

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



Case number: 119373/2024

Date of hearing: 8 November 2024

Date delivered: 12 November 2024

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
12/11/24	[REDACTED]
DATE	SIGNATURE

In the application of:

MTHOBISI PRICE MNCUBE
FISOKUHLE NTULI

First Applicant
Second Applicant

and

MINISTER OF CORRECTIONAL SERVICES
NATIONAL COMMISSIONER,
DEPARTMENT OF CORRECTIONAL
SERVICES
REGIONAL COMMISSIONER,
GAUTENG PROVINCE

First Respondent

Second Respondent

Third Respondent

AREA COMMISSIONER, KGOSI MAMPURU II CORRECTIONAL SERVICES	Fourth Respondent
HEAD OF CENTER, KGOSI MAMPURU II CORRECTIONAL SERVICES	Fifth Respondent
HEAD OF C-MAX KGOSI MAMPURU II CORRECTIONAL SERVICES	Sixth Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Seventh Respondent
THE JUDICIAL INSPECTORATE FOR CORRECTIONAL SERVICES	Eighth Respondent

JUDGMENT

SWANEPOEL J:

INTRODUCTION

[1] Throw him in a cell and throw away the key! Let him rot! That is the cry one often hears from a community that is ravaged by the scourge of crime. Our society is well and truly sick of the many crimes, often violent, that are perpetrated daily.

[2] However, the measure of a society lies in the way in which it treats its most vulnerable; the sick, the poor, the helpless, but also those who are imprisoned for one reason or another. When the State takes custody of a prisoner, it also accepts responsibility for his or her well-being, and when the State takes up that responsibility, it must care for the prisoner humanely, and it must at least adhere to its own regulations and guidelines.

[3] In this application the applicants, both of whom are detained at the C-Max section of the Kgosi Mampuru II Correctional Facility, seek relief

in two parts. In Part A, which is before me, the applicants seek an urgent order that they be transferred from C-Max to their original detention centers.¹ In Part B, which shall be dealt with in the fullness of time, the applicants seek a declaration that their detention at C-Max is inconsistent with the Constitution and with International Law, and they seek the review and setting aside of the decision of the Department of Corrections not to release them from C-Max.

[4] The application has been withdrawn against the seventh respondent, the Minister of Justice and Constitutional Development, and the eighth respondent, the Judicial Inspectorate for Correctional Services, abides the decision. I will refer to the remaining respondents collectively as "the respondents".

[5] As a preliminary matter, I wish to deal with the parties' attempts to introduce new evidence at the last minute. When the matter came before me on Wednesday 6 November the respondent's counsel, Mr Madiba, complained that the applicants had attempted to introduce new affidavits shortly before the matter was called. I pointed out that there was no application before me explaining why it was necessary to introduce new evidence at such a late stage, and that I would consequently not take heed of the applicants' proposed supplementary affidavit. The matter then stood down until Friday 8 November for argument. On Friday morning the respondents suddenly wanted to introduce further affidavits. As with the applicant, there was no substantive application to supplement the respondent's papers. The respondents could provide no explanation why the information in the proposed affidavit, some of which was already known to the respondents a year ago, had not been included in the answering affidavit. I took the view that what was good for the goose was good for the gander and I declined to admit any further affidavits from the respondents.

[6] The applicants are awaiting trial for the murder of the well-known soccer player, Mr. Senzo Meyiwa, and as I have said, they are currently

incarcerated at the C-Max maximum security facility of the Kgosi Mampuru II Management area. C-Max comprises of 284 cells that measure approximately 2 meters X 2.5 meters in size. Prisoners are housed in these cells individually, and on the applicants' version, they are detained in their cells for more than 22 hours per day. The first applicant was transferred from Johannesburg Medium B to C-Max on 4 December 2020. He has, therefore, spent almost 4 years in C-Max. In contrast, the second applicant has been in C-Max for a little over a year.

[7] The first applicant is apparently incarcerated at C-Max due to his 'high risk profile'. On the papers before me, there is no evidence that justifies such a classification.

[8] The first applicant says that he has effectively been held in solitary confinement for four years. He says that he suffered a mental breakdown on 7 October 2024, and that the strain of solitary confinement for such a prolonged period has left him unable to concentrate, severely stressed, with feelings of fear and hopelessness, and suffering from insomnia. Due to his mental health issues, he has apparently been unable to provide his counsel in the criminal trial with instructions in the matter. The result is that the criminal trial has been interrupted.

[9] The first applicant paints a dire picture of his confinement at C-Max. He says that for 22 hours per day he has no contact with other persons. He says that he has no access to reading material, radio or television. On occasion he is allowed one hour of exercise in a cage. He is allowed a cold-water shower in a cage for two minutes per day. His telephonic contact with family members is limited to 10 minutes, twice per month, and two in-person visits of 30 minutes each per month. He is only allowed to consult with his legal team for an hour, twice per month.

[10] The respondents deny the first applicant's allegations. Specifically, the respondents say that the applicants are not in solitary confinement nor in segregation. This may well simply be semantics. If the

circumstances amount to solitary confinement or segregation, call it what you will, it remains solitary confinement or segregation. As far as the first applicant's mental health challenges are concerned, the respondents take a rather supine approach. They say that if he has such problems (which they deny), he could have approached "all manner of specialists". Considering that the Act² places an obligation upon Correctional Services to see to a prisoner's well-being, the rather no-care attitude of the respondents is alarming.

[11] However, as I have said, I do not intend to make any finding regarding the circumstances in C-Max. That is for the reviewing court to consider, and I will not tread outside of the ambit of this application for interim relief. Suffice it to say that there is no dispute that a prisoner who is incarcerated in C-Max enjoys far less privileges, and is subjected to much harsher circumstances than prisoners in normal maximum-security centers.

URGENCY

[12] The respondents have argued that the matter is not urgent. They say so on two grounds: Firstly, that the applicants have been imprisoned in these same circumstances for a long time, in the case of the first applicant, for years, and any urgency, the respondents say, is self-created. Secondly, they argue that it would make no difference to the applicants if they were to be detained at C-Max until the review application in Part B is heard.

[13] I have been referred to the judgment in *Simon v National Commissioner*³ in which the applicant applied to be transferred from C-Max on the basis that his continued incarceration there amounted to torture. The court held that the urgency was self-created in that it had apparently taken the applicant months to realize that he was being tortured. The applicant's delay in bringing the application timeously was therefore fatal to the matter and the application was struck from the roll.

As will be seen below, this matter is distinguishable on the facts from *Simon*.

[14] Although the first applicant says that his incarceration amounts to torture in terms of rule 43 of the United Nations Standard Minimum Rules for the Treatment of Prisoners, the so-called Nelson Mandela Rules, his case really hinges on the allegation that his further incarceration at C-Max is in conflict with the respondent's own Standard Operating Procedures that only allow for the incarceration of a prisoner in C-Max for eighteen months, save in certain exceptional cases. The first applicant has been there for four years. In my view, if a prisoner is incarcerated unlawfully, an application to rectify the position is inherently urgent. I will deal hereunder with the averment that the first applicant is unlawfully incarcerated. The first applicant has also alleged that the conditions under which he is incarcerated have caused him to suffer a mental breakdown. The allegation is denied by the respondents in a perfunctory manner, but they have made no effort to investigate the first applicant's complaints. I do not believe that the first applicant's averments should be rejected out of hand. I find that, as far as the first applicant is concerned, the matter is urgent.

[15] The same cannot be said for the second applicant. Although he says that he is also a victim of the same allegedly inhumane circumstances in C-Max, his continued incarceration falls within the four walls of the Correctional Services Act, 111 of 1998 ("the Act"), the Regulations and the Standard Operating Procedure. The allegation that the circumstances in which the applicants are held amount to torture is denied by the respondents and I do not intend to make any finding thereon. In my view there is no urgency to the second applicant's application. His application stands to be struck from the roll for lack of urgency.

IS THE FIRST APPLICANT ENTITLED TO BE RELEASED FROM C-MAX?

[16] The Bill of Rights contained in Chapter 2 of the Constitution protects the rights of all, including those of prisoners. Section 10 emphasizes the right to dignity. Section 12 protects all persons from the arbitrary deprivation of freedom, against torture and against inhumane and degrading treatment. Section 33 (1) guarantees administrative action that is lawful, reasonable and procedurally fair. Section 35 protects detainees, including sentenced prisoners, against conditions that are inconsistent with human dignity. In order to give effect to these Constitutional imperatives, the Act, the Correctional Services Regulation⁴ and the Standard Operating Procedures for C-Max provide for certain standards that must be adhered to in detention centers. Of importance to this matter, specific standards and procedures have been laid down for the treatment of prisoners in maximum security facilities such as C-Max.

[17] Paragraph 4.2 of the C-Max Standard Operating Procedure principles ("SOP's") provides that prisoners are subjected to a mandatory three-phase treatment programme for a minimum of 12 to 18 months. The intention with a prisoner's incarceration at C-Max is clearly to prepare him for integration into another maximum correctional facility and not to detain him at C-Max indefinitely. Paragraph 4.2.3.2 and 4.2.3.3 of the SOP's are insightful:

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| "4.2.3.2 | No offender may be kept at C-Max Correctional Facility for more than 12 to 18 months unless risks posed dictate otherwise and pre-approval is granted. . . |
| 4.2.3.3 | In exceptional circumstances, where it is required for an offender to be incarcerated at C-Max Correctional Facility for a period longer than 12 to 18 months, written application must be submitted by the center of origin to be approved by the National Commissioner or his/her |

delegate. Should this rule not be applied the offender must be collected by the center/region of origin.”

[18] Evidently, C-Max personnel were also of the view that the first applicant should be returned to his center of origin. On 17 January 2024 the Acting Chairperson CMC of C-Max wrote a memorandum to various persons, including the Area Commissioner, the Acting Regional Head Corrections, Gauteng, the Acting Deputy Regional Commissioner, Gauteng, and the Regional Commissioner, Gauteng. The memorandum requested leave to return the first applicant to his center of origin on the grounds that he had been incarcerated at C-Max for longer than 18 months. The memorandum remarked that the first applicant had been:

“mistakenly omitted from the list of offenders for 2020 that were transferred late last year to their centers of origin.”

[19] The memorandum specifically states that:

“C-Max is supposed to keep inmates for a period of eighteen months and thereafter be transferred back to Centers of origin upon good behaviour.”

[20] One Mr. CJ Matlala commented that the first applicant’s further incarceration at C-Max was contrary to the SOP’s.

[21] The reply from the RH Corrections, which I presume is the Regional Head for Gauteng, was that:

“This offender is attending a high-profile case of murder involving a high-profile soccer hero. It is recommended that he continue to be housed in C-Max for security reasons.”

[22] The request was, consequently, not approved. The Acting Deputy Regional Commissioner remarked that the request was denied because the first applicant was attending a critical case.

[23] The fact that a person is awaiting trial in a so-called “high profile” or “critical” case is not, in terms of the SOP’s, a basis for the indefinite incarceration of that person in C-Max. The fact is that there are numerous murder trials held every day in which the accused are not incarcerated in C-Max. In fact, there are co-accused in the same trial as the first applicant who are not incarcerated in C-Max. The question then remains: what sets the first applicant apart from the others who are on trial in the same or in similar matters, but are not incarcerated in C-Max? That question is not answered in these papers.

[24] However, even if they were the official view that the first applicant should remain in C-Max, it was incumbent on the respondents to make that determination strictly in accordance with the procedures laid down in the SOP’s. The respondent’s counsel submitted that although a prisoner should ideally be held in C-Max for no longer than 18 months, if it were necessary to extend the period, an application should be submitted in terms of paragraph 4.2.3.3 of the SOP’s. The respondents attached one page extracted from the SOP’s to their papers that said exactly that.

[25] However, when I had regard to the following page of the SOP’s, that did not form part of the respondents’ papers, it became apparent that the extract presented by the respondents was incomplete, and that it only contained half a sentence. The sentence continued on the following page to the effect that a written application to extend the period had to be submitted by the center of origin, in this case Johannesburg Medium B, to the National Commissioner or his delegate, and should such application not be brought, the prisoner was to be automatically collected by the center of origin.

[26] Here there was no such application. Mr. Madiba’s suggestion that the C-Max application to return the first applicant to Johannesburg Medium B was the application referred to in paragraph 4.2.3.3 is ill founded. That application was, in fact, exactly the opposite to the application envisaged in the SOP’s.

[27] In consequence, not only has the first applicant been incarcerated at C-Max longer than the SOP's provide for, also, no application has been brought to extend the period. The first applicant has, in my view, been detained unlawfully in C-Max beyond the 18-month period.

INTERDICT

[28] The reviewing court will be called upon to consider whether the first applicant has established a case for his contention that his incarceration in C-Max is inconsistent with the Constitution, and whether it constitutes solitary confinement. I do not intend to tread on that path. I have to consider the normal requirements for an interdict as set out in *Setlogelo v Setlogelo*⁵ and as amplified in *Webster v Mitchell*⁶.

[29] In *Setlogelo (supra)* the court set out the elements of an interdict as follows:

[29.1] A clear right, or at least a *prima facie* right though open to some doubt;

[29.2] Where a *prima facie* right is established, that the applicant would suffer irreparable harm were the interdict not to be granted;

[29.3] That there is no alternative remedy available.

[30] In *Webster v Mitchell (supra)* the Court said:⁷

"In an application for a temporary interdict, applicant's right need not be shown on a balance of probabilities; it is sufficient if such right is *prima facie* established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set

up in contradiction by respondent should then be considered, and if serious doubt is thrown on the case of applicant he could not succeed.”

[31] This application seeks to interdict the manner in which the State exercises its statutory powers with regard to C-Max prisoners. In *Gool v Minister of Justice and Another*⁸ the court was also concerned with an application to interdict the exercise of statutory powers. It said that a higher standard applied, and that the test in such a case is not whether an applicant could obtain final relief at trial, but whether it should be successful. It held that, in the absence of *mala fides*, such an interdict would not readily be granted.

[32] The same warning was conveyed in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*⁹, that the responsibility of a court was not to usurp the authority of other branches of government but to ensure that the other branches exercised their authority in accordance with the Constitution.

[33] In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*¹⁰ the Constitutional Court said:

“In a dispute as the present one, this does not mean that an organ of state is immunized from judicial review only on account of separation of powers. The exercise of all public power is subject to constitutional control.”

[34] Nonetheless, I thoroughly take heed of the warning by Froneman J in *National Treasury* that where one intrudes upon the domain of the executive on an interim basis, one should only do so in the clearest of cases.

[35] In my view this is one of those cases in which it would be appropriate to grant an interdict. Firstly, the first applicant’s right not to be detained in C-Max in contravention of the Department of Corrections’ own policy, and without any due process, has been established. Secondly,

should the first applicant continue to be detained in these circumstances, not only may his mental health be at risk, his further incarceration will be unlawful, and I would be allowing an ongoing wrong to be perpetrated. The first applicant's further incarceration beyond the 18 months' period will likely result in irreparable harm to the first applicant. There are also no alternatives remedies available.

[36] Finally, the balance of convenience favours the granting of the application. The first applicant will still be incarcerated in a maximum-security facility, he will still stand trial, and there is no evidence that the respondent's operations may be compromised. On the other hand, should he be moved from C-Max, the first applicant's mental health may well improve with exposure to other prisoners and to more normal conditions.

[37] As far as costs concerned, it was suggested that costs should be reserved for determination in Part B. I believe that order to be appropriate.

[38] I make the following order:

[38.1] The first applicant shall be removed from the C-Max Center and returned to his center of origin or to any other maximum-security center that may be convenient.

[38.2] The second applicant's application is struck from the roll for lack of urgency.

[38.3] The costs of Part A of the application are reserved for determination in Part B of the application.

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

Counsel for the applicant:	Adv. M Steenkamp
Instructed by:	Legal Aid SA, Pretoria
Counsel for the respondent:	Adv. Madiba
Instructed by:	The State Attorney
Date heard:	8 November 2024
Date of judgment:	12 November 2024

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- ¹ The notice of motion is not a model of clarity, but such is the relief sought essentially, as set out in the proposed draft order.
- ² Section 41 (3). See also para 13 of the C-Max Standard Operating Procedures.
- ³ (116396/2023) [2023] ZAGPPHC (29 November 2023)
- ⁴ Government Gazette no. 26626 dated 30 July 2004 (as amended)
- ⁵ Setlogelo v Setlogelo 1914 AD 221
- ⁶ Webster v Mitchell 1948 (1) SA 1186 (WLD)
- ⁷ In the headnote
- ⁸ Gool v Minister of Justice and Another 1955 (2) SA 682 (C)
- ⁹ International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC) at para 95
- ¹⁰ National Treasury v OUTA and Others 2012 (6) SA 223 (CC) at para 64