

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 095695/2024

Reportable: No
Of interest to other Judges: No
Revised: No


SIGNATURE

Date: 23/10/2024

In the matter between:

BETHUEL MARABA & 5 ORS

Applicants

and

THE HEAD OF PRISON: KGOSI MAMPURU
CORRECTIONAL FACILITY

First Respondent

THE MINISTER OF CORRECTIONAL SERVICES

Second Respondent

JUDGEMENT - APPLICATION ITO SECTION 18(3)

- 1 The applicants seek relief in terms of section 18(3) of the Superior Court Act, 10 of 2013. They made the application following the respondents' application for leave to appeal. This judgement is to be read together with the judgement in the application for leave to appeal, where the court detailed the background to the dispute among the parties.
- 2 The applicants seek relief that the order of 12 September 2024 be executed pending finalisation of the respondents' application for leave to appeal.
- 3 The applicants raise the following as exceptional circumstances. Their application is a matter of compliance with the rule of law and to ensure that unlawful decisions are not made, in that the respondents did not follow the due process of the law when transferring the applicants from one facility to the other; the illegality of the respondents' conduct will hang over their shoulders for months, because the leave to appeal could take long to complete. The applicants further say the respondents acting unlawfully to the prejudice of the applicants constitute exceptional circumstances.
- 4 The applicants say they stand to suffer harm as follows. They stand to miss out on programs and skilling which they require for parole, which would interrupt their rehabilitation process. They denied refusing to participate in programs, as that would affect their chances of parole. They contend that programs have stopped since their transfer. The applicants further say that they have been transferred further away from their homes. They say there

will be no harm on being returned to the Kgosi Mampuru prison, where they have been held for years.

- 5 The respondents say there are no exceptional circumstances that merit granting relief sought by the applicants. They contend that the applicants refused to participate in available programs and that the applicants did not specify programs which the applicants say they will miss. The respondents maintain that they complied with Regulation 25(1)(b), in that inmates were informed to prepare for their transfer. Inmates were also told to notify their families about the transfers.
- 6 The respondents say the applicants will not suffer irreparable harm. That is because they are held in medium B facilities and that medium B facilities are the same. The applicants are close to their families because Baviaanspoort and Kgosi Mampuru prisons are in Pretoria.
- 7 The respondents indicated the harm which they will suffer as follows. They will suffer irreparable harm because the order by the court trumps on section 7 of the Correctional Services Act¹, which mandates respondents to transfer inmates when it is necessary. Execution of the order will require amendment of section 7 to allow inmates to choose a place of their imprisonment. The Correctional Services Act will have to be amended “to relinquish executives from the mandate and prerogative entrenched by the Act to manage, control prisons and transfer inmates where necessary.”

¹ Act 111 of 1998

Analysis

- 8 The applicants are required to meet two primary requirements for the relief that they seek. They must show the existence of ‘exceptional circumstances’ that merit the granting of relief. They must also show that they will suffer irreparable harm if the court does not grant the order, whereas the respondents will not suffer irreparable harm if the court grants the order.²
- 9 There are no precise rules as to what circumstances are to be regarded as ‘exceptional’. Each case is decided on its own facts.³ The prospects of success in the appeal are relevant in deciding whether to grant relief.⁴
- 10 Prisoners, by law, are deprived of certain entitlements and rights. Their confinement is subject to control by prison authorities. Prison authorities, in turn, do not have a free hand in their control of prisoners. That control is subject to the law.
- 11 The respondents are entitled by law to transfer prisoners within a facility or across facilities. The transfer must be conducted as provided for in Regulation 25. The respondents say they effected the transfer of the applicants pursuant to Regulation 25(1)(b). The respondents do not say what are the “security reasons,” in relation to the applicants, that informed

² Section 18(1) read with Section 18(3) of the Act

³ *UFS v Afriforum & another* [2016] ZASCA 165 (17 November 2016), para 13

⁴ *UFS v Afriforum & another*, para 15

the transfer of the applicants. No such security reasons were mentioned in the main application or in the notice of application for leave to appeal.

- 12 The respondents are, in substance, coy about the true reasons for transferring the applicants. The court has not been told the true reasons. The respondents have not shown that the transfer of the applicants was in accordance with the law. I agree that the respondents' failure to act as required by the law is an exceptional circumstance. This is more so because the conduct by the respondents is in relation to prisoners, who have very limited scope to vindicate their rights. This is demonstrated by the respondents refusing to grant the applicants access to a commissioner of oaths for purposes of the applicants approaching the court to resolve their grievance against the respondents.
- 13 Compliance with the rule of law is particularly heightened when there is a gross imbalance in the power relations between parties. The respondents, in this matter, would use their authority over the applicants, who are in confinement, almost without check.
- 14 The applicants say that they have, since their transfer, been unable to participate in programs which are considered for their rehabilitation and parole prospects. The respondents say the applicants have refused to participate in programs, which are standard across all prisons. The applicants deny refusing to participate in programs, as such refusal would be to their detriment for parole purposes.

- 15 The applicants challenged respondents to make available programs and skills made available to the applicants since their transfer from 15 August 2024 to date. The respondents did not meet the challenge.
- 16 The respondents did not deny averments by the applicants that the applicants have, since their arrival at Baviaanspoort, done nothing except to eat and sleep; which, the applicants say, affects them. The respondents' answer to this complaint is that "It is standard that applicants have sentence plans according to their conviction sentences."
- 17 The applicants maintain that they have been transferred to facilities that are far from their families. It is a requirement that prisoners be held in facilities as close to their families as possible. The applicants showed that Baviaanspoort is, relative to Kgosi Mampuru, distant from their homes in Ga-Rankuwa. The respondents do not comment on the applicant now held at Leeuwkop. This is an admission that this applicant is held far from his home.
- 18 I am satisfied that the applicants will suffer irreparable harm. They are at risk of their prospects of parole being affected by virtue of not being able to participate in programs. They are also being held at facilities that are distant from their families. They have been long-term inmates at the Kgosi Mampuru prison, without their being involved in activities that rendered their conduct unbecoming. The respondents do not claim that the applicants have not been model prisoners throughout their incarceration at the Kgosi Mampuru prison.

19 No harm will be visited on the respondents in implementing the order. There is simply no foundation to the respondents' claim that implementing the order will necessitate amending the Correctional Services Act, or that immediate implementation will result in prisoners deciding where they are to be incarcerated. The complaint against the respondents is simply that the respondents must effect transfers in accordance with the law.

20 The respondents did not comply with Regulation 25(1)(b) when transferring the applicants. I refer to the findings in the application for leave to appeal in this regard. The respondents have no prospects of success in the appeal. This is one of the considerations in a section 18(3) application.

21 I make the following order:

(1) The order made on 12 September 2024 is to operate with immediate effect, notwithstanding any appeal process by the respondents.

(2) The respondents are ordered to pay the costs.


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JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Counsel for the applicant (leave to appeal):

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Instructed by:

The State Attorney,
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Instructed by:

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Heard: 17 October 2024

Delivered: 23 October 2024