

**IN THE HIGH COURT OF SOUTH AFRICA**

**NORTH GAUTENG PROVINCIAL DIVISION**

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**Case No.: 63532/2012**

**Case No.: 16995/2013**

*16/4/2013*

In the matter between:

**LEE BESSIE MASILELA**

First Applicant

**THULANI TSEWANE**

Second Applicant

**BONGANI ZIKALALA**

Third Applicant

**SEITH RADITAPOLE**

Fourth Applicant

And in the matter between

**TEBOGO STEVEN BOUWERS**

First Applicant

**MZWANDILE MAGAXAKA**

Second Applicant

**AYANDA NENE**

Third applicant

versus

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**MINISTER OF CORRECTIONAL SERVICES & OTHERS**      Respondents

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**JUDGMENT**

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1. The applicants in these two applications are long term prisoners who have been convicted of very serious offences, including armed robbery and murder. With two exceptions, they are all classified as '*high risk*' offenders who, according to the respondents, require maximum security incarceration because of the serious and violent nature of their crimes.
2. They are being held at Kutama Sinthumule Correctional Centre, Makhado in Limpopo, at Thohyandou in Venda and in Zonderwater Maximum Security at Cullinan in Gauteng respectively.
3. All of them wish to be transferred to a correctional centre in Johannesburg. On the papers the request was motivated on the grounds that they wished to be closer to their families. During argument they added that they wished to further their studies at the Johannesburg correctional centre, as the courses

that were offered there are not presented at the facilities in which they are housed at present and they have completed the courses that were available.

4. They approached the court by way of urgency for an appropriate mandamus.
5. The respondents, the Minister of Correctional Services, the Commissioner of Correctional Services and other senior officials of the Department of Correctional Services, opposed both the merits and the enrolment of the matters in the urgent court.
6. It is necessary to consider the legal arguments presented by the parties against the background of the Constitution and the applicable legislation before the alleged urgency and the merits of the matters can be considered.
7. The Constitution guarantees in section 35 thereof the minimum rights of sentenced prisoners:

*'(2) Everyone who is detained, including every sentenced prisoner, has the right—*

*(a) to be informed promptly of the reason for being detained;*

*b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;*

*(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;*

*(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;*

*(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and*

*(f) to communicate with, and be visited by, that person's—*

*(i) spouse or partner;*

*(ii) next of kin;*

*(iii) chosen religious counsellor; and*

*(iv) chosen medical practitioner.'*

8. The fundamental rights are not unlimited and incarceration of an accused or a sentenced prisoner is not unconstitutional. Section 12 of the Constitution provides in subsection 1 (a) that nobody may be deprived of freedom '*..arbitrarily or without just cause*'. Conversely, incarceration consequent upon a fair trial resulting in a conviction after the evidence established the accused's guilt beyond a reasonable doubt, and the imposition of an appropriate sentence constitutes a justifiable limitation of the right. See *S v Dladla & Others*; *S v Joubert*; *S v Schietekat* 1999 (2) SACR 51 (CC).
9. Convicted offenders who have been sentenced to direct imprisonment without the option of a fine are the responsibility of the Department of Correctional Services. Their detention and the powers and duties of the Department are determined by the Correctional Services Act 111 of 1998 as amended.
10. The relevant sections of this Act are the following:

**'4. Approach to safe custody.—**(1) *Every inmate is required to accept the authority and to obey the lawful instructions of the National Commissioner and correctional officials of the Department and custody officials.*

(2) (a) *The Department must take such steps as are necessary to ensure the safe custody of every inmate and to maintain security and good order in every correctional centre.*

(b) *The duties and restrictions imposed on inmates to ensure safe custody by maintaining security and good order must be applied in a manner that conforms with their purpose and which does not affect the inmates to a greater degree or for a longer period than necessary.*

(c) *The minimum rights of inmates entrenched in this Act must not be violated or restricted for disciplinary or any other purpose, but the National Commissioner may restrict, suspend or revise amenities for inmates of different categories.'*

**‘13. Contact with community.—**(1) The Department must encourage inmates to maintain contact with the community and enable them to stay abreast of current affairs.

(2) The Department must give inmates the opportunity, under such supervision as may be necessary, of communicating with and being visited by at least their spouses or partners, next of kin, chosen religious counsellors and chosen medical practitioners.

(3) In all circumstances, a minimum of one hour must be allowed for visits each month.

(4) If an inmate is not able to receive visits from his or her spouse, partner or next of kin, the inmate is entitled to be visited by any other person each month.

(5) An inmate who is a foreign national must be allowed to communicate with the appropriate diplomatic or consular representative or, where there is no such representative, with a diplomatic representative of the state or international organisation whose task it is to protect the interests of such inmate.

(6) (a) On admission to a correctional centre and after transfer to another correctional centre, an inmate must notify his or her next of kin that he or she is being detained in a particular correctional centre, and if—

(i) the next of kin is unknown, the inmate may notify any other relative;

(ii) the inmate does not wish to notify his or her next of kin, the inmate must indicate this to the Head of the Correctional Centre.

(b) The National Commissioner must ensure that all reasonable steps are taken to enable an inmate to notify his or her next of kin in terms of paragraph (a) and, if necessary, steps must be taken to notify his or her next of kin on his or her behalf.

(c) (i) In the case of an inmate who is a child, the National Commissioner must notify the appropriate state authorities who have statutory responsibility for the education and welfare of children as well as the parents of such child when this is required in terms of paragraph (a).

(ii) If no parent is available, the National Commissioner must notify the legal guardian and if the legal guardian is not available the next of kin or other relative must be notified.

(iii) An inmate who is a child may not refuse to allow notification.

(d) If requested by the spouse, partner or next of kin, the National Commissioner must as soon as practicable, with the written consent of the inmate, give particulars of the place where the inmate is detained.

(7) (a) The National Commissioner may allow community organisations, non-governmental organisations and religious denominations or organisations to interact with sentenced inmates in order to facilitate the rehabilitation and integration of the inmates into the community.

(b) The organisations or denominations referred to in paragraph (a), must be registered with the Department and members thereof may be screened by the National Commissioner before they can be allowed to interact with sentenced inmates.’

**'21. Complaints and requests.—**(1) Every inmate must, on admission and on a daily basis, be given the opportunity of making complaints or requests to the Head of the Correctional Centre or a correctional official authorised to represent such Head of the Correctional Centre.

(2) The official referred to in subsection (1) must—

(a) record all such complaints and requests and any steps taken in dealing with them;

(b) deal with complaints and requests promptly and inform the inmate of the outcome;  
and

(c) if the complaint concerns an alleged assault, ensure that the inmate undergoes an immediate medical examination and receives the treatment prescribed by the correctional medical practitioner.

(3) If an inmate is not satisfied with the response to his or her complaint or request, the inmate may indicate this together with the reasons for the dissatisfaction to the Head of the Correctional Centre, who must refer the matter to the National Commissioner.

(4) The response of the National Commissioner must be conveyed to the inmate.

(5) If not satisfied with the response of the National Commissioner, the inmate may refer the matter to the Independent Correctional Centre Visitor, who must deal with it in terms of the procedures laid down in section 93.

**'29. Security classification.—**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.'

**'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 practitioner before his or her transfer. Where such an offender is being treated by a medical practitioner, he or she must not be transferred until such an offender has been discharged from the treatment or the transfer has been approved by the correctional medical practitioner after consultation with the Head of the Correctional Centre.

(4) The Commissioner may, in consultation with a provincial head of education, or a provincial head of social development, as the case may be, transfer a sentenced child to a child and youth care centre providing a programme contemplated in section 191 (2) (j) of the Children's Act, 2005 (Act No. 32 of 2005) and from the date of such transfer the provisions of section 76 of the Child Justice Act, 2008, will apply.

**93. Powers, functions and duties of independent Correctional Centre Visitors.—**

(1) An Independent Correctional Centre Visitor shall deal with the complaints of inmates by—

- (a) regular visits;
  - (b) interviewing offenders in private;
  - (c) recording complaints in an official diary and monitoring the manner in which they have been dealt with; and
  - (d) discussing complaints with the Head of the Correctional Centre, or the relevant subordinate correctional official, with a view to resolving the issues internally.
- (2) An Independent Correctional Centre Visitor, in the exercise and performance of such powers, functions and duties, must be given access to any part of the correctional centre and to any document or record.
- (3) The Head of the Correctional Centre must assist an Independent Correctional Centre Visitor in the performance of the assigned powers, functions and duties.
- (4) Should the Head of the Correctional Centre refuse any request from an Independent Correctional Centre Visitor relating to the functions and duties of such a Visitor, the dispute must be referred to the Inspecting Judge, whose decision will be final.
- (5) An Independent Correctional Centre Visitor must report any unresolved complaint to the Visitors' Committee and may, in cases of urgency or in the absence of such a committee, refer such complaint to the Inspecting Judge.
- (6) The Inspecting Judge may make rules concerning, or on the appointment of an Independent Correctional Centre Visitor, specify, the number of visits to be made to the correctional centre over a stated period of time and the minimum duration of a visit, or any other aspect of the work of an Independent Correctional Centre Visitor.
- .....'

11. The relevant regulations promulgated under Act 111 of 1998 are the following:

**'8. Contact with Community.—**(1) The Head of the Correctional Centre must give special attention to the development and maintenance of good family relationships between inmates and their family members and other relatives.

(2) The Head of the Correctional Centre must convey any important information regarding an inmate's family, relatives or friends that may come to his or her attention, to the inmate as soon as practicable.

(3) On admission to a Correctional Centre or when an inmate is transferred, subject to the provision of Regulation 25 (1) (b), the Head of the Correctional Centre must, allow the inmate to notify his or her spouse, partner or next of kin in the manner prescribed by the Order, unless otherwise requested in writing by the inmate.'

**22. Classification of Sentenced Offenders.—**(1) Subject to the provisions of Sections 7 (3), 29, and 39 of the Act, a sentenced offender must be classified

*according to the security risk he or she poses, taking into account his or her suitability for treatment and training at a Correctional Centre.*

*(2) The National Commissioner determines the classification in accordance with the following principles—*

- (a) individual classification in so far as the period of sentence permits and an analysis and assessment of the offender's previous record, aptitude, qualification or previous training, ability and other personal factors;*
- (b) the maintenance of regular contact with, spouse, partner and next of kin; and*
- (c) insofar as the duration of sentence permits, the application of progressive and flexible reclassification.*

**'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 offender 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.*

*(b) If the transfer is for security reasons the Head of the Correctional Centre or the authorised official need not inform the inmate of the proposed transfer, but the inmate must be informed of the reasons as soon as practicable after his or her admission to the place where he or she is transferred to and must be allowed an opportunity to make a representation in this regard as well as an opportunity to notify his or her spouse, partner or next of kin in the manner prescribed by the Order.*

*(2) If an inmate or cared-for child is being transferred, his or her medical history file and any prescribed medication must be transferred with him or her.*

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 to the ease with which the offender's next of kin or friends may be able to visit him. It is, however, clear 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 respondents' service.

13. Should an offender be of the view that his classification is incorrect or that his placement in a particular correctional centre is unreasonable, irrational or *mala fide*, the complaints procedure provided for in section 21 must be followed.
14. An offender may, of course, also follow the same route by way of a request to be transferred to another centre. If the head of the relevant correctional centre reacts in a manner the inmate regards as unsatisfactory to a complaint or request, an appeal may be directed to the National Commissioner. If the inmate is still displeased with the National Commissioner's response, he has the option to seek the assistance of the Independent Prison Visitor.
15. It would appear that the assessment, classification and placement of an offender in a correctional institution, the filing and consideration of a complaint or the submission and consideration of a request are administrative actions. Any challenge of a decision taken in regard to these matters must therefore be brought in terms of the Promotion of Administrative Justice Act 3 of 2000.
16. The regulations published in 2002 in terms of Act 3 of 2000 provide in Chapter 4 thereof for the following steps that must be taken in writing to obtain reasons for an administrative action with an eye to an internal appeal or a judicial review:

#### **'CHAPTER 4 REQUESTS FOR REASONS**

##### ***Application of this Chapter***

**26.** *This Chapter applies to administrative action which materially and adversely affects the rights of any person, and must be complied with if a request for reasons for administrative action is made in terms of section 5(1) of the Act.*

##### ***Formal requirements***

**27. (1)** *A request in terms of section 5 of the Act for reasons for administrative action which materially and adversely affected a person's rights must be-*

*(a) in writing;*

*(b) addressed to the administrator concerned; and*

(c) sent to the administrator by post, fax or electronic mail or delivered to the administrator by hand.

(2) If an administrator receives an oral request for reasons from a person who cannot write or otherwise needs assistance, the administrator or a person designated by the administrator must give reasonable assistance to that person to submit such request in writing.

(3) A request for reasons contemplated in this Chapter must -

(a) indicate-

(i) the administrative action which affected the rights of the person making the request; and

(ii) which rights of that person were materially and adversely affected by the administrative action; and

(b) state-

(i) the full name and postal and, if available, electronic mail address of that person; and

(ii) any telephone and fax numbers where that person may be contacted.

#### **Administrator's duties**

**28.** (1) An administrator to whom a request for reasons is made must-

(a) acknowledge receipt of the request; and

(b) either-

(i) accede to the request and furnish the reasons in writing; or

(ii) decline the request.

(2) If an administrator declines a request for reasons in terms of section 5(4)(a) of the Act, the administrator must give reasons in writing to the person who made the request why the request was declined.'

17. The Rules of Procedure for Judicial Review of Administrative Action formulated by the Rules Board were published in October 2009. They contain comprehensive provisions for the launching an application to court, the preparation of affidavits, discovery of documents and preparation for trial. They would govern any application for the review of any decision relating to the accommodation of a sentenced prisoner in a specific correctional institution after the internal remedies referred to above have been exhausted. They have not yet come into operation, though, see: *Lawyers for Human Rights v Rules Board for Courts & Another* 2012 (3) All SA 153 (GNP) - with the consequence that the Rules of Court relating to reviews, and in particular Rule 53 thereof, apply to review applications. In the ordinary course of litigation the Rule 53 procedure takes several weeks to reach finality.

18. Neither counsel appearing for the respondents in the two applications raised the point that the correct procedure to challenge the decisions the applicants attacked was a judicial review, which the court pointed out but which counsel adopted after some consideration.
19. This is, however, not the only reason why the applications cannot succeed. The respondents drew attention to the fact that the applicants were all classified as '*high risk*' upon admission to a correctional institution and that they therefore had to be accommodated in a maximum security centre until they had successfully completed a sufficient number of rehabilitative programmes to justify their reclassification and subsequent placement in a medium security correctional centre. Not one of the applicants challenged their original classification and neither was the rationale of placing them in a maximum security centre at the commencement of their incarceration put in issue.
20. Respondents further pointed out that the applicants would, in time, be transferred to a medium security correctional centre which would in all probability be in Johannesburg. Not all prisoners that had to be accommodated in maximum security centres could or should be admitted to one close to their next of kin or friends. Again, the applicants did not challenge the rationale of their original placement in the relevant correctional centre, but argued that they were entitled as a matter of course to be accommodated in the centre closest to their families. This approach is incorrect. There may be very sound reasons to place a high risk offender in a centre far removed from his home or friends.

21. The fact that the successful completion of appropriate programs leads to an eventual reclassification and placement in a medium security facility was proven by the transfer of the second applicant in the first matter to a Johannesburg medium security centre, following upon his reclassification, while the application was pending. He did not participate in the proceedings thereafter.
22. The first and second applicants in the second matter had requested a transfer to the Johannesburg medium security facility, which request was communicated to that facility's Head in writing by the Zonderwater management during 2012 already, to which no reply had been received by the time the application was heard. One of the Zonderwater applicants had already been classified as a medium risk offender at this stage. All the Zonderwater applicants had completed all programmes that are available at the latter centre and expected to be reclassified soon.
23. In the light of these facts it is indisputable that the applicants have failed to satisfy the requirements of an urgent application. Applications for a transfer from a maximum security centre to one with a lesser security grading could hardly be said to be urgent in the absence of truly extraordinary circumstances. All the applicants have been convicted of grave offences. The minimum sentence that was imposed upon one of them was 15 years' imprisonment, the other sentences range from twenty years to life. The process of completing the necessary programs and thereafter embark upon the administrative process of reclassification and transfer to another centre obviously takes time. Given the applicants' circumstances, the hearing of a judicial review against a decision to decline a transfer to another facility, or a

decision to admit an offender to a maximum security centre, would under normal circumstances scarcely qualify to be heard as a matter of urgency.

24. In addition the facts of these two matters do not justify the relief sought, namely a *mandamus*. The respondents have never refused to transfer the applicants to another correctional centre as soon as they are no longer regarded as '*high risk*' and have in fact enquired from the Johannesburg medium security centre whether first and second applicants could be accommodated there.

25. There is no suggestion that the administrative actions involving the applicants performed by the respondents and their officials were executed unlawfully, irrationally or *mala fide*. No review could therefore be launched against them.

26. While the applications cannot succeed, the respondents readily agreed that the first two applicants in application No 16995/2013 are entitled to a reply from the Johannesburg Medium B correctional centre to their applications for a transfer to it.

27. The following orders are made:

1. Both applications are dismissed.
2. The respondents in Case No 16995/2013 are ordered, by consent, to procure a reply to the first and second applicants' application for a transfer to the Johannesburg Medium B correctional centre within fifteen days from date hereof.

Signed at Pretoria on this 16<sup>th</sup> day of April 2013.

E BERTELSMANN

Judge of the High Court