

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 188/2012

In the matter between:-

SAM HANS

First Applicant

ZOLA ELVIS GROOTBOOM

Second Applicant

and

MINISTER OF CORRECTIONAL SERVICES

First Respondent

**COMMISSIONER OF CORRECTIONAL
SERVICES**

Second Respondent

**HEAD OF THE CORRECTIONAL CENTRE
MANGAUNG MAXIMUM SECURITY PRISON**

Third Respondent

HEARD ON:

22 MARCH 2012

JUDGMENT BY:

DAFFUE, J

DELIVERED:

29 MARCH 2012

INTRODUCTION

[1] Applicants, two inmates presently detained at the Mangaung Maximum Security Correctional Centre (hereinafter referred to as MMC), intended to apply on an urgent basis for certain interim relief on 25 January 2012 after giving a mere four court days notice to respondents. Third respondent managed to file an opposing affidavit on 24 January 2012, a day before the

intended hearing. By demand the matter was postponed on 25 January 2012 *sine die*, costs to stand over.

- [2] On 10 February 2012 first and second respondents filed their opposing affidavits. No replying affidavits were filed on behalf of applicants and on 12 March 2012 and thus more than a month later, a notice of set down for 22 March 2012 was delivered on behalf of third respondent. A notice informing that first and second applicants' attorneys withdraw as attorneys of record, was served and filed on 20 March 2012, attached whereeto was a letter of even date by the local attorney to his instructing correspondent, Mr. Joka, the first sentence of which reads as follows:

"Good afternoon, Ntate Joka. As per your instructions a while ago, we will withdraw, and attach a copy of the notice of withdrawal."

- [3] When the matter was called in open court, there was no appearance on behalf of applicants, who were absent as well as there were probably no instructions for them to be questioned. Mr. Venter appeared for first and second respondents and Mr. J. Zietsman for third respondent. Heads

of argument were also filed on behalf of respondents in accordance with the Rules of Practise of this division. I enquired from both counsel whether they could give me any further information pertaining to the position of applicants as I was loath to deal with the matter, given the late withdrawal of their attorneys. I was informed there were indeed telephonic conversations and email correspondence between the local attorney of applicants, Mr. Steyn and their attorneys of record to the effect that on 19 March 2012 the applicants requested a postponement to file a replying affidavits on or before 11 April 2012 and the matter to be removed from the roll. The attorneys of the respondents were of the view that they would agree to such a request, but only on the basis that the wasted costs had to be tendered, which was not done. Consequently no agreement pertaining to postponement or removal of the roll was reached. I was handed a copy of the email of Mr. Steyn on behalf of applicants dated 19 March 2012 confirming that I would have been informed by counsel. I was also handed correspondence from the State Attorney acting for first and second respondents and Honey Attorneys acting for third respondent, dated 19 March 2012, again confirming what I was

informed by counsel.

THE POSSIBILITY OF A POSTPONEMENT

[4] I indicated to both counsel that although I was of the view that there was no merit in the application, it might be in the interest of justice, bearing in mind applicants' rights of access to the court in accordance with section 34 of the Constitution to allow them the opportunity to reply and to obtain new legal representatives to argue the matter on their behalf. Both counsel emphasised that the application is doomed to fail and that it could not be remedied by way of a replying affidavit and that no possible arguments could be advanced to persuade the court to grant the relief claimed. I considered the matter and without making a definite ruling, allowed argument on the merits.

THE RELIEF SOUGHT

- [5] Applicants in essence seek the following orders:
- (a) Directing third respondent to allow them access to a telephone to make telephone calls to their attorneys and family.
 - (b) Interdicting third respondent from harassing, intimidating

and imposing cruel punishment upon applicants by instructing its subordinates to assault and ill-treat applicants.

- (c) Directing third respondent to allow first applicant access to his business chequebook to allow him to sign cheques for payment of employees at his businesses.
- (d) Directing respondents to transfer applicants to Colesberg and Port Elizabeth Correctional Centres respectively or to any other correctional centre within the Eastern Cape Province.
- (e) Costs of suit.

FACTS NOT IN DISPUTE

[6] The following facts are not in dispute:

- 6.1 First applicant was sentenced in February 2010 to 15 (fifteen) years imprisonment and was transferred to MMC on 13 May 2010. Although it does not appear from the founding papers when second applicant was transferred to MMC, it is apparent that this from the opposing affidavit of third respondent that this happened 30 December 2004.

- 6.2 It is not applicants' case that they are presently classified as maximum security classified inmates.
- 6.3 First and second applicants shared a cell and on 9 December 2011 a cellular phone was found in the cell.
- 6.4 First respondent did apply for transfer from MMC but this application was declined by second respondent.

FACTS IN DISPUTE

[7] The following facts are in dispute:

- 7.1 The allegation that first applicant is a candidate to be classified as a medium security category inmate.
- 7.2 First applicant is not entitled to be transferred to any prison in the Eastern Cape and the MMC is the closest maximum security correctional centre to Colesberg where his relatives stay.
- 7.3 Over and above the cellphone found, a cellphone charger was found in first applicant's locker as well as R900,00 in cash on first applicant's person. MMC is a cash free environment and the cellphone posed a high security breach. An investigation is still pending and disciplinary proceedings will be instituted shortly which disciplinary proceedings would include action against an employee of

third respondent, who was allegedly involved in corrupt dealings with applicants.

- 7.4 Although cellphones are not allowed in MMC, telephones are located throughout the correctional centre and inmates have free access thereto, contrary to what is alleged on behalf of applicants.
- 7.5 First applicant previously applied for a transfer, but his application was unsuccessful. He did not take that decision on review and did not file a new application for transfer at any later stage.
- 7.6 Applicants' allegations that they were threatened by gangster members and fear for their lives are denied. In fact, it is made clear on behalf of third respondent that it cannot allow the ill-treatment of inmates, because of the strict contractual obligations based on it by second respondent. It is placed on record that the MMC is a world-class correctional centre. Although applicants declined to be removed to the single cell special treatment unit, they are presently detained in the intermediate unit where both of them share a different cell with one other inmate. It is contrary to the Correctional Services Act,

111 of 1998, to allow inmates to conduct business activities whilst detained and consequently first applicant's request to utilise his chequebook and to sign cheques, was turned down.

- 7.7 Second applicant filed a confirmatory affidavit confirming the allegations made by first applicant, but absolutely no facts were alleged by him or on his behalf pertaining to any entitlement to be transferred from MMC.

APPLICABLE LEGISLATION AND POLICIES

- [8] The Department of Correctional Services and third respondent in particular in this instance are due to be bound to ensure the safe custody of inmates and to maintain security and good order in MMC *in casu* like in all other correctional centres. Inmates are required to accept the authority and to obey the lawful instructions of the National Commission and all other employees and custody officials. See section 4 of the Correctional Services Act, 111 of 1998 (the Act). Segregation of an inmate which may include detention in a single cell is permissible, *inter alia*, when an inmate is threatened with violence. See section 30(1)(d) of the Act.

[9] A sentenced offender (inmate) must, due regard to the availability of accommodation and facilities to meet his or her security requirements and with reference to the availability of programmes, be housed at the correctional centre closest to the place where he or she is to reside after release and the transfer of a sentenced offender is subject to these same considerations. See sections 43(1) and (3) of the Act. Chapters IX and X of the Act provides for inspections by inspecting judges and in the correctional centre visitors who have to pay regular visits and may interview inmates in private and record complaints in an official diary and to discuss those complaints.

[10] Third respondent utilises an information handbook for all inmates approved by the National Commissioner of Correctional Services and it is distributed to all inmates. It deals with various aspects such as contact with family by making use of the telephone, financial matters and the fact that MMC is a cash free environment and that all calls to family and friends are recorded for security reasons, obviously these calls had to be made through the installed telephones available for

the benefit of inmates and not cellphones.

- [11] First and second respondents attached the applicable transfer policy as well as the policy and/or procedure applicable for placement of inmates in MMC to their opposing affidavit. The allegations contained in the opposing affidavit are in harmony with It is apparent that the applicants are duly detained in MMC insofar as they belong to the maximum custody classification and all other criteria set out in the policy applied to them. It is also apparent that inmates must be transferred according to the custodial classifications. Inmates with approved placement/release dates must be transferred at an available opportunity as soon as possible after their placement/release dates are known to the correctional centre nearest to their intended place of residence. Obviously and bearing in mind the information placed on record on behalf of first and second respondents, no placements/release dates have been approved in respect of applicants and they are not as of right entitled to be transferred to any correctional centre closest to their homes.

- [12] Insofar as first applicant applied for transfer and which

application was dismissed, he would have been entitled if so advised and if sufficient grounds existed, to apply to this court for the review and setting aside of the decision not to transfer him. The present application is not a review application.

APPLICATION OF THE LAW TO THE FACTS AND EVALUATION OF THE EVIDENCE

[13] Insofar as a factual dispute has arisen, the matter should be dealt with in accordance with the well-known dictum in **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (A) at 634 I and further. A final order can only be granted if those facts averred in an applicant's affidavit which have been admitted by the respondent, together with the facts alleged by the respondent justify such an order.

[14] It is apparent from the notice of motion that applicants intended to request a rule *nisi* with interim relief initially, but insofar as respondents have fully dealt with all the allegations contained in the founding affidavits, the application should be dealt with as if

final relief is sought at this stage. Applicants have not made out any case whatsoever that they were not allowed to access the telephones installed within MMC for the use of inmates in accordance with the inmates handbook. In any event there is no allegation that they laid complaints in this regard and that these complaints have not been considered, investigated and dealt with to their satisfaction. They are not entitled to the relief claimed in prayer 2 of the notice of motion.

- [15] It is indeed strange that applicants who fear for their lives and seek an interdict against third respondent, as is apparent from prayer 4 of the notice of motion, preferred not to be detained in the single cells or cell, called special treatment unit (segregation), where they would be safe from any harassment or assaults from other inmates. The version is not only improbable, but insofar as it is denied and fully explained on behalf of respondents, there is no reason not to accept the respondents' version. Again no allegations have been made as to complaints filed and what the outcome thereof was. They are not entitled to the relief claimed in prayer 4.

- [16] First applicant wishes to carry on with the conduct of a business

whilst incarcerated. There is no reason why he cannot authorise a relative or any other person to conduct the business on his behalf. In any event, third respondent was totally within its rights to prevent first applicant from having access to his chequebook in order to sign business cheques. See in this regard section 40(2) of the Act. First applicant is not entitled to the relief claimed in prayer 5 of the notice of motion.

[17] Second applicant has made out no case whatsoever that he has at any stage applied for a transfer, that such application was dismissed or that there is a pending application for transfer which is not dealt with properly by respondents. Insofar as first applicant's application for a transfer has been dismissed, he was entitled, if so advised to take that decision on review. This court cannot entertain the application in its present form, but in any event respondents have shown clearly that applicants are not entitled to be transferred from MMC at this stage. They are not entitled to their relief claimed in prayer 6 of the notice of motion.

COSTS

[18] Both counsel for respondents requested me to dismiss the application with costs and Mr. Zietsman, on behalf of first and second applicants, requested a punitive costs order. On my request to indicate any reported or unreported judgment where a costs order has been made in the past against inmates launching similar applications, neither counsel could be of any assistance. From the past experience as counsel, I am fully aware of the fact that several judges of this division have refused to burden unsuccessful inmates with costs orders. The mere fact that inmates might not be in a position to settle costs orders granted against them, should not be the overriding factor. *In casu* both applicants made use of an attorney from outside Bloemfontein, who has instructed Bloemfontein attorneys to act on behalf of them. I have to accept that the instructing attorney would not be willing to accept a brief and papers without being compensated fully or at least in part. Inmates should not be allowed to argue that they are incarcerated, unemployed and unable to pay legal fees and I can see no reason why they should be in a more privileged position than the normal man in the street who has lost his legal battle. Therefore I am of the view that costs should be awarded against the applicants.

[19] In conclusion the following orders are issued:

1. The application is dismissed with costs.
2. Applicants are ordered to pay respondents' costs in opposing the application, jointly and severally, the one to pay the other to be absolved.

J.P. DAFFUE, J

On behalf of applicants:

None

On behalf of first and second respondents:

Adv. P.M. Venter
Instructed by:
Mr. J.F. Botha
State Attorney
BLOEMFONTEIN

On behalf of third respondent:

Adv. P.J.J. Zietsman
Instructed by:
B.M. Jones
Honey Attorneys
BLOEMFONTEIN

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