



IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO: 596/2015

In the matter between:

MARTIN DIPPENAAR

Applicant

And

THE MINISTER OF CORRECTIONAL SERVICE

1st Respondent

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

2nd Respondent

**THE AREA COMMISSIONER:
CORRECTIONAL SERVICES: UPINGTON**

3rd Respondent

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

4th Respondent

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

5th Respondent

JUDGMENT

CORAM: LEVER AJ

1. This is an interlocutory application, brought by the respondents in the main application, for leave to file a fourth set of affidavits in the main application. The main application is an application to review the decision of the respondents to transfer the applicant, a prisoner, from a facility in Upington to a facility in Kimberley.

2. In order to avoid any confusion, the parties herein will be referred to as in the main application.
3. The applicant, in the main application, obtained an interim interdict by way of a rule nisi, issued on the 27 February 2015 and confirmed on the 28 August 2015, preventing the said transfer pending the outcome of the said review and ordering that the costs of the interim interdict be costs in the review application. The review application was duly filed. The respondents opposed the review and an answering affidavit was filed on their behalf.
4. In broad terms the basis of the applicant's review of the said decision was based on the contention that moving him from Upington would take him away from his family. Also that he was studying architecture through an external institution and that he had a mentor who was able to visit him in Upington periodically, but that he did not know any architects in Kimberley and that he would not have access to a mentor to assist him with his studies. Furthermore, in making the decision to transfer him, the applicant alleges that the respondents had not complied with all of the statutory formalities.
5. At the outset when it became apparent that the relevant transfer was about to take place one Ms Rita Strauss lodged a complaint with the Judicial Inspectorate For Correctional Services (JICS) on behalf of her

brother Mr DP Strauss and the applicant. The Office of the JCIS, by way of a letter authored by a Mr James Madiga and dated the 23 March 2015, ruled that: "...the mandatory procedures to be followed per provisions of section 43 of the Correctional Services Act 111 of 1998, read together with the provisions of regulation 25 (promulgated under the Act) and those of B order 1 chapter 2 were not complied with."¹

6. This ruling from the office of the JCIS was not available to the applicant when he lodged the founding papers to the main application herein. This is not disputed by the respondents. The respondents also acknowledge that the said JCIS ruling was available to the respondents before they finalised the answering affidavit in the main application.
7. Subsequently, the said JCIS ruling came into the possession of the applicant and it was annexed to the replying affidavit. The respondents maintain that Mr Madiga misunderstood and/or misconstrued certain documents, further that he failed to consult relevant personnel to clarify certain issues when he made the said ruling for the Office of the JCIS.
8. The respondents, by way of this substantive application, seek leave under the provisions of Rule 6(5)(e) of the Uniform Rules of Court (the Rules) to file a fourth set of affidavits to deal with the issues that they maintain Mr Madiga misconstrued, misunderstood or failed to clarify.

¹ Annexure "MDP1", to the replying affidavit in the main application, para 8.4 thereof.

9. The question of whether an additional or further sets of affidavits are allowed is one that is within the discretion of the court. Rule 6(5)(e) of the Rules provides that:

“6(5)(e) Within 10 days of the service upon him of the affidavit and documents referred to in sub-paragraph (ii) of paragraph (d) of sub-rule (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits.”²

10. The law relating to how this discretion should be exercised was dealt with by Williamson J in the matter of TRANSVAAL RACING CLUB v JOCKEY CLUB OF SOUTH AFRICA³, where he reached the following conclusion:

“In my view the authorities do not restrict the discretion in the Court in the manner suggested. I think that if there is an explanation which negatives male fides or culpable remissness as the cause of the facts or information not being put before the Court at an earlier stage, the Court should incline towards allowing the affidavits to be filed. As in the analogous cases of the late amendment of pleadings or the leading of further evidence in a trial, the Court tends to the course which will allow a party to put his full case before the Court. But there must be a proper and satisfactory explanation as to why it was not done earlier, and, what is also important, the Court must be satisfied that no prejudice is caused to the opposite party which cannot be remedied by an appropriate order as to costs.”⁴

11. The deponent to the respondents' founding affidavit herein stated that the ruling of the office of the JICS was available to the respondents when they consulted, evidently in respect of the interim interdict. That a hard copy of the said JICS ruling was printed and taken to Counsel's chambers for such consultation. During the said consultation

² Rule 6(5)(e) Uniform Rules of Court.

³ 1958 (3) SA 599 (W)

⁴ Above, at p 604C-E.

respondents' Counsel was informed of the ruling from the office of the JICS and the hard copy of such ruling was placed on the table. According to the said deponent the respondents' Counsel indicated that he might have missed what he had been told about the JICS ruling and that he did not remember seeing it. Further, that it might have been taken by one of the other persons who participated in that consultation. Their Counsel indicated that if he had seen such ruling he would have dealt with it.

12. It must be remembered that this consultation that took place on the 24 March 2015 dealt with the interim interdict. Shortly thereafter, and on the 25 March 2015, the applicant lodged the review application, the main application herein.
13. The deponent to the respondents' founding papers herein contends that the applicant's founding papers in the interim interdict application were substantially the same as the papers in the main application. According to the said deponent, there were minor changes in places. That in these circumstances the respondents felt comfortable dealing with these minor differences telephonically and a full consultation was deemed unnecessary. The respondents' answering affidavit in the main application was settled and forwarded to the deponent to peruse. At all stages of this litigation the deponent to the respondents' affidavits has been the same person. The said deponent went through the draft affidavit and found it to be in accordance with the telephonic

instructions given. The said deponent believed that in addressing the concerns of the JICS that the relevant ruling had been dealt with. Further, that in not dealing directly with the JICS ruling, there was no intention to withhold anything from the court.

14. Mr Olivier, who appeared for the applicant in the main application, opposed the present application on the basis that in its founding papers it referred to Mr Madiga's e-mail correspondence where Mr Olivier submitted it at least raised doubts as to whether the statutory requirements were complied with. That this ought to have alerted the respondents to deal with the ruling of the JICS.

15. At first blush Mr Olivier's argument looks persuasive, but it overlooks two important considerations. Firstly, the deponent to the respondents' founding affidavit herein is a lay person as far as the law and court practice are concerned. At the very least there was clearly a miscommunication between her and the respondents' Counsel. Secondly, the e-mail correspondence, being annexure "DIP3" to the founding affidavit to the main application, does not express doubt as to whether the relevant legislation had been complied with, but merely asks for confirmation that it had been complied with.

16. Mr Olivier's argument would have been more convincing if either respondents' Counsel had indeed had sight of the ruling or if the deponent to the respondents' affidavits in this matter had been legally

qualified. In either event the significance and need to deal with the JICS ruling would have been apparent to either or both of them.

17. There is nothing to indicate from the explanation given or the evidence placed before me that either the respondents' Counsel or any of the respondents acted male fide in the circumstances. There is no basis for me to find male fides or culpable remissness on the part of the respondents. In the circumstances I believe that the respondents have given a proper and satisfactory explanation as to why the JCIS report was not dealt with. Further, it is in the interests of justice that the respondents are given an opportunity to place all of the facts and circumstances before the court in the relevant review application.

18. I do not think the applicant will be prejudiced by allowing the respondents to file their fourth set of affidavits by way of a 'rejoinder'. The applicant has indicated that in the event that I am disposed to grant the respondent's leave to file a fourth set of affidavits they may wish to file a reply thereto by way of a 'surrejoinder' or fifth set of affidavits. In the circumstances I believe this would be fair and reasonable. Mr Mene, who appeared for the respondents', certainly did not object to a surrejoinder. In my view, the appropriate order to make is to allow the respondents to file their rejoinder and allow the applicant to file a surrejoinder, if he wishes to reply to respondents fourth set of affidavits.

19. The final issue to be decided is the issue of costs of the present application. Mr Mene for the respondents argued that the costs of this application should be costs in the review application. Mr Olivier on the other hand submits that respondents seek an indulgence and that given the explanation given by the respondents that it was not unreasonable for the applicant to have opposed this application for leave to file a further affidavit.
20. In the present circumstances the question really boils down to whether or not it was reasonable for the applicant to oppose the application for leave to file a further affidavit. In all of the circumstances of the case I believe that it was reasonable for the applicant to have opposed the present interlocutory application and is thus entitled to his costs.

In the circumstances the following order is made:

- 1) The respondents in the main application are hereby granted leave to file a fourth set of affidavits in the main application within 10 (ten) days of the date on which this judgment is handed down.
- 2) The applicant is granted leave to file a reply thereto within 15 (fifteen) days of the respondents filing their fourth set of affidavits in the main application.
- 3) The respondents, in the main application, are jointly and severally, the one paying the others to be absolved, ordered to pay the party-and-party costs of the applicant, Mr Martin Dippenaar, in this application for leave to file a further affidavit in the main application.

Lawrence Lever

Acting Judge

Northern Cape Provincial Division

On behalf of Applicant: **Adv Olivier – Hugo Matthewson & Oosthuizen**

On behalf of Respondents: **Adv Mene – Office of the State Attorney**

Date of hearing: **25 April 2016**

Date of Judgment: **02 August 2016**