



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

- (1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 13 September 2024

WJ du Plessis

Case 2024/00410

In the matter between:

NDHLOVU, ZIGGY XOLANE

Applicant

and

**THE HEAD OF CASE MANAGEMENT COMMITTEE
KGOSI MAMPURU II CENTRAL**

1st Respondent

THE HEAD OF PRISON KGOSI MAMPURU II CENTRAL

2nd Respondent

**THE AREA COMMISSIONER KGOSI MAMPURU II
CENTRAL**

3rd Respondent

**THE NATIONAL COMMISSIONER CORRECTIONAL
SERVICES**

4th Respondent

THE MINISTER OF CORRECTIONAL SERVICES

5th Respondent

THE MINISTER OF HOME AFFAIRS

6th Respondent

THE DIRECTOR GENERAL OF HOME AFFAIRS

7th Respondent

Coram: Du Plessis AJ

Heard on: 22 August 2024
Decided on: Order granted 22 August 2024, reasons on 13 September 2024.

The judgment has been delivered by uploading it to the CaseLines digital data base of the Gauteng Division of the High Court of South Africa, Johannesburg, and by email to the attorneys of record of the parties. The deemed date of the delivery is 22 August 2024.

JUDGMENT

DU PLESSIS AJ

Introduction

[1] Mr Ndhlovu is serving a term of imprisonment at the Kgosi Mampuru II Central. He is making the application in terms of the Protection of Harassment Act¹ read with the Intimidation Act,² asking that the court declare that the Respondents' conduct is in conflict with ss 9, 10, 11 and 12 of the Constitution; that they have undermined and violated a previous order of this court; that they must be sternly warned, restrained and interdicted from harassing, intimidating, insulting and scorning the applicant in any way, that they are not allowed to question the applicant about his nationality, and that they remove the classification of him as an "immigrant" on his system. This is what he seeks in terms of his notice of motion.

[2] The complaint stems from the treatment he says he receives because of being regarded as a Nigerian. He was born to a South African mother and a Nigerian father, which his mother confirms in a confirmatory affidavit. Although his abusive Nigerian father took him to Nigeria as a child, he returned to South Africa when he was 17 as he preferred to stay in South Africa with his mother.

¹ 17 of 2011.

² 72 of 1982.

[3] He sets out the history of the application in his affidavit as follows: The trouble started in 2013 when he was arrested in Springs. While applying for bail, he was taken to a branch office of the Department of Home Affairs in Springs, which confirmed his identity through fingerprints before he was granted bail. While on bail, he was arrested for another matter in Benoni. When he arrived in Modderbee prison in 2013, one of the officials, Mr Mangani, refused to accept the information from Mr Ndhlovu that he is South African and born in this country and told him that since he “looks like a Nigerian”, he would be entered into the system as a foreigner. Mr Ndhlovu claims that this is where his troubles started.

[4] He was tried and convicted in both 2014 and 2015. The committal warrants contained his personal information, including his nationality. Rather than relying on the warrants, they relied on the information Mr Mangani entered into the system, which classified him as an immigrant. This information was used to put him on a deportation list. The Department of Home Affairs was called in for another set of fingerprints, which confirmed that he was South African. Yet he remained an immigrant on the system.

[5] He alleges that in 2019, the South African Police and the respondents (he does not specify who) unlawfully attached his identity document. He came to court and obtained an order on 6 August 2020, ordering, in short, the following:

1. That the respondents must return his confiscated South African identity document.
2. That the 1st to 3rd Respondents are interdicted and restrained to, absent a valid court order, approach or interview the applicant in relation to any criminal investigation without his attorney.
3. That the 3rd to 7th respondents are interdicted to, without a valid court order, assist a member of the South African Police Service in any investigation to any criminal investigation involving the applicant without the involvement of his attorney;

4. That the respondents are interdicted from assaulting, insulting, intimidating or extorting the applicant.

[6] He continues stating that before the elections in May 2024, the Department of Home Affairs came to Kgosi Mampuru II and issued him a new smart identity card. Yet, on 25 June 2024, the respondents again gave him a deportation form to sign. He asked the respondents to stop violating his rights and respect the court, reprimanding them to act within the bounds of the Constitution.

[7] On 21 July 2024 he had a meeting with the first respondent to discuss issues pertaining to his parole, for which he says he became eligible three years ago, he says. He states that the respondents used “all manners of dubious tactics to keep [his] release in abeyance indefinitely”. They questioned him once again about his nationality. He states that he saw the parole board on 28 July 2022 and was given a new date to return to the parole hearing on 28 June 2024, but the respondents failed to take him to the board that day.

[8] His profile, he says, was prepared and submitted to the parole board in 2022, and he was refused to be released on parole on the grounds of being held in the “super-maximum” in Kokstad. He states this was later proven to be an unlawful committal that jeopardize his release from custody. It is not clear if there was a decision to this effect or what he bases this assertion on.

[9] He saw the parole board, but the 1st respondent did not act upon the issues raised by the parole committee that refused him parole and instead decided to question him about his nationality. He states that despite this, and in contravention of the court order against them, they called the 6th and 7th respondents who came in on 15 July 2024 and demanded his identity documents, and further questioned, threatened, insulted and victimised him over an identity document they issued to him. He now refuses to cooperate and go through another verification process.

[10] Ms Mphahlele, the head of the correctional services Kgosi Mampuru Correctional Centre, the second respondent, filed an answering affidavit. She states that this is not an interlocutory application deriving from the main application brought in 2019 under case number 85772/2019, where directives were made. The main application was disposed of in 2020. There is no information about the main application made available to the respondent or the court. Thus, there is insufficient information before this court can determine this application. While I agree with this, I also accept that as a self-represented litigant, the applicant might not always follow the correct procedure. Not much turns on this, as will be explained below.

[11] Furthermore, the applicant also fails to make a case to be protected from harassment. His main issue is with the committal warrant supplied by the courts to the respondents after conviction by Mr Mangani, an official at Modderbee Correctional Centre, by being called an immigrant. This was in 2013. He does not take the point further. He is wasting the court's time.

[12] The second respondent further points out that the applicant is misleading the court regarding his parole hearing. He initially obtained a parole date to appear before May 2022, when his offender status was of an offender incarcerated in the medium section of Leeuwkop Correctional Centre. However, in 2022, a violent incident happened at Leeuwkop, where the applicant was implicated as being the central figure in the violence. This led to the applicant and various inmates being transferred to Kokstad (Ebongweni) Correctional Centre based in Kwazulu Natal. His category changed from being an inmate with medium status to a maximum offender. Because of the change in the category, the applicant lost the privilege of being assessed by the Parole Board at Leeuwkop. The rule is that only inmates in the medium category have the privilege of being assessed by the Parole Board. There is thus no further date to attend the hearing at the Parole Board provided to the applicant.

[13] He was also not seen by the parole board on 28 July 2022. He was re-classified as a maximum offender with no privilege of being interviewed by the Parole Board. His

accommodation in Kgosi Mampuru is temporary; he is permanently accommodated at Kokstad (Ebongweni) Maximum Facility. He is considered a security risk as well as a maximum offender. The respondents did not harass the applicant. The applicant is merely wasting the court's time.

[14] On the day of the hearing, the applicant handed up his replying affidavit. He submitted that the respondent was wasting the court's time as they merely recited what he said in his founding affidavit. He also states in his replying affidavit that he was sentenced in October 2014 to 16 years and thus became eligible for parole in 2022. He states he qualifies for parole, yet he is still in custody. He argues that he is two years beyond his release date. He states that the respondents criminally blocked his release on parole. He regards the committal that the respondents allude to in Ebongweni as unlawful and adds again that it "was proven to be fraudulent". He, however, does not understand the relevance of that saga in this court.

[15] Apart from the applications, Mr Ndhlovu also made submissions to the court, also on the Ebongweni issue. It should be stated that this issue was before Mia J in January 2024, and she handed down a judgment in *Ndhlovu v Minister of Justice and Correctional Services*.³ Mia J had to review an application to transfer the applicant to Ebongweni. This judgment referred to the incident in Leeuwkop Correctional Centre. The incident occurred in May 2022, where inmates in possession of knives attempted to assault Correctional Centre officials, resulting in two inmates being killed. There was a lockdown, and the cells the applicant occupied, along with thirty others, were searched. The prison officials found the applicant's laptop, which he declared he used for study purposes, along with a cell phone, which he denied was his.

[16] A disciplinary inquiry was held that he did not attend, and he was not informed of the outcome. However, he understood that he was suspected of being involved in the assault incident at Leeuwkop relating to the stabbing of the correctional centre officials

³ [2024] ZAGPJHC 24.

and the possession of the cell phone. They were, therefore, transferred to Ebongweni, and the matter was transferred to the Hawks. As far as he was seeking to have that disciplinary set aside, the court found that he had not exhausted the internal remedies and that the court was not able to consider that matter in terms of PAJA. The court dismissed that application.

[17] After hearing the applicant, there were two issues in terms of the notice of motion to determine: the harassment and, linked to that, the applicant's nationality and the fact that he is indicated as an immigrant on the system. The issue of parole was not raised in the notice of motion.

[18] During the hearing, I indicated that there was not enough evidence before the court to make a finding in line with what the applicant sought in terms of the notice of motion or any other issue he raised in the court. As for the harassment claim, it was not clear who was harassing him or what actions he deemed to be "harassment". The respondents' version is that he was not seen by the parole board, where he claims to have been harassed. The respondents' version prevails in terms of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.⁴

[19] He was unhappy, but absent proof of harassment and intimidation based on answerable allegations about his nationality, I cannot grant the relief sought in his notice of motion. However, to get clarity on the nationality issue, I informed Mr Ndhlovu that I would order that his identity documents be validated, and if it is a valid document and he is South African, that this be reflected in the system. I should add that he handed up a paper that indicated that he is classified as an "immigrant" on the system, but it was not clear where the paper comes from or what it pertains to.

[20] Ms Ali explained that the issue with the identity document is not as straightforward as the applicant stated. However, she agreed that an order to verify the

⁴ [1984] (3) SA 623 (A).

identity document might help resolve the issue and that once that is addressed, ensure that this reflects on the system if it does not already do so. I asked Ms Ali to draft an order to that effect and email it to me.

[21] Despite not seeking any relief regarding the parole in his notice of motion, Mr Ndhlovu got angry when Ms Ali raised the issue of his status. He insisted that he was not a maximum offender and insisted that the court must help with the parole issue. No document or affidavit was uploaded to confirm the unlawfulness of his detention in Ebongweni. Ms Ali, for the state, relied on the affidavit from the second respondent, where it is explained that he is a maximum offender. Ms Ali informed the court that he has not appealed or reviewed the disciplinary hearing outcome, as Mia J explained, must happen. The disciplinary committee's finding thus stands, which is why he is regarded as a maximum offender. I then informed Mr Ndhlovu that I could grant an order that the first to fifth respondents must clarify his offender status for the next court hearing the matter having clarity on it, but also, should he wish to take that classification on review, that the relevant information is available.

[22] Since this special court for incarcerated people does not sit on regular days, it was not possible to make a *rule nisi* for the respondents to return on a specific day. I was assured that postponing the matter *sine die* solves that conundrum. Ms Ali emailed the draft order after court on the Thursday, as requested. I did not sign it, as I intended to write a judgment to explain the reasons for the order for Mr Ndhlovu's benefit.

[23] On Monday, 26 August 2024, I received an email through my registrar sent from "UMEH Group" to inquire about the court order. The email was not signed. The writer explained that they expected the order to be emailed the next day and that it would also be emailed to his PA. This never happened. The writer referred to this as an injustice in the hands of the courts. In the email, it was noted that the writer is displeased by how they are being treated by the court officers, presumably because they have not received a copy of the order yet. I have not written a judgment by Monday. I considered Mr

Ndhlovu's request and decided to sign a draft order, indicating on the order that the reasons for the order will follow.

[24] As I prepared this written judgment, I noted that the first paragraph in the order did not contain what was agreed upon in court: if Mr Ndhlovu's citizenship is verified, it should reflect correctly on the system. I have clarified this agreement in the order.

[25] I requested Mr Ndhlovu to send his replying affidavit via email so that it can be uploaded to CaseLines to ensure the record is complete. Along with the replying affidavit, Mr Ndhlovu sent other affidavits and attachments. I have not read the other attachments and the "supplementary affidavit", as it was not part of the documents filed for the hearing on 22 August 2024 for me to consider. If the outcome of this case aggrieves Mr Ndhlovu, the correct procedure would be to apply for leave to appeal.

[26] Should the applicant launch further applications on the issue of his nationality, the disciplinary hearing, his classification as a medium or maximum offender or his parole, it would be helpful if the outcome of the verification of his identity document, as well as proof of his offender status, together with all the judgments and orders handed down by the courts concerning the applicant, is uploaded onto CaseLines so that the court can better understand the issues.

[27] Lastly, I must point out that Mr Ndhlovu's allegations are serious. Should they be proven to be true, that would indeed amount to an infringement on his rights to equality and dignity. Regardless of Mr Ndhlovu's nationality, he has a right not to be discriminated against because of his nationality or perceived nationality. Xenophobia has no place in a constitutional democracy.

Order

[27] The following order is made:

1. The First to Fifth Respondents are required to verify whether the identity document of the Applicant is indeed a valid South African identity

document. Once the Applicant's nationality is verified, this should reflect correctly on the correctional services system.

2. The application is postponed *sine die* for First to Fifth Respondents to provide proof clarifying Applicant's prison status, whether Applicant is classified as a medium or maximum offender in terms of its Records.

[REDACTED]

WJ du Plessis
Acting Judge of the High Court

For the Applicants:

Mr Ndhlovu, self-represented.

For the Respondents:

N Ali, instructed by the state attorney.