

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 FOR LEAVE TO APPEAL

MOOKI J

1 The applicants are prisoners serving long-term sentences. The respondents transferred the applicants from the Kgosi Mampuru prison to prisons at Baviaanspoort and at Leeuwkop. The court made the following order in relation to the applicants:

1. The matter is heard as urgent and non-compliance with rules of court pertaining to service of process and time limits be dispensed with in terms of Rule 6(12).
2. The decision of the Respondents to transfer the Applicants from Medium Prison Section to the Maximum B Section of Kgosi Mampuru II Correctional Facility on 15 August 2024 is declared unlawful, irrational and unconstitutional, and consequently is hereby set aside.
3. The decision of the Respondents to transfer the Applicants from Kgosi Mampuru II Correctional Facility to Baviaanspoort and Leeuwkop Prison facilities on 9 September 2024 is declared unlawful, irrational and unconstitutional, and consequently is hereby set aside.
4. The Respondents are ordered to take necessary steps to ensure that the Applicants are returned to Medium B section, Kgosi Mampuru Correctional Centre within 5 (Five) days from the date of this order.
5. The Respondents are ordered to pay costs of this application, jointly and severally the one paying the other to be absolved.

2 The respondents seek leave to appeal. They raise the following grounds:

- 2.1 The court erred by allowing the applicants to cure a defective founding affidavit in affording the applicants the opportunity to have the document commissioned.
 - 2.2 The court did not determine urgency on 12 September 2024.
 - 2.3 The relief sought by the applicants was moot on 12 September 2024 because the applicants had been transferred on 9 September 2024.
 - 2.4 The relief granted in prayer 3 of the order was not pleaded.
 - 2.5 The court ought not have granted costs against the respondents.
- 3 The respondents did not seek reasons for the order before making this application. I therefore set-out the background in some detail. The background is essential for addressing the grounds advanced for the application.
- 4 The applicants were transferred from the medium section at the Kgosi Mampuru prison to the high security section of that prison on 15 August 2024. The applicants launched urgent proceedings on 5 September 2024, seeking relief, among others, that they be returned to the medium section of the prison. The application was set-down for 10 September 2024. The respondents transferred the applicants on 9 September 2024, with some transferred to Baviaanspoort prison and others to Leeukop prison.
- 5 The applicants were not told why they were transferred. They were not afforded the opportunity to make representations pertaining to the transfers. They contend that the respondents breached Regulation 25(1),

which stipulates that prisoners be given reasons whenever a prisoner is transferred.

- 6 The court did not hear the application on 10 September 2024. There was no founding affidavit in the application. That is because the document relied upon by the applicants was not commissioned before a Commissioner of Oaths. The applicants explained that prison officials refused them access to a commissioner of oaths. The respondents had not filed an answering affidavit when the matter was called.
- 7 The court stood the matter down to be heard on 12 September 2024. This was to allow the applicants to present a founding affidavit. This was also to allow the respondents to file an answering affidavit, if so minded. The matter was recalled on 12 September 2024.
- 8 The respondents contended that the matter was not urgent. They pointed out that the applicants were serving long term sentences. The respondents pointed out that prisoners are classified into various categories, such as medium prison for medium offender sentences and maximum prison for maximum offenders.
- 9 The applicants were originally classified as maximum offenders. They were not placed in a maximum facility due to non-availability of accommodation in the maximum facility.
- 10 The respondents contended that the relief that the decision to transfer the applicants be declared unlawful and that they be returned to the medium section of the prison was moot. That was because, according to the

respondents, the applicants were transferred from the maximum facility at Kgosi Mampuru on 9 September 2024 to the medium facilities at Bavianspoort and at Leeuwkop prisons.

- 11 The respondents further contended that the applicants have no choice of where they are to be incarcerated, with the result that the applicants are not competent to seek to be imprisoned at the Kgosi Mampuru prison.
- 12 The respondents referenced Regulation 25 in their answering affidavit. They pointed out that Regulation 25(1)(a) required that a prisoner be informed of the reasons for a proposed transfer and that a prisoner also be afforded the opportunity to make representations. Regulation 25(1)(a) is qualified where a prisoner is transferred for security reasons. A prisoner, in this instance, is not given reasons for a transfer before a transfer. A prisoner is told the reasons as soon as practicable after the transfer. A prisoner is to be allowed to make representations and is further given the opportunity to notify their family.
- 13 The respondents explained that transfers of prisoners are justified on the grounds of maintaining safety and security within the prison system. A transfer to a more secure facility is warranted where a prisoner poses a significant risk to other inmates, staff or themselves. An inmate can also be transferred to maximum security prisons as a result of behavioural issues , such as where an inmate exhibits violent or disruptive behaviour.
- 14 The respondents denied that they refused to give reasons for the transfer, and that Regulation 25(b) stipulated that an inmate need not be informed

of the proposed transfer until after the transfer “if the transfer is for security reasons...”.

- 15 The respondents filed a supplementary affidavit in which they raised three issues. First, they contended that the application ought to have been struck from the roll because the applicants had not filed an affidavit when the matter came before court on 10 September. Second, that the matter was moot. Third, that a finding in favour of the applicants would result in prisoners “being ungovernable. The decision will set a precedent that may make it difficult for respondents to manage and control sentenced prisoners.”

Analysis

- 16 The respondents did not allege any “security reasons” concerning the transfer of the applicants. The applicants pleaded that they had not, throughout their stay at Kgosi Mampuru prison, demonstrated any violent behaviour or risk of escape. The respondents did not dispute this assertion.
- 17 The respondents make a throw-away statement that Regulation 25(1)(b) provides that reasons are to be given as soon as practicable. The applicants were never given reasons for their transfer. They were not afforded to make representations. They were not given opportunities to inform their families of their transfer.
- 18 The respondents did not comply with Regulation 25, be it Regulation 25(1)(a) or 25 (1)(b). It makes no sense for the respondents to transfer the applicants from a medium facility to a maximum facility on 15 August 2024,

and then transfer them from a maximum facility to a medium facility on 9 September if the applicants were transferred for “security reasons.” The respondents explained that “security reasons” include instances where a prisoner poses a significant risk to other inmates, staff or themselves or where a prisoner exhibits violent or disruptive behaviour. The respondents did not aver or show evidence that the applicants fell in either category. The respondents thus failed to show that the transfer of the applicants was for “security reasons.”

19 There is no merit to the respondents saying prisoners would be “ungovernable” in the court granting relief to the applicants. The applicants do not dispute that the respondents have the right to determine where a prisoner is incarcerated. The applicants’ complain is that the respondents did not comply with Regulation 25. Granting relief does not detract from prison authorities determining the housing of prisoners, including whether a prisoner is to be moved within a facility or where a prisoner is moved from one prison to another. The rule of law requires that prison authorities comply with governing instruments when determining where a prisoner is to be kept. Prison authorities are obliged to comply with Regulation 25 when transferring a prisoner.

20 The application for leave to appeal is unmeritorious.

21 The application came before the urgent court. The court determined that the matter was urgent. Whether a matter is urgent or not is in the discretion of a court, with a court permitting the hearing of a matter

without a party having to comply with the usual rules on how a matter is placed before a court.

- 22 It was submitted on behalf of the respondents that the court ought to have struck the application from the roll because it was not accompanied by an affidavit on 10 September and therefore there was “no application” for the court to consider.
- 23 It behooves public officials, in this case, prison officials responsible for the upkeep of the applicants, not to deny prisoners access to a commissioner of oaths when those prisoners seek redress in courts of law. It reflects poorly on prison officials to say a prisoner should be denied access to courts because a prisoner came to court with an unsworn document, when the self-same prison official denied a prisoner access to a commissioner of oaths. The court is duty-bound to ensure that any person is allowed through the doors of courts, for the law to determine whether such a person merits redress.
- 24 The relief sought by the applicants was not moot when the court heard the matter on 12 September 2024. The applicants were transferred internally within Kgosi Mampuru prison. They were later transferred from that prison to the Leeuwkop and Baviaanspoort prisons. The respondents labour under the mistaken view that the applicants had, by 12 September 2024, been transferred to a medium facility and that, as a result, the issue of their transfer from the Kgosi Mampuru prison had become academic. It was not.

- 25 The issue is not the moving of the applicants from a medium facility to a medium facility, or from a maximum facility to a medium facility. The applicants' primary complaint is that they were transferred without the respondents having complied with Regulation 25. The applicants were entitled to insist on such compliance when the court heard the matter on 12 September.
- 26 The applicants pleaded that they sought an order to be returned to Pretoria central prison with immediate effect. The respondents are wrong in saying the relief granted in prayer 3 was not pleaded. Paragraph 3 of the notice of motion seeks relief that the applicants be returned to the medium section of the Prison immediately. "Prison" means the Kgosi Mampuru Correctional Facility, where applicants were incarcerated before their transfer.
- 27 The respondents say the court ought to have ordered each party to pay its own costs because the application was not properly before court on 10 September (on account of the absence of a founding affidavit by the applicants) and that the dispute was moot when the matter was called on 12 September 2024. I am not persuaded that the court erred in granting costs in favour of the applicants.
- 28 The court's duty is to ensure that justice is done between parties. It would be unjust to have non-suited the applicants because they did not have an affidavit when they came to court on 10 September 2024. Officials of the respondents denied the applicants access to a commissioner of oaths. It is poor form of the respondents to now say the applicants are not due the costs of being in court on 10 September. The dispute remained live on 12

September. The applicants succeeded in their claim. They are entitled to their costs.

29 The respondents seek leave to appeal in terms of s 17(1)(a)(i) of Act 10 of 2013. They say the appeal has reasonable prospects of success and that another court may come to a different conclusion. 'The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court . . . A sound rational basis for the conclusion that there are prospects of success must be shown to exist.'¹ The respondents have not met this test. I therefore decline the application.

30 I make the following order:

(a) The application is dismissed.

(b) The respondents are ordered to pay costs.



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JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Counsel for the applicant (leave to appeal):

G Khumalo

Instructed by:

The State Attorney,
Pretoria

Counsel for the respondents (leave to appeal)

V Mukwevho

¹*Ramakatsa and Others v African National Congress and Another* (Case No. 724/2019) [2021] ZASCA 31 (31 March 2021), para 10

Instructed by:

M E Makgopa Attorneys

Heard: 17 October 2024

Delivered: 23 October 2024