



**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 ☒

Case 2023/04233

Date: 08 November 2024

WJ du Plessis

In the matter between:

GIFT ALPHA NGWENYA

Applicant

and

THE MINISTER OF CORRECTIONAL SERVICES

First Respondent

**AREA COMMISSIONER JOHANNESBURG PRISON
(CORRECTIONAL SERVICES)**

Second Respondent

**THE HEAD OF PRISON
(JOHANNESBURG MED “B” CENTRE)**

Third Respondent

**THE HEAD OF INTERNAL SECURITY PRISON
(JOHANNESBURG MED “B” CENTRE)**

Fourth Respondent

Coram: Du Plessis AJ

Heard on: 22 August 2024

Decided on: 8 November 2024

This 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 and time of the delivery is 10H00 on 8 November 2024.

JUDGMENT

DU PLESSIS AJ

[1] This is an application where a sentenced offender, Mr Ngwenya, ask for the return of his laptop and router, and to be given a report on a stabbing that took place in the prison. Mr Ngwenya represented himself. This required the court to follow a pragmatic approach to get to the crux of the matter and required the court to afford a generous construction of his affidavits.¹ Questions from the Bench also helped clarify the applicants' complaints and the respondents' answers.

[2] In his founding affidavit, Mr Ngwenya, a sentenced offender, states that he is a registered student who requires his laptop for studies. However, on 8 August 2023, his router was confiscated. When he followed up about his router, he was told that he could collect it from the education office, but he only received the communication on a Saturday.

[3] He then went to the acting head of the centre, who promised to make proper arrangements. He states that he had to approach the acting head because he was stabbed by a gang member and struggled to open a case. He does not know why he was stabbed, he understands it is a form of intimidation. He alleges that prison officials searched him to intimidate him not to follow up on the matter that he was stabbed as he came out of the ground to be a marshal in the sports field.

[4] After that, they came to him to search for him and took his laptop, including his router and charger. He was told that the papers on his laptop were invalid.

¹ *Xinwa v Volkswagen of South Africa (Pty) Ltd* [2003] ZACC 7; 2003 (4) SA 390 (CC).

[5] He then approached the unit manager to make some enquiries. He was informed that they were waiting for the IT specialist – that is the procedure. If his laptop did not breach security, then he will get the laptop back.

[6] Two days later he was summoned to appear before a disciplinary committee. He was called to the acting head of the centre's office, because he made his request for the stabbing report. He state the report was finalised without any input from him.

[7] When he arrived at the Head of the Centre's office, they informed him that they found a Betway App on his laptop and informed him that it was a security breach and that he would appear in front of the disciplinary committee. He was told they have a report but that he will not get it in written form. He did not have time to prepare for his hearing, so he could not ask questions. He did not have an opportunity to arrange representation for himself. They did not show him the Betway App or betting receipts on his computer; instead, they showed him a DSTV slip. He lodged an appeal, but was never afforded a hearing. He stated that the officials were aggressive and rude. He spent fourteen days in a segregation cell. He tried to consult with the Judicial Inspectorate for Correctional Services (JICS), who came to see him after a month, but they have not returned with feedback.

[8] He wants his laptop back to continue with his studies. He wants to DCS to pay the costs of his studies that he could not complete, together with the monthly data he continued to pay.

[9] Mr Ngwenya suspects that the stabbing incident of 16 August 2022 has something to do with his laptop being taken away. He states that a gang member stabbed him but was never taken to a doctor. He was stitched, but the Nurse did not fill in a J88 form. He made various entries into the complaints book. He did file a motion in court, but nothing came of it. He wants an incident report regarding the stabbing.

[10] The head of security in the DCS at the Johannesburg Correctional Centre answers as follows. Firstly, they state that he has not exhausted all the internal remedies, and failure to do so is fatal. They aver further that he has not stated if the complaints were registered and what the outcomes of the complaints were or to escalate the complaints.

[11] They further point out that the proof of registration relates to a different person and is only valid for 2020.

[12] They state the applicant's laptop was confiscated after a random search at the correctional facility. When they searched his laptop, they discovered that he was using his laptop for gambling – something that is forbidden. They had the authority to do this based on the indemnity that the applicant signed, where, according to them, he agreed that his laptop and router may be confiscated if it is used for any purpose other than study. After they confiscated the laptop, he was subjected to a disciplinary hearing to give him an opportunity to present his case. Evidence was provided at the hearing, and he was found guilty. Other than the documents attached, not much more information is provided about the disciplinary hearing.

[13] The first document attached is the particulars of the charge (dated 27 August 2023), which states that he was searched and was found to be misusing his laptop by betting with it. They found betting slips downloaded on his computer – he was betting on soccer. This means the laptop is not used for education purposes and is thus against the education policy. It further states that “gambling is a very serious offence”. The comments state that s 24(4) of the Act is to apply. This form shows that he pleaded “guilty”, with the penalty of 14 days in isolation and a 23-hour lockdown was ordered. The reasons (on this form) for the decision were that he confirmed that he had two letters typed and that they had seen the Betaway betting and DSTV on the laptop.

[14] The minutes of the disciplinary hearing (30 August 2023) show that Mr Ngwenya pleaded not guilty to and consistently denied that he uses his computer for

betting. He was also asked if he wrote letters to his attorney on his laptop (which he seems to admit) and that he typed a letter on his laptop about the kitchen. He also seems to be suspected of typing complaints on behalf of inmates. During the hearing, he stated that he was unaware that his laptop could be confiscated if it was misused. He was questioned whether his laptop was a “complaint and request” book. He confirmed that he uses the laptop for study purposes only. In the end, the letter states, “guilty as charged, based on the evidence presented and secured from laptop”.

[15] In reply, Mr Ngwenya set out the internal steps he took to report the matter. He sets out the complaints, the reference numbers, and what happened after he lodged the complaints. He also attaches an affidavit indicating his name as “Alpha Kali Ndaba” with a Zimbabwean identity and passport number listed.

[16] In his heads of argument, Mr Ngwenya summarises that the respondents took his laptop and router without following a proper procedure. For instance, they have provided no written reasons or warned him of such action; no DCS IT specialist was involved in checking the laptop as required by the policy; the incident was never recorded in the sectional record book, and the Case Management Committee (CMC) was not aware of the matter until they were instructed to demote Mr Ngwenya to “B” group, without his knowledge of what happened.

[17] Mr Ngwenya further states that it was an ambush search that targeted him specifically. He was informally charged and sentenced to isolation cells after allegations that he was gambling illegally with his laptop. Other inmates had their phones confiscated but were not charged; dagga was confiscated with no inmate charged; and stoves and cooking materials were confiscated with no inmates charged. Other inmates who had their laptops confiscated for various reasons had it returned to them with warnings, and the education office is not monitoring their laptops. Mr Ngwenya states that his laptop is the only one that has been taken and not given back. He suspects it is because the respondents think he has some information that implicates them in negligence in the centre.

[18] Mr Ngwenya states that the allegation that he was gambling was not proven and that the DCS IT specialist was never alerted or involved in checking the laptop. He further states that the policy is silent on gambling, which is legal.

[19] Mr Ngwenya opened a case against the respondents when they failed to secure his safety when a gang member in prison stabbed him. He states no steps were taken by the respondents regarding the incident, no J88 was filled in, and no investigation was launched.

[20] Mr Ngwenya states that he has exhausted all internal remedies. His only choice was to submit this application. He needs his computer to complete his course, pursue his studies, and submit his assignments on time. He asks for a declaration of his constitutional rights as per s 29(1)(b) of the Constitution, stating that taking his study material without giving him an alternative violates his rights. He refers the court to the *Ntuli* judgment.² He attaches a “confirmation of studies” document to his affidavit that shows a registration date of 30 January 2020 and a course duration of 12 months, with the name Mr Alpha Kali Ndaba.

[21] He relies on s 18 of the Correctional Services Act 111 of Correctional Services (“the Act”), which provides that an inmate must be allowed access to available reading material of their choice unless the materials constitute a security risk or are not conducive to their rehabilitation.

[22] The policy provides that sentenced offenders who are students and who need a personal computer to support their studies are allowed to have a personal computer within the facility. A sentenced offender must apply to the head of the correctional centre, who must approve the application. He attached documents where permission to

² *Minister of Justice and Correctional Services v Ntuli* [2023] ZASCA 146.

use the laptop was granted on 31 March 2023, scratched out as “cancelled”, and a second one dated 1 August 2023 also “cancelled”.

[23] Mr Ngwenya wants the confiscation of the laptop without a proper procedure to be declared unlawful and wants the laptop and router returned to him for study purposes, subject to it being made available for inspection by IT. He wants the instalments of the months he was not studying repaid. He wants the court further to declare that the disciplinary hearing where he was found guilty and punished was unlawful. He furthermore wants an incident report on the stabbing made available to him.

The law

[24] Once people are imprisoned, the state must take care of prisoners that do not violate or compromise their constitutional rights. The purpose of being sent to prison is to curtail a person’s freedom as punishment for the crime that they were found guilty of, not to add additional punishment for the crime.

That being said, to ensure an orderly prison, there is provision for disciplinary hearings should a prisoner not keep to the rules and appropriate sanctions for contravening the rules. Still, during this process, it is important to take cognisance of the fact that prisoners are vulnerable to human rights violations due to the nature of prisons as fortresses from the outside world and the general perception that prisoners should have an (additional) tough time in prison as punishment for the crimes that they have committed. Minor violations are excused under this thinking, and more significant violations are often difficult to investigate and are not always properly reported.³ The legal principles applicable in this case should be understood in this context.

[25] Section 29(1)(b) of the Constitution provides that

29. (1) Everyone has the right—

[...]

³ Muntingh, L. (2006). Prisons in democratic South Africa—a guide to the rights of prisoners as described in the correctional services act and regulations. *Cape Town, South Africa: Civil Society Prison Reform Initiative.*

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

[26] To give effect to this right, s 18(1) of the Correctional Services Act states, “Every inmate must be allowed access to available reading material of his or her choice, unless such material constitutes a security risk or is not conducive to his or her rehabilitation.”

[27] *Minister of Justice and Correctional Services v Ntuli*⁴ explained that this right may be limited. The court stated

A prisoner enjoys the rights the Constitution extends to all persons and those specifically given to every sentenced prisoner (s 35(2)), unless these rights are limited by a law of general application in terms of s 36. So understood, it is for the State to justify a measure that compromises a prisoner’s constitutional rights. Following what is said in s 36, it must be a measure that is a law of general application; and that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[28] Mr Ngwenya enjoyed this right until his computer was removed after a disciplinary hearing. He asserts that the disciplinary hearing was not conducted properly, and there was no reason to take his computer away. He avers that he was targeted after the facility failed to provide him with a report on the stabbing incident that took place.

[29] The crux of the respondent's answer is that Mr Ngwenya cannot ask the court to review, as he has not exhausted all his internal remedies. However, Mr Ngwenya lodged an appeal against his disciplinary findings, made entries in the complaints book and approached JICS. He also does not bring the review under PAJA.

⁴ [2023] ZASCA 146.

Was the disciplinary hearing lawful?

[30] The indemnity declaration signed by Mr Ngwenya confirms that the *modem* will only be used for study purposes. It states that if it is used for other purposes, the *modem* may be confiscated and that he will not hold the Department of Correctional Services liable for any costs. Based on that indemnity form, the DCS is thus entitled to confiscate only the modem if it is not used only for study purposes. The computer could thus not be confiscated based on the indemnity form signed, as the respondent's affidavit states. If it could be confiscated based on the education policy, a case has not been made to that effect, nor has any policy or regulations that would justify it been provided or referred to. Based on the indemnity form, the removal of the laptop was unlawful.

[31] S 23 of the Correctional Services Act deals with disciplinary infringements. According to the Disciplinary Offence Register attached (dated 27 August 2023), Mr Ngwenya was charged under s 23(1)(c), which states that "[a]n inmate commits a disciplinary infringement if he or she is abusive to any person". It is not explained how the misuse of the computer links with this section. A plea of "guilty" was noted. He was sentenced to "occasional leave" for 14 days, reduced to 7.

[32] The disciplinary hearing notes the offence "misuse of a computer by inmate". This is not a disciplinary infringement listed in s 23. Furthermore, how the offence of "misuse of a computer" relates to s 23(1)(c) indicated on the Disciplinary Offence Register remains unclear. It is indicated on the form that Mr Ngwenya pleaded guilty to the offence, although, from the notes written below that entry, he pleaded not guilty. He stated that he was not on Betway. He admitted that he wrote a letter on the laptop about the kitchen and stated that he is not allowed to type complaints for inmates.

[33] The person conducting the disciplinary hearing further implied that a misuse of the laptop is a breach of security, but from the notes, it is not clear why this may be the case. They asked Mr Ngwenya if his laptop was a complaints and requests book, implying that the typing of complaints was a misuse. After this line of questioning, they

found him “guilty as charged”. The reasons are that “based on the evidence presented and sourced from a laptop, we find him guilty”.

[34] None of the evidence that the decision was relied on was attached to the answering affidavit. Mr Ngwenya stated that he had not received a copy of it either. It certainly does not indicate how he is abusive to any person. Thus, Mr Ngwenya could not be found guilty in terms of s 23(1)(c) listed on the Disciplinary Offence Register, as there was no proof of that. He could also not be guilty of “misuse of computer”, as no such infringement is listed in s 23. His computer could not be confiscated based on the indemnity, as the indemnity only referred to the modem. As far as these issues are concerned, the disciplinary was unlawful.

[35] S 24 of the Correctional Services Act deals with procedures and penalties. It is not clear whether s 24 only applies to s 23 infringement, I assume it is not. S 24 states that (own underlining):

24. Procedures and penalties.-

(1) Disciplinary hearings must be fair and may be conducted either by a disciplinary official, a Head of the Correctional Centre or an authorised official.

[...]

(3) Where the hearing takes place before the Head of the Correctional Centre or the authorised official, the following penalties may be imposed severally or in the alternative:

(a) A reprimand;

(b) a loss of gratuity for a period not exceeding one month;

(c) restriction of amenities for a period not exceeding seven days.

(4) At a hearing before a disciplinary official an inmate-

(a) must be informed of the allegation in writing;

(b) has the right to be present throughout the hearing, but the disciplinary official may order that the accused inmate be removed and that the hearing continue in his or her absence if, during the hearing, the accused inmate acts in such a way as to make the continuation of the hearing in his or her presence impracticable;

(c) has the right to be heard, to cross-examine and to call witnesses;

- (d) has the right to be represented by a legal practitioner of his or her choice at his or her own expense, unless a request to be represented by a particular legal practitioner would cause an unreasonable delay in the finalisation of the hearing in which case the inmate may be instructed to obtain the services of another legal practitioner; and
- (e) has the right to be given reasons for the decision.

[36] Mr Ngwenya's laptop and modem were confiscated *and* he was segregated, so he was penalised twice for computer misuse. In terms of International Law, the United Nations Standard Minimum Rules for the Treatment of Prisoners (the so-called “Mandela Rules”)⁵ Rule 39 clarifies that a prisoner shall not be sanctioned twice for the same act or offence. Mr Ngwenya's having his computer confiscated and segregated for at least seven days means he was sanctioned twice for the same offence.

[37] These provisions must be interpreted in light of the right to human dignity,⁶ the right to freedom and security of persons, and the right of prisoners to be detained in conditions consistent with human dignity.

[38] Segregation of a sentenced offender for computer misuse further is grossly disproportionate to the offence, especially because the computer was already confiscated. Segregation is allowed within the confines of s 30 of the Correctional Services Act, specifically 30(1)(b), which states that a prisoner can be segregated to give effect to the penalty of the restriction in terms of s 24(3)(c) to the extent that it is necessary to achieve the objective. If the objective is to stop computer misuse, the objective is achieved by removing the computer. It is not clear what the objective of segregation is, and this was not explained or justified.

⁵ UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) : resolution / adopted by the General Assembly, A/RES/70/175, 8 January 2016, <https://www.refworld.org/legal/resolution/unga/2016/en/119111>.

⁶ S 10 of the Constitution.

[39] Furthermore, in terms of rule 39.2 of the “Mandela Rules” there must be proportionality between a disciplinary sanction and the offence. This should be understood together with Rule 44 and 45 that states:

Rule 44

For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.

Rule 45

1. Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner’s sentence. [own emphasis]

[40] As already stated, it is not clear why segregation for 14 days (reduced to 7) was seen as a proportionate punishment for the use of a computer contrary to the agreement, especially not since the computer and modem were already confiscated. This seems disproportionate. If it was for being abusive to others, this was not proven.

[41] The question is, what is the correct remedy in this case? Mr Ngwenya already served 7 days in a segregated cell, so he was punished as per the disciplinary hearing. Therefore, an order to refer the decision back to the disciplinary hearing is not competent, as he was already punished.

[42] However, since the hearing was unlawful, the laptop and modem must be returned to Mr Ngwenya, subject to the normal rules governing the use of laptops and modems. That might include that access is only allowed if the sentenced offender is validly enrolled in a course requiring access to a laptop.

[43] The proof of registration before the court did not indicate that Mr Ngwenya did not indicate that Mr Ngwenya was enrolled in a current course in 2023/24. Therefore, the court cannot order the payment of the fees while the computer is confiscated.

[44] As for the report on the stabbing of Mr Ngwenya, he requested the report on the incident that led to his stabbing. Mr Ngwenya should be provided with such a report to enable him to query it should he still wish to do so.

Order

[45] The following order is made:

1. The third respondent is ordered to ensure that the applicant's computer and modem are returned to him.
2. The third respondent is ordered to provide the applicant with a report on the stabbing incident within 30 days of this order.
3. The third respondent must ensure the applicant gets a copy of this judgment.
4. No order as to costs.


WJ du Plessis
Acting Judge of the High Court

For the Applicant:

Self-represented

For the Respondents:

Z Mokatsane instructed by the State
Attorney