



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

27 / 2 / 15

CASE NUMBER: ~~40959~~ / 2014

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
27 / 02 / 2015	
DATE	SIGNATURE

In the matter between:

OKAH HENRY EMOMOTIMI

FIRST APPLICANT

OKAH AZUKA STELLA

SECOND RAPPICANT

And

MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES

FIRST RESPONDENT

NATIONAL COMMISSIONER OF
CORRECTIONAL SERVICES

SECOND RESPONDENT

JUDGMENT

MAVUNDLA J;

[1] The first applicant was convicted of thirteen (13) charges relating to terrorism and effectively sentenced to twenty four (24) years imprisonment on 26 March 2013. He is currently incarcerated at Ebhongweni Kokstad Maximum Security facility in Kwa-Zulu Natal. The second applicant is the wife of the first applicant, and relied on s38 of the Constitution to bring these proceedings on behalf of the first applicant. In my view, the question of *locus standi* in this matter is not in issue.

[2] The applicants approach this court by way of urgency seeking the following relief:

2.1 That the forms and service provided in the Uniform Rules of this Court are dispensed with and this matter be disposed of in terms of Rule 6(12)(a);

2.2 An order in terms of which the disciplinary hearing held against the first respondent on the 3rd April 2014 together with its findings and sanctions be reviewed and set aside;

2.3 The consequent decision of the Respondent to transfer the first respondent to Ebhongweni Maximum Correctional Centre "Kokstad prison" in Kwa Zulu Natal be reviewed and set aside;

2.4. Directing the respondents to return the first applicant to the Kgosi Mampuru II Maximum Security Centre "New Lock Prison" in Pretoria within 48 hours of this order being granted;

2.5 Directing the respondents' actions, in terms of which the first applicant was downgraded from A-group to C-group inmate, is set aside;

2.6 Directing the respondents to reinstate all rights and privileges accorded such inmates by virtue of their A-group status as to the applicant;

2.7 That the respondents allow the first applicant's doctor, Dr. Omoniyi Akerele to have contact visitation and to administer the first applicant's medication to him within 24 hours of his return to Newlock Prison;

2.8 Directing the respondent to bear the costs of this application on a scale as between attorney and own client.

- [3] The applicants contend in their papers that the purpose of the application is to restore the *status quo ante* and as such to have the first applicant returned to Newlock Prison in Pretoria in order for him to be consulted by his private practitioner and restoring the attorney and client relationship between the first applicant and his attorney which the respondent is currently frustrating and unlawfully and maliciously preventing.
- [4] The applicants contended further that the matter is urgent because the first applicant will not be afforded substantial redress at the hearing of the matter in due course as the matter would in all likelihood be opposed by the respondents thus necessitating that it be placed on the opposed roll at the end of August. Were this to happen the respondent would have succeeded in depriving the first applicant from having his private medical practitioner to administer the necessary medication to him.
- [5] The applicant contended further that the first applicant suffers from a condition known as Keloids. During the period of April 2014 the respondent, through its employees, allowed the first applicant to have his own private doctor to administer and treat this condition. The second applicant further alleged that neither the Leeuwkop nor Newlock prisons' facilities where the first applicant was incarcerated previously have any know-how to treat the condition of the first applicant. The second respondent averred further that she learnt telephonically from the first applicant that neither does the Kokstad prison have know-how to treat his condition.

- [6] Although it is conceded by the respondents that the first applicant suffers from a condition known as Keloids, his medical doctor can access and treat him at Kokstad, if he so wished. Otherwise, the medical doctor serving the Correctional Centre at Kokstad where the first applicant is incarcerated is available to attend and treat him. His condition can be treated by any dermatologist. I am inclined to accept the version of the respondent and conclude that the first applicant's condition does not necessarily require a particular medical practitioner of the applicant's choice.
- [7] The second applicant further alleged that the respondents frustrated any effort on the part of the applicants to bring review proceedings against the decision to downgrade the status of the first applicant from A-group to C- group inmate much earlier by not responding to their inquiries.
- [8] The further essence of the applicants' contention, *inter alia*, is that in transferring the first applicant to Kokstad, the respondent failed to have regard to subsections (1), (2), and (3) of section 43 of the Correctional Service Act (CSA) in not incarcerating the first applicant at the nearest centre to his home and or relatives, which is would be Kgosi Mampuru II in Pretoria.
- [9] It is common cause that a disciplinary hearing was conducted against the first applicant by the department of correctional services wherein, after he walked out of the proceedings, was in absentia, found guilty on the 3rd April 2014. The first applicant brought an urgent application before De Vries J to have the aforesaid disciplinary hearing set aside. However that application was opposed and subsequently withdrawn in court and both parties were ordered to pay their own costs. It needs mentioning that according to the second applicant, the first applicant had already been downgraded and effectively to a C-group as from January 2014. In my view, once the applicant withdrew the aforesaid urgent application, assuming that the matter was indeed then urgent, that urgency was lost. The present application was brought in June 2014. The applicant cannot again seek to have the disciplinary decision of the 3rd April 2014 to be adjudicated upon on urgent basis after they had withdrawn the initial application.

[10] In so far as the applicant seeks an order that the respondents be directed to have him returned to and incarcerated at a place nearest to his next of kin in Pretoria, he in fact seeks a mandamus which is of final interdictory nature. The applicant must meet the requirements of a final interdict, namely:

- (i) that he has a clear right to the issues raised in the prayer sought;
- (ii) an injury committed or reasonable apprehended in relation to the issues raised in (i); and
- (iii) absence of any other satisfactory remedy in settling these matters.

[11] It is trite that a convicted and sentenced inmate's incarceration is governed by the Act 111 of 1998 and does not have absolute rights. Section 43 of CSA provides that a sentenced offender must be incarcerated at a correctional centre closest to the place where he is to reside after his release, with regard to the availability of accommodation and facilities to meet his security requirements in consideration of available programmes. This section also empowers the second respondent to transfer a sentenced inmate to another correctional centre. In this regard Bertelsmann J in the matter of *Masilela v Bouwers* 2013 (2) SACR 350 (GNP) held that:

"[12] It is therefore clear that, upon admission to a correctional institution, an inmate may lawfully be assessed and placed in a correctional centre that provides the appropriate level of security, considering the risk the sentenced offender poses at that stage. The locality of the correctional centre best equipped to accommodate the offender must be considered with reference with which the offender's next of kin or friends may be able to visit him. It is clear that, however, that an offender may lawfully be placed in a centre that is far removed from his family's residence, if it is necessary to do so in the *bona fide* opinion of the responsible official in the respondent's centre."

[12] When the applicant was convicted and sentenced on the 26 March 2013 he was incarcerated at the Leuwkop prison but was subsequently transferred from Leuwkop Prison to Pretoria. Whilst at Pretoria a disciplinary hearing was conducted on the 3 April 2014 in terms whereof he was found guilty and transferred to Kokstad. The applicant did not exhaust the internal remedies available to him, before turning to the court. In this regard Bertelsmann J held in the *Masilela* matter (supra) that: "[13] Should an offender be of the view that his classification is incorrect or that his placement in

a particular centre is unreasonable, irrational or mala fide, the complainant's procedure provided for in s21 must be followed."

[13] I am of the view that the applicant, as a sentenced inmate, does not have a right to demand where he must be held. The respondents contend in their paper's that the first applicant is a high security risk inmate. The Pretoria Local Correctional Centre where he wants to be returned to, has no capacity to deal with high risk inmates, whereas the correctional centre where he is presently housed does, according to the respondents. In this regard, the version of the respondents must in the circumstances prevail, *vide Townsend Productions (PTY) Ltd v Leech and Others* 2001 (4) SA 33 (CPD) at 40 D-F; *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at 375E.

[14] I am of the view that, this application stand to be dismissed, without the need of traversing all the issues other issues raised by the applicants in their papers. In so far as the costs are concerned there is no reason why the general principle that costs follow the event, should not apply. The respondent was represented by senior counsel assisted by a junior. There is no reason why the respondents should be put out of pocket at all.

[15] In the result the application is dismissed with costs including the costs of two counsel.

N.M.MAVUNDLA

Date of Hearing : 10 / 11 / 2014

Date of Judgment : 27 / 02/ 2015

APPLICANTS' ADVOCATE: ADV G. C. MULLER SC

INSTRUCTED BY : P.I. URIESI ATTORNEYS

RESPONDENT'S ADV : ADV MTK MOERANE SC, with ADV E B NDEBELE

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