



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: **367/2015**
Datum verhoor/Date heard: **21/08/2015**
Datum gelewer/Date delivered: **28/08/2015**

In the matter between:

MARTIN DIPPENAAR

Applicant

and

THE MINISTER OF CORRECTIONAL SERVICES

First Respondent

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

Second Respondent

**THE AREA COMMISSIONER : CORRECTIONAL
SERVICES UPINGTON**

Third Respondent

**THE HEAD OF THE CENTRE: CORRECTIONAL
SERVICES UPINGTON**

Fourth Respondent

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

JUDGMENT

ERASMUS, AJ

- [1] The applicant herein seeks confirmation of a rule *nisi*, issued on 27 February 2015, in terms of which the respondents were interdicted from transferring the applicant from Upington Correctional Centre ('Upington'), pending the outcome of a review application to be filed on or before 27 March 2015. Costs of the application were ordered to be costs in the review application. Paragraph 1 of the said rule *nisi* operated as an *interim mandamus* against the respondents.
- [2] It is common cause between the parties that the review application, as envisaged in the rule *nisi*, was issued and is to be heard on 17 September 2015; that is just less than a month from today. The purpose of the review application is to have the decision taken by one or more of the respondents to transfer the applicant from the Upington to the Tswelopele Correctional Centre ('Tswelopele'), situated in Kimberley, set aside.
- [3] It is common cause that the applicant made representations to the third and fourth respondents to prevent being transferred to Tswelopele. On 25 February 2015 the applicant received a letter from the Department of Correctional Services' Legal Department, informing him that his representations were unsuccessful. The applicant ascertained that he would be transferred to

Tswelopele on 2 March 2015, after which he immediately proceeded to lodge the urgent application to prevent his transfer.

- [4] The basis for the opposition of the applicant's transfer to Tswelopele was and still is that it will have a negative impact on his studies the contact he has with his parents. They are both elderly and reside in Springbok which is situated 400 km from Upington and approximately 800 km from Kimberley.
- [5] The applicant is in his 5th year of architectural studies through INTEC College, a distance training college. It is common cause that he worked under supervision of a mentor in Upington. The applicant had regular contact with this mentor. The mentor has since passed away. The applicant managed to obtain the guidance of a new mentor. Although this mentor resides in Kathu, he agreed to mentor the applicant in his architectural studies. This mentor visits the applicant in Upington whenever he visits his relatives who reside in Upington. He assists the applicant and visits him in prison every two to three weeks. The mentor has indicated that he will not be able to assist the applicant if the applicant is transferred to Kimberley. The applicant does not know any architects in Kimberley and states that it will be

difficult for him to obtain the services of a mentor if transferred to Tswelopele.

- [6] The opposing papers of the respondents were filed on 8 April 2015. The respondents aver that the applicant was provided with the opportunity to make submissions or representations in respect of the decision to transfer him to Tswelopele. These were unsuccessful. It is alleged that the transfer to Tswelopele will not have a negative impact on the applicant's studies as he is studying through a distance training college. Tswelopele has a library, internet facilities and computer centre. The decision to transfer the applicant and 149 other inmates was based on the fact that Upington is over-crowded and the transfer would alleviate such over-crowding. Only two inmates, one being the applicant, opposed their transfer. The transfer was done in accordance with section 43 of the Correctional Services Act, No. 111 of 1998. Due regard was had of the family ties of the Applicant, the availability of accommodation, the facilities to meet his security requirements and the integration into rehabilitation programmes. The applicant will not be prevented from having contact and non-contact visits. It is further the case of the respondents that the granting of the relief will negatively impact on the morale of the other detainees held at Upington.

[7] The applicant filed his replying affidavit, attaching thereto a copy of a report of the Judicial Inspectorate for Correctional Services ('JICS'), dated 23 March 2015. This report deals with a complaint lodged on behalf of the applicant and the other inmate who opposed their transfer to Tswelopele. The respondents, in their Heads of Argument, indicated that application would be made to strike out the report as it introduces new matter, which the respondents were not afforded an opportunity to address. The respondents proceeded with this application at the hearing of the main application. As stated earlier, this report is dated 23 March 2015 and appears to have been addressed also to the Third and Fourth respondents. This report thus appears to have been available to at least some of the respondents before the opposing papers were filed. Even if it wasn't, the respondents failed to apply to the Court for leave to file further affidavits in terms of Rule 6(5)(e). Furthermore, even if this report introduced new matter, the applicant could not have been aware of it at the time that he had filed his founding affidavit. This report is relevant to the issues in this application. In exercising my discretion, I dismissed the application to strike out the report.¹

¹ Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal SA Ltd 2013 (2) SA 204 (SCA) at par 26

[8] The legal requirements for an *interim* interdict are that the applicant must show that he has a *prima facie* right to the relief even though this right might be open to some doubt.² He must further show a well-grounded apprehension of irreparable harm if the *interim* relief is not granted and that the balance of convenience must favour the granting of the *interim* relief. The applicant must further show that he has no other satisfactory remedy.³ These requisites must be considered in conjunction with one another when considering whether to exercise discretion in favour of granting the interim relief.⁴ The proper approach is, as set out by Corbett J (as he then was) in *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality*:⁵

'Briefly these requisites are that the applicant for such temporary relief must show -

- (a) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;*
- (b) that, if the right is only prima facie established, there is a wellgrounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;*
- (c) that the balance of convenience favours the granting of interim relief; and*
- (d) that the applicant has no other satisfactory remedy.*

(See Gool v Minister of Justice and Another, [1955 \(2\) SA 682 \(C\)](#) at pp. 687 - 8; Pietermaritzburg City Council v Local Road Transportation Board, [1959 \(2\) SA 758 \(N\)](#) at p. 772). Where the applicant cannot show

² Webster v Mitchell 1948 (1) SA 1186 (W) at 1188-1189

³ Setlogelo v Setlogelo 1914 AD 221 at 227

⁴ Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton 1973(3) SA 685 (A) at 691F

⁵ 1369 (2) SA 256 (C) at 267A-F

a clear right, and more particularly where there are disputes of fact, the Court's approach in determining whether the applicant's right is prima facie established, though open to some doubt, is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial of the main action (see Gool's case, supra).'

[9] In an application for an interdict *pendente lite*, as in this instance, the Court has discretion whether or not to grant the application. The discretion must be exercised upon consideration of all the circumstances and the probabilities of success of the applicant in the main action/application. This involves a consideration of the prospects of success and the balance of convenience: The stronger the prospects of success, the lesser the need for the balance of convenience to favour the applicant and, on the other hand; the weaker the prospects of success, the greater the need for the balance of convenience to favour the applicant.⁶

[10] The applicant challenges the decision of the first respondent in terms of the Promotion of Administrative Justice Act, No. 3 of 2000, hereinafter referred to as “PAJA”. The grounds upon which the review application is based are, *inter alia*, that the decision to transfer the applicant to Tswelopele is not rationally connected to the

⁶ Olympic Passenger Service (Pty) Ltd v Ramlagan 1957 (2) SA 382 (D) at 383C-G

information which was placed before the decision taker or to the reasons for the decision and that the decision was taken without proper consideration and consultation, as required in terms of section 43 of the Correctional Services Act, No. 111 of 1998 ('the Act') and Regulation 25 of the regulations promulgated in terms of the Act. The applicant specifically averred that his right to have proper relations with his next of kin was not taken into account when the decision was made. He averred that his right to procedural fairness was infringed upon.

[11] The respondents, in response to these allegations, aver that the applicant was afforded opportunity to make submissions before the decision to transfer was made and that these were properly considered. It is correct that the applicant made submissions before the decision was taken. These were based on his studies and the situation pertaining to contact with his elderly parents. From the papers in this application, the effect of the transfer on his rights to have contact with his elderly parents, appear not to have been considered.

[12] The JICS have investigated the complaints of the applicant. From the report it appears, at least *prima facie*, that the mandatory procedures, as prescribed in section 43 of the Act, read with the provisions of

Regulation 25, were not complied with. I am satisfied that the applicant has established a *prima facie* right, though it might be open to some doubt.

- [13] I am further satisfied that the applicant has established a well-grounded apprehension of irreparable harm if the relief is not granted. It is common cause that the applicant is currently being assisted by a mentor in Upington. If the rule *nisi* is discharged, the applicant will be moved to Tswelopele. If the applicant is moved during this *interim* period pending the outcome of the review application, it will have a negative impact on his studies as he will not have a mentor to assist him and/or will need to find a new mentor. He will not immediately be able to obtain the services of a mentor while in Kimberley. If the review application is successful, he will have to be returned to Upington and once again secure the services of his mentor in Upington.

- [14] This brings me to the issue of the balance of convenience. The respondents averred that the overcrowding of the centre at Upington and the possibility of dissatisfaction amongst other inmates which may result in a risk to security and good order weigh heavily against confirmation of the rule *nisi* in this instance. I fail to see how the *interim* relief interdicting the transfer of

one person will make a difference in respect of the overcrowding at this centre. There is no evidence of such dissatisfaction amongst inmates and/or threats. I fail to see what prejudice there is for the respondents if the *interim* relief is granted. The *status quo* will remain intact pending the outcome of the review application which is to be adjudicated in less than a month's time.

[15] In this instance I am satisfied that the balance of convenience weighs heavily in favour of the applicant and that the *rule nisi* should be confirmed.

[16] I find no reason why the order of Lacock J, in terms of which the costs of this application are to be costs in the review application, should be discharged.

WHEREFOR I MAKE THE FOLLOWING ORDER:

THE RULE *NISI* ISSUED ON 27 FEBRUARY 2015 IS CONFIRMED.

S L ERASMUS, AJ
ACTING JUDGE

<u>On behalf of Appellant:</u>	Adv. A.D. Olivier (oio Hugo Mathewson & Oosthuizen Inc.)
<u>On behalf of Respondents:</u>	Adv.B.S Mene (oio The State Attorney, Kimberley)