and 4th respondents on 12 February 2015 and indicate that that applicant had received information on that day that he is to be transferred the following day. They further advance reasons as to why Applicant should not be transferred, inter alia,

8.1 To enable applicant to complete his studies;

8.2 To be closer to his family, namely his aged parents who reside in Springbok;

8.3 The availability of an architectural mentor in the private sector in or around Kimberley, as opposed to the current mentor who was assisting him in Upington Correctional Services;

8.4 applicant's position as study leader in the training centre in Upington (this point was abandoned as it was not raised in these proceedings);

8.5 He is a member of the Latter Rain Mission International Church and receives pastoral visits and support.

[9] After no feedback was received from either 3rd or 4th Respondent, the applicant himself addresses a letter to the 4th Respondent dated 20 February 2015 wherein he reiterates the points above and for the first time alleges the reason under point 8.5 above. I have included same above for the sake of convenience. Respondents deny having received this letter.

- [10] However, unbeknownst to the Applicant, the Regional Commissioner: Free State and Northern Cape Region addressed a letter to the Area Commissioners: Upington; Kimberley on 13 February 2015. The letter provides the *approval* for the transfer of the identified offenders, 150 of which are to be transferred from Correctional Services Upington to Correctional Services: Tswelopele.
- [11] On 23 & 24 February 2015, the Judicial Inspectorate for Correctional Services (JICS) sent e-mails to applicant's attorney which contained e-mails from the JICS to 3rd respondent. The gist of the e-mails were that a complaint had been lodged at their offices regarding the transfer of applicant and another inmate after no satisfactory feedback was received from the 3rd or 4th respondents. Applicant's reasons for not wanting to transfer are reiterated and an invitation extended to the 3rd and 4th respondent to provide feedback, responses or comments to the formal complaint lodged with 3rd & 4th respondents.
- [12] The JICS further requests an indication as to whether the transfer was voluntary, and if not if consideration was given to the potential jeopardy of applicant's

rehabilitation programmes, contact with family and legal representatives, sentence plan and studies.

[13] Most importantly, the JICS requested an indication whether the transfers comply with section 43 of the Correctional Services Act 111 of 1998 ('the Act'), read together with regulation 25 of the regulations thereto ('the regulations') and the provisions of B order 1 chapter 2. Compliance with the regulation 25 requirement of a medical examination to be done before the transfer is also questioned. These issues form part of the procedural requirements for the transfer of a sentenced offender.

[14] On 24 February 2015, the Regional Coordinator: Legal Services responded to applicant's attorneys and responded as follows to applicant's representations:

14.1 That the applicant will be in a position to continue his studies at any centre as he is studying via distance learning. The Tswelopele Correctional Centre will in fact be beneficial for applicant's studies as there is a computer room whilst at Upington

Correctional Centre laptops are no longer allowed in cells due to security risks;

14.2 The applicant will be in a position to find a new mentor as there are 8 architect firms in Kimberley;

14.3 The Upington Correctional Centre has exceeded 100% capacity and must address the issue of overcrowding. This reason is captured under the sub-title 'travelling costs and challenges'. No mention is made that applicant's concern regarding travel by his elderly parents was considered;

14.4 It is indicated that there is currently a skills development programme running at the relevant centre.

[15] Respondent's argue that this was the date upon which the decision to transfer the applicant was made and applicant's representations were considered.

[16] The respondents are of the view in opposing papers that applicant is not prevented from having contact and non-contact visits with family and friends. The applicant lists his sister residing in Kuruman as the next-of-kin, which the Respondent argues is closer to Kimberley. The applicant states that his elderly parents live in Springbok and travel some 400 kilometres from Springbok to Upington and 400 kilometres home again. His transfer to Tswelopele Correctional Services will double the distance his parents will have to travel.

[17] On 23 March 2015, the JICS released a ruling on the complaint of applicant and Strauss on the proposed transfer. The pertinent findings in terms thereof are:

17.1 Only applicant and Strauss provided representations;

17.2 These representations yielded no positive results. The 3rd and 4th respondent had no opportunity to entertain the representations and that said respondents were constrained to carry out the instructions of their seniors or be seen as being insubordinate;

- 17.3 The representations must of necessity have been dealt with by the decision makers, in this case either the Regional or National offices, but was regrettably left to the Management Areas and the respective correctional centres to deal with the complaints resulting from the decision taken;
- 17.4 Third and Fourth Respondents' response to compliance with section 43 and regulation 25 of the Act and compliance with B Order 1 Chapter 2 were so vague that it cannot be determined if individual attention was given to the applicant's personal circumstances;
- 17.5 That despite applicant's written representations, 3rd and 4th respondents failed to adhere to the *audi alteram partem* rule as they were obliged to do;
- 17.6 The provisions of section 43 and regulation 25 and B order 1 Chapter 2 were not complied with;

17.7 That in future the respondents are required to adhere to legislative provisions and the *audi alteram partem* rule when receiving written representations.

[18] The respondents were granted leave to file a further answering affidavit to respond to the findings by the JICS. In a nutshell, this further affidavit seeks to nullify the binding effect of the JICS report on the respondents and further proceeds to criticise the report due to the apparent lack of information by the JICS which was necessary to make any sort of finding.

[19] The questions that arise from the evidence are when the decision was taken, by whom the decision was taken, whether the applicant had the right to be heard before a decision was taken, if the statutory and policy provisions were followed, whether the applicant's representation were properly considered and whether the JICS finding is binding on the respondents.

[20] Section 43 of the Act reads as follows:

"43. Location and transfer of sentenced offenders.

– (1) *A sentenced offender must be housed at the correctional centre closest to the place where he or she is to reside after release, with due regard to the availability of accommodation and facilities to meet his or her security requirements and with reference to the availability of programmes.*

(2) The transfer of a sentenced offender is subject to the same consideration.

(3) A sentenced offender must be examined by the registered nurse or correctional medical office before his or her transfer...'

[21] Regulation 25 (1) (a) determines the following:

"25. Location and transfer of inmates – 1 (a) *When an inmate is transferred the Head of the Correctional Centre or a correctional official authorised by him or her must, subject to paragraph (b) convey the reason for the proposed transfer to the inmate and allow the inmate to make a representation in this regard, which must be recorded in writing, where after the Head of the*

Correctional Centre or the authorised official may take a decision on the proposed transfer.'

[22] Regulation 25 (b) is not applicable to this matter. Both parties are *ad idem* that the plain meaning of Regulation 25 (1) (a) should be accepted in that only the sentenced prisoner's representation must be in writing and not the disclosure of the reason for the transfer, nor the right to make representations thereon. This is a practical and acceptable interpretation based on the specific wording of the regulation.

[23] B order 1 Chapter 2 determines that the competency to transfer sentenced prisoners is delegated to Heads of Prisons and Provincial Commissioners depending on the circumstances. No specific delegation is given for a transfer due to overcrowding. Section 4.1.3 deals with principles applicable when transferring by reason of deconcentration, viz:

- 23.1 as far as possible prisoners are to be transferred within the same province;
- 23.2 prisoners must also be informed of the transfer beforehand;
- 23.3 the transfer may never take place if it is to the detriment of the prisoner and factors such as

relations / family ties, language, culture, training and safe custodial classification should be borne in mind;

23.4 prisoners should not be transferred to an alternate prison, which already has a high percentage of occupation.

[24] Regulation 25 and B order 1 Chapter 2 both seek to regulate the common law principle of *audi alteram partem*.

[25] The only certain date the court has is the final approval that was granted on 13 February 2015. The court accepted applicant's version of being informed on 12 February 2015. It is then evident that applicant was: not informed of the reason for the transfer before the decision was taken, was not granted an opportunity to make representations before the decision was taken; and said representations were not considered before the decision was taken.

[26] The Respondent argues that the *audi alteram partem* rule is flexible and based on the *Janse Van Rensburg &*

Another v Minister of Trade & Industry and Another NNO 2001 (1) SA 29 (CC) matter at paragraph 24, the question as to whether such decision was both fair and just should be determined according to the circumstances present.

[27] The Respondent further argues that the court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively.

[28] *Nortjè & ander v Minister van Korrektiewe Dienste & andere [2001] 2 All SA 623 (A)* at 628 indicates that the way in which the *audi alteram partem* rule is applied is flexible, it is preferable that the rule be applied before the decision is taken, since a person who is only heard after a decision is taken is worse off than the person heard before the decision is taken. At 479 C – F, the learned Judge held that it does not by necessity mean that each prisoner must be given a hearing as of a right but the *audi alteram partem* rule is applicable where an administrative decision can prejudice a prisoner to such extent that, in accordance with that prisoner's legitimate expectation, the decision should not be taken until he is heard.

- [29] Applying the above case law, the applicant was entitled to be heard before a decision was taken. It is also clear that applicant was not afforded an opportunity to make formal or informal submissions before the decision was taken. The respondent views the date of the decision as 24 February 2015. This is the date upon which feedback was given to applicant's representations. This statement cannot be correct, is disingenuous and stands to be rejected. This is substantiated by the fact that the final approval was granted on 13 February 2015.
- [30] This final approval was for the transfer of 150 identified inmates, applicant having been previously identified for transfer. The applicant's representations dated 12 February 2015 were not considered at the level where such decision was taken before the decision was taken.
- [31] Far be it from the court to inhibit the respondent, as an organ of state, from effectively implementing policy. However, a line will be drawn as to how far the respondent may stretch the flexibility of the *audi alteram partem* rule. Added to this, regulation 25 and the policy document, B order 1 Chapter 2 are both prescriptive in how this maxim should be applied. There are no unusual circumstances which would permit respondent the degree of flexibility they claim in applying the rule. It is clear, in

the present circumstances, that the respondent failed to follow the *audi alteram partem* rule in a proper manner.

[32] Section 43 states that a medical examination before the transfer of a prisoner is a pre-requisite. The respondent attaches a letter from the Operational Manager: Department of Correctional Services (Upington) to the Area Commissioner: Upington Management Area dated 6 March 2015. This letter confirms that 148 prisoners had been medically screened before transfer. As the applicant was initially to be transferred on 13 February 2015, it is unclear whether he forms part of this 148 prisoners. The fact that 150 prisoners were to be transferred and 2 lodged an objection, leaving 148 to be medically screened is suggestive but still does not provide clarity. The respondent is unable to assist in this regard and in the absence of documentation from the respondent, for example the applicant's medical file, or the G335 form, it can be accepted that the applicant was not medically screened before he was to be transferred. This is a procedural irregularity.

[33] No assistance was forthcoming from the respondent as to whom the official was who took the decision. As stated, the only certainty arises from the document dated 13 February 2015 which provides final approval for the

transfer by the Regional Commissioner. It appears from this that the final decision rested with said Regional Commissioner. The applicant's representation was responded to by the Office of the Regional Coordinator: Legal Services. It is not clear whether the final decision maker was party to such responses. Ultimately, the decision maker must consider such representations. This cannot be the case here as such final approval pre-dates the responses furnished and there is no indication that the final decision maker rejected the applicant's representations at the time he/she took the final decision for the reasons set out in the said correspondence.

[34] The JICS made a finding that the officials involved in the transfer attended to the transfer based on instructions from their seniors. Consequently, we hereby find that the respondents did not properly apply their mind to the applicant's representations and that the decision was taken due to the unwarranted or unauthorised dictates of another.

[35] The decision to transfer is also substantively unfair as found by the JICS, consideration was not given to the personal circumstances of the applicant. The respondent also dealt with the representations piecemeal. Some responses were contained in their letter dated 24

February 2015 and the rest were only dealt with the opposing affidavit, most notably the contact visits with his elderly parents which was not addressed at all in their above correspondence. Clearly, a relevant consideration was ignored when taking the decision.

[36] Concerning the JICS report, which the respondents criticised, this court is compelled to find that the report is binding on the respondents. The JICS is a statutory body formed in terms of the Act and the findings are done in terms of section 90 of the Act. The respondents did not seek to have such findings set aside and in light thereof, the respondents are bound to those findings.

[37] On the papers it is clear that the decision to transfer applicant was both procedurally and substantively unfair.

We therefore make the following order:

- 1. THE DECISION TO TRANSFER THE APPLICANT FROM THE CORRECTIONAL CENTRE: UPINGTON TO THE CORRECTIONAL CENTRE: TSWELOPELE IS HEREBY SET ASIDE;**

2. THE MATTER IS REMITTED BACK TO 2ND TO 4TH RESPONDENTS FOR RECONSIDERATION.
3. COSTS OF THE APPLICATION ARE AWARDED AGAINST THE RESPONDENTS JOINTLY AND SEVERALLY, THE ONE TO PAY, THE OTHERS TO BE ABSOLVED.



JA SNDYERS
ACTING JUDGE

I concur



L LEVER
ACTING JUDGE

<u>On behalf of Applicant:</u>	Adv AD Olivier (Instructed by: KBVS Attorneys)
<u>On behalf of Respondent:</u>	Adv MC Modisa (State Attorney)