IN THE EQUALITY COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: EC10/2016

JADE SEPTEMBER	Applicant
v	
MR SUBRAMONEY N.O.	1st Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	2nd Respondent
THE NATIONAL COMMISSIONER, DEPARTMENT OF CORRECTIONAL SERVICE	3rd Respondent
MR VISAGIE N.O.	4th Respondent
and	
GENDER DYNAMIX	*Amicus Curiae*

JUDGMENT: MONDAY 23 SEPTEMBER 2019

FORTUIN, J:

"A society should be judged not by how it treats its outstanding

Citizens, but by how it treats its criminals."

Fyodor Dostoyevsky

A. INTRODUCTION

[1] The applicant, Ms Jade September, who is currently incarcerated at Malmesbury Medium Correctional Centre, is a transgender person. She brings this application to be allowed to express her gender identity while in prison. The applicant was born male and is currently anatomically still male.

[2] It is the applicant's case that the respondents' treatment constitutes unfair discrimination and harassment under the Equality Act. This Court is requested to order just and equitable relief for the violation of her fundamental constitutional rights to equality and human dignity, including an order that the respondents permit her to express her gender identity.

[3] The application is brought in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 ("PEPUDA"), in the applicant's own interest and also in the public interest in terms of ss 20(a) and (d). It is the applicant's contention that, not allowing her to express her gender identity while incarcerated, amounts to unfair discrimination and harassment against her.

[4] The first respondent is Mr Subramoney. At the time of the launching of these proceedings, he was head of Helderstroom Correctional Centre

("Helderstroom"). He is cited in his official capacity and he therefore has a direct interest in this matter.

[5] The second respondent is the Minister of Justice and Correctional Services in the national government ("the Minister") who is cited in his official capacity. He is cited as the member of the National Executive who is responsible for the administration of Correctional Services (and thus all prisons, including Helderstroom and Malmesbury Correctional Centre "Malmesbury") and for the administration and implementation of the Correctional Services Act 111 of 1998 ("the CSA"). He is cited for whatever interest he may have in this matter.

[6] The third respondent is Mr Zach Modise who, at the time of the launching of these proceedings was the National Commissioner of Correctional Services ("the National Commissioner") who is cited in his official capacity. He is cited for whatever interest he may have in this matter.

[7] The fourth respondent is Mr Visagie who, at the time of the launching of these proceedings was the Head of Malmesbury. He is cited in his official capacity and he therefore has a direct interest in the matter. The fourth respondent was later joined to these proceedings.

[8] Gender Dynamix ("the *amicus*"), represented by the Legal Resources Centre, Cape Town, was admitted as *amicus curiae* by the consent of the parties to assist the Court by placing relevant expert evidence before the Court. Gender Dynamix is an organisation dealing specifically with trans-diverse persons and their rights. Their submissions had been most helpful and for which I am grateful.

[9] This application was initially brought for certain relief. Subsequently, the Notice of Motion was amended and the following relief was sought:

"*1. Declaring that the first respondent's failure and or refusal to allow the applicant to express her gender by-*

1.1 Not allowing her to wear female underwear and make-up;

1.2 Ordering her to cut her hair; and

1.3 Refusing and/or failing to address her as a woman or through the use of the female pronoun, constituted unfair discrimination under section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA") and was thus unlawful and unconstitutional.

2. Declaring that the applicant's detention in solitary confinement from 19 March 2016 to 4 April 2016 constituted unfair discrimination under section 8 of PEPUDA and harassment under section 11 of PEPUDA and was thus unlawful and unconstitutional.

3. In the event that the applicant is again incarcerated at Helderstroom Correctional Centre, directing the first respondent to allow the application to express her gender identity by –

3.1 Returning to the applicant her female underwear and make-up. Allowing her to use such in future and not confiscating such in future;

3.2 Not to direct or force the applicant to cut her hair; and

3.3 addressing the applicant as a woman and through the use of the female pronoun; and to

3.4 Direct all correctional services officials who are employed under his authority at Helderstroom, Maximum Correctional Centre to do the same.

4. *Directing the first respondent to apologise to the applicant in writing for not allowing her to express her gender and for placing her in solitary confinement form 19 March 2016 to 4 April 2016 in response to and in effect as punishment for her expressing her gender.*

5. *In the event that the applicant is again incarcerated at Helderstroom Correctional Centre, directing the first respondent to ensure that the applicant is not again placed in solitary confinement or subjected to any other punishment, including the revocations of her A Group Status and other privileges, for/or in response to/or as a punishment for expressing her gender identity (by wearing female underwear and make-up, not cutting her hair and/or referring to herself or requesting correctional services officials to refer to her as a woman or through the use of the female pronoun.)*

6. *Directing the first respondent to remove from the applicant's correctional services' record/file, the charges or infractions that were entered against her on 19 March 2016 and 28 May 2016 respectively, in relation to her expressing her gender identity.*

6(a). 1. *Declaring clause 2.3 (a) of the Standing Order on Personal Hygiene to be unlawful to the extent that it prohibits and/or prevents the respondents from issuing the applicant (and other transgender female prisoners) with female underwear and/or from being allowed to wear such.*

2. *In order to cure the illegality of clause 2.3, striking out the word "underpants" and, in its place, reading in the words "gender appropriate underwear".*

6(b). *Declaring that the fourth respondent's failure and/or refusal to allow the applicant to express her gender by-*

1. *Not allowing the applicant to wear female underwear, make-up and jewellery, and;*

2. *Not allowing the applicant to wear her hair long and in feminine styles; and*

3. *Refusing to address the applicant as a women and through the use of the female pronoun constitutes unfair discrimination under section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA") and thus to be unlawful and unconstitutional.*

6(c). *Directing the fourth respondent to allow the applicant to express her gender identity by-*

1. *Returning to the applicant her female underwear, make-up and jewellery, allowing her to use such in future and not confiscating such in future;*

2. *Allowing the applicant to wear her hair long and in feminine styles;*

3. *Addressing the applicant as a women and using the female pronoun;*

4. *Directing all correctional service officials who are employed under his authority at the Malmesbury Correctional Centre to do the same.*

6(d). *Directing the fourth respondent to apologise to the applicant in writing for not allowing her to express her gender identity from 30 November to date.*

7. *Directing the first and fourth respondent (jointly and severally, the one paying the other to be absolved) to pay the costs of the application.*

8. *Directing the second and third respondents (jointly and severally, the one paying the other to be absolved) to pay the costs of the application in the event of their opposition.*

9. *Any further or alternative relief that the Court deems appropriate."*

B. COMMON CAUSE BACKGROUND FACTS

[10] The applicant was born and raised as a boy. From a young age, the applicant knew that, although born anatomically male, her gender was that of a girl/woman.

[11] As a teenager, the applicant entered into a relationship with an older man who wanted her "*to be gay and not transgender*". The applicant, out of fear that the relationship would otherwise end, acquiesced to an extent. Since 2012, when this relationship in fact ended, the applicant began living more fully as a woman in terms of dress and lifestyle.

[12] The applicant was sentenced to 15 years' imprisonment in the Cape Town Regional Court on 28 May 2013, after being convicted of murder, theft and attempted theft of a motor vehicle. She was incarcerated firstly at Pollsmoor Admission Centre ("Pollsmoor"), then at the Helderstroom Maximum Correctional Centre ("Helderstroom") in Caledon, where she was placed in a single cell as a disciplinary measure. Hereafter she was transferred to Malmesbury Medium Correctional Centre ("Malmesbury") on 15 June 2017, where she is currently incarcerated.

[13] On 6 March 2016, the applicant informed the first respondent that she would be pursuing treatment to enable her to transition.

[14] After a number of disagreements about whether she was allowed to express her gender identity while at Malmesbury, the applicant attempted to commit suicide.

C. APPLICANT'S VERSION

a. General

[15] It is the applicant's version that, even though she is anatomically still male, her own internal understanding of her gender is not that of a man, but of a woman.

[16] Further, that she wants to undergo medical treatment in future to enable her to "live more fully" as a woman, but that she has not as yet had access to such treatment. Thus, she expresses her gender identity in the only manner available to her, e.g. by dressing as a woman, by wearing her hair long and in feminine styles, by wearing make-up and by referring to herself (and requesting others to refer to her) as a woman and through the use of the female pronoun.

[17] Moreover, it was submitted by the applicant that she did not institute these proceedings in order to "*be difficult, but that her motivation was, until she can undergo medical treatment in order to transition*" that this was the only way in which she can express her gender identity.

[18] It is her case that her gender identity is the core and the essence of who she is as a human being.

[19] She submitted that, since her incarceration, the respondents denied her permission to express her gender identity by not allowing her to:

- Wear her hair long and in feminine styles;
- Wear make-up;
- Wear female underwear; and
- Be referred to as a female through the use of the female pronoun.

[20] It is the applicant's case that the respondents' treatment constitutes unfair discrimination and harassment under the Equality Act ("PEPUDA"). This court is requested to order just and equitable relief for the violation of her fundamental constitutional rights to equality and human dignity, including an order that the respondents permit her to express her gender identity.

[21] When she was incarcerated at Pollsmoor, she was allowed to express her gender identity. She was also allowed to do the same during her initial incarceration at Helderstroom. She was, for example, allowed to wear her hair long, in braids and neatly tied up. She was also allowed to wear a bit of makeup. There were no complaints about this from anyone, including the first respondent. She was even permitted to dress up and take part in drama performances and talent shows.

[22] According to her, this position changed dramatically when she was temporarily transferred to Brandvlei Correctional Centre ("Brandvlei"). Her make-up and female underwear were confiscated upon her arrival there, and she was referred to as a man. None of her complaints, including the complaint about a certain DCS official's derogatory remarks were followed up.

[23] On her return to Helderstroom, her circumstances were worse than ever. According to her, the acceptance of her expression of her gender identity was no longer the *status quo.* In fact, it became much worse and

resulted in her detention in segregation. This detention is discussed in detail below.

[24] It is the applicant's case that the first respondent refused to allow her to express her gender identity while she was incarcerated at Helderstroom from March 2016 until June 2017.

[25] Moreover, that she was not allowed to:

- wear her hair long and in feminine styles;
- wear make-up;
- wear female underwear;
- wear jewellery; and
- be addressed as a woman through the use of the female pronoun.

[26] It is her submission that this conduct by the first respondent constitutes unfair discrimination. Even though the applicant is no longer detained at Helderstroom, she persists with this application in relation to the alleged violation of her rights to equality and human dignity during detention at Helderstroom on the two following basis:

- In her own interest in terms of section 20(a) of "PEPUDA". On her behalf it is submitted that it cannot be excluded as a possibility that she, in future, may be transferred back to Helderstroom.

- In terms of section 20(d) of "PEPUDA", in the public interest, and, in particular, in the interest of other transgender inmates who will be incarcerated at Helderstroom in future.

[27] It is further her case that the feeling of her being targeted by the prison authorities was perpetuated, after being transferred to Malmesbury, when the fourth respondent changed his attitude after initially allowing her to express her gender identity for a period of almost six months.

[28] These feelings intensified and resulted in her attempting to take her own life after a confrontation with the fourth respondent in his office on 7 December 2017. Accordingly, her submission is that the fourth respondent discriminated against her on the basis of her transgender identity.

[29] It is further the applicant's case that, should she be allowed to express her gender identity, she would not be at an increased risk of sexual abuse as, on her version, for the total period of her incarceration, including the lengthy periods of when she was permitted to express her gender identify, only one inmate has sexually harassed or threatened her.

[30] The applicant's incarceration history can be summarised as follows: During May 2013, she was sentenced and held at Pollsmoor. Thereafter, she was incarcerated at Helderstroom (first). She was then temporarily transferred

to Brandvlei and back to Helderstroom in March 2016 (second). She is currently held at Malmesbury.

b. The applicant's detention in segregation at Helderstroom

[31] The applicant is of the view that her detention in "segregation" under section 30 of the Correctional Services Act 111 of 1998 (" the CSA") for a period of 17 days from 19 March 2016 to 4 April 2016 was punishment for asserting her gender identity in response to the authorities' disregard thereof.

[32] On 6 March 2016, at her first meeting with the first respondent, she told him that she would be pursuing medical treatment to enable her to transition. According to her, his response was that he would obtain legal assistance to resist such attempts on her part and that he "*would not have*" her "*looking like a woman*" because she is a man.

[33] On 19 March 2016, during conducting his rounds, the first respondent entered the applicant's cell. He instructed her that she was to stand when she addressed him. He addressed her as a man. He, thereafter introduced disciplinary measures by removing her make-up, female underwear and jewellery, and detained her in segregation because of the disrespectful manner in which she behaved towards him. However, it is her version that she was so detained because she was expressing her gender identity.

[34] It is further her version that she did not intend any disrespect. She did so simply to express and assert her gender identity in response to the first respondent's complete negation of it. Consequently, the applicant was detained in segregation.

[35] It is the applicant's version that her detention in segregation constituted harassment and unfair discrimination under the relevant provisions of "PEPUDA".

[36] After the applicant was released from segregation, she was forced to cut her hair and was forbidden to wear what was left of her make-up. In addition, she was forced to sign a warning in relation to her hair and make-up infractions and was ordered not to wear make-up any longer. She was told that if she did so she would forfeit her *"Grade A Group Status"* (the status achieved for good behaviour and for not contravening prison rules) and other privileges.

c. Incident of Sexual Harassment at Helderstroom

[37] While the applicant was still held in Helderstroom Maximum, and shortly before she was placed in segregation Ranchell "Midnight" Goodman ("Ranchell") made sexual advances towards her, which she rejected. By the time the applicant was taken out of segregation she discovered that Ranchell was transferred to the Medium Section. Before he left, he however gave a

message to another inmate that he would be waiting for the applicant in the Medium Section. According to her she felt safe in the Maximum Centre as Ranchell was no longer there. For this reason she did not want to be transferred to the Medium Section. During March 2016, the applicant was in fact transferred to Helderstroom Medium.

[38] On her version, the respondents were aware of this threat, but continuously failed to move her to a safer facility. She was held at Helderstroom Medium, where the threat emanated from. According to her, she informed various officers at Helderstroom of the threat and the need to be transferred. She was finally transferred to Malmesbury on 15 June 2017.

[39] The assault by Ranchell on the applicant occurred prior to her transfer to Malmesbury. According to the applicant, she has neutral or positive relationships with other prisoners.

[40] It is her version that, instead of ensuring her safety, the respondents did the opposite and transferred her to the correctional services facility where this inmate was incarcerated, thereby exposing her to the risk of sexual assault.

D. RESPONDENTS' VERSION

a. General

[41] The respondents oppose this application on the basis that the applicant's gender identity is constrained by the following facts:

- Her birth assigned identity;
- Her physical, genital and reproductive anatomy; and
- The safety and security of the applicant whilst serving a sentence in a male correctional centre.

[42] It is the respondent's contention that:

- The applicant was prosecuted and incarcerated as a male;
- The applicant biologically and anatomically remains a male;
- The applicant is legally identified as a male in terms of the applicant's identity document.

[43] It is accordingly the respondents' case firstly that, because the applicant is anatomically and legally male, there is no ground on which it could have discriminated against her, as she is legally still male. Secondly, that even if discrimination is established on a particular ground, such discrimination does not amount to unfair discrimination.

[44] It is the respondents' submission that in terms of section 12(1) of the Correctional Services Act No 111 of 1998 ("the CSA"), the State is indeed obliged to provide, within its available resources, adequate health care services, based on the principles of primary health care, in order to allow every inmate to lead a healthy life. However, section 12(2) of the CSA provides that no inmate is entitled to cosmetic medical treatment at State expense. Accordingly, the applicant's request to undergo gender transitioning surgery was rejected.

b. Incident of sexual harassment

[45] It is the respondents' version that it did not unfairly discriminate against the applicant and denies any form of harassment in that:

45.1 The applicant's female underwear and make-up was removed for the applicant's own safety and retained in the private belongings area at reception.

45.2 The applicant informed the first respondent on 6 March 2016 of a desire to undergo gender transitioning and of an application for medical treatment. The request for medical treatment fell under the definition of cosmetic medical surgery.

45.3 The respondents submit that the incident involving Ranchell serves as support for its contention that granting the applicant her relief would expose her to an increased risk of sexual harassment.

c. The applicant's detention in segregation

[46] The respondents dispute the applicant's allegation that she was initially allowed at Helderstroom to express her gender identity through various means, including being allowed to dress up and take part in drama performances and talent shows.

[47] Moreover, the allegation by the applicant that, on return to Helderstroom after a short period at Brandvlei the circumstances were worse than ever, is denied by the respondents and it is their version that:

- The applicant's female underwear and make-up was removed for her own safety and placed in safe keeping at reception; and
- The applicant's request to undergo gender transitioning surgery while incarcerated was rejected as sec 12(2) of the CSA provides that no inmate is entitled to cosmetic medical treatment at State expense.

[48] It is the respondents' version that the applicant was placed in a single cell, not because she expressed her gender, but because she was belligerent, defiant, aggressive, using violent expressions and abusive language when asked to hand over her make-up and for failing to follow standard security procedures. Accordingly, on the respondents' version, the applicant was placed in a single cell as a disciplinary measure.

[49] Therefore, according to the respondents, the applicant's treatment as a male while incarcerated in terms of the legal framework is consistent with that of other inmates, and there has been no difference of treatment or unfair discrimination. What the applicant is therefore seeking is to be treated as a woman, whereas the applicant's legal status is a man.

[50] It is the respondents' case that the applicant's transgender requirements placed her in a high security risk category at Helderstroom, a maximum security correctional centre where there is a male population of approximately 770 prisoners with the majority of the prisoners serving multiple sentences for violent crimes.

[51] Moreover, it is submitted by the respondents that the correctional centre is such that male inmates take physical possession or ownership of other male prisoners that display feminine characteristics.

[52] In addition, it is submitted that the applicant's request for communal access to other male prisoners whilst the applicant express herself as a female, would expose the applicant to sexual violence, because "*male rape is an undeniable reality of incarceration*".

[53] During argument, the court enquired from the respondents' counsel what the current situation is at prisons in respect of hairstyles, make-up and

underwear. As this information was not available during the hearing, the respondents were granted an opportunity to furnish the court with same. This information was provided on 6 March 2019, i.e. approximately 4 months after the hearing. The following relevant information can be gleaned from the submitted document.

d. The current position in correctional centres

[54] According to the Acting Director of Correction Administration, a prisoner is managed in terms of the personal details appearing on the warrant of detention, e.g. if a prisoner is identified on the warrant as male, he will be treated as male while in detention.

[55] Where a person's sex is altered in terms of the Alteration of Sex Description and Sex Status Act No 49 of 2003 ("the Sex Alteration Act"), that person will be treated in accordance with his/her altered sex. This is based on the fact that such a person's sex would have been altered on the birth register. The treatment of a prisoner is therefore in accordance with the details on the birth register.

[56] Currently, no provision is made for persons who have commenced treatment for a sex alteration but before a change on the population register occurred.

[57] In respect of hairstyles, make-up and underwear in particular, the following was submitted by the respondents:

- Male prisoners are allowed the following toiletries:
    - Comb 1
    - Razor blades 1 weekly
    - Razor 1
    - Shaving brush 1
    - Soap – general 2 x 200g per month
    - Toilet soap 2 x 100g per month
    - Face cloth as required
    - Towel as required
    - Toothbrush 1 x 6 monthly
    - Toothpaste 2 x 25ml – 3 weekly

      1 x 50ml – 1 monthly (board cases) if available

      1 x 100 ml – 2 monthly
    - Toilet paper as required

Female prisoners are allowed the following toiletries:

- Comb 1
- Razor blades as required
- Razor 1
- Soap – general 2 x 200g per month use
- Toilet soap 2 x 100g per month
- Face cloth as required
- Towel as required

- Toothpaste (as for males)
- Toothbrush 1 x 6 monthly
- Sanitary towels as required
- Toilet paper as required

[58] All prisoners are allowed the following in respect of their hair:

- They must be given the opportunity to shave or be shaved at all times.
- They are permitted to wear their hair (including facial hair) in any style consistent with health, hygiene, security and safety.
- When working in jobs in which long hair constitutes a health or safety hazard they will be required to wear hair covering.
- A prisoner's hair may be required to be cut if medical treatment so requires.

[59] It is further submitted by the respondents that currently, male prisoners are allowed the normal male underwear including 2 underpants, while female prisoners are allowed the normal female underwear including panties and bras. Jewellery is allowed only for certain male and female prisoners, i.e. A-Group: C-Max (Phase 2) (maximum/medium and medium categories) and unsentenced prisoners.

[60] Moreover, it is the respondents' submission that there is currently no provision made regarding make-up in the standing orders. Section 14.6 of the Departmental Order B, Chapter 1, **Admissions of Prisoners,** determines as follows:

> "... *when sentenced prisoners have toiletries in their possession on admission, they may, according to the discretion of the Head of the Prisons, be allowed to keep such articles in their possession after items have been searched. The number, standard and quality of the items must be the same as that issued to prisoners by the state.*"

[61] The current practice in a female correctional facility is as follows:

61.1 Make-up is regarded as toiletries;

61.2 Female prisoners are allowed to wear make-up;

61.3 Use of make-up is at the prisoner's own responsibility;

61.4 Make-up is not stocked or sold at the correctional facility's stores/kiosks; and

61.5 Make-up is provided by family or friends.

[62] It is in short the respondent's submission that the applicant in *casu* is male and has not yet followed the process for gender reassignment. As a result, it is the respondent's case that the applicant is rightly treated as male. Accordingly, there is no basis for a claim of unfair discrimination on a listed ground.

E. RELEVANT LEGAL PRINCIPLES

[63] The Republic of South Africa has a number of laws relevant to the issue of discrimination and how it relates to gender. Here follows a list of these laws and case law in this regard as well as other relevant issues.

[64] As this matter deals with the rights of an incarcerated person, the words of Langa J (as he then was) are worth remembering when considering this application:

> *"The simple message is that the State must, in imposing punishment, do so in accordance with certain standards; these will reflect the values which underpin the Constitution; in the present context, it means that punishment must respect human dignity and be consistent with the provisions of the Constitution."*[1]

(a) Domestic Legislation Chronologically

1. Identification Act 68 of 1997 ("Identification Act")

[65] **Section 7** of the Identification Act deals with assignment of identity numbers. Subsections (1) and (2) read as follows:

> *"(1) The Director-General shall assign an identity number to every person whose particulars are included in the population register in terms of section 8.*
>
> *(2) An identity number shall be compiled in the prescribed manner out of figures and shall, in addition to a serial, index and control number, consist of a reproduction, in figure codes, of the following particulars, and no other particulars whatsoever, of the person to whom it has been assigned, namely-*
>
> *(a) his or her date of birth and gender; and ..."* (My emphasis.)

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[1] **S v Williams** 1995 (3) SA 632 (CC) at para 38.

[66] **Section 8** of the Identification Act reads as follows:

> *"**8. Particulars to be included in population register.** - There shall in respect of any person referred to in section 3, be included in the population register the following relevant particulars available to the Director-General, namely-*
>
> *(a) his or her identity number referred to in section 7;*
>
> *(b) his or her surname, full forenames, gender, date of birth and the place or country where he or she was born; ..."* (My emphasis.)

2. Births and Deaths Registration Act 52 of 1992

[67] The Births and Deaths Registration Act 51 of 1992 ("the Births and Deaths Act") provide that notice of a birth must be given in a prescribed manner[2]. Thereafter, a birth certificate is furnished.[3] The assignment of identity number occurs on the basis of, *inter alia*, the gender of the individual.[4]

[68] The process prescribed in the Births and Deaths Act in respect of sex can therefore be described as follows:

68.1 The notice of birth must identify the sex designation;

68.2 A birth certificate reflects the information on the National Population Register, which includes the sex of a person;

68.3 The National Population Register reflects the sex of an individual;

68.4 A birth certificate shall in all courts of law, on the face of it, give evidence of the particulars therein; and

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[2] Section 9(1).
[3] Section 9(5).
[4] Section 7(2): Director – General may supplement and rectify such particulars in consultation with the person in question.

68.5 There are only two sexes recognised in South African Law, being male and female (a binary model).

3. Constitution of the Republic of South Africa, 108 of 1996

[69] The Constitution enshrines equality as both a value under section 1(a) and 7(1) and a substantive right in terms of section 9:

> *"**1. Republic of South Africa**-The republic of South Africa is one, sovereign, democratic state founded on the following values:*
>
> *(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.*
>
> ...
>
> ***7. Rights**- (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.*
>
> ...
>
> ***9. Equality**- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*
>
> *(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
>
> *(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
>
> *(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
>
> *(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."*

[70] These constitutional protections were at the heart of a number of decisions in our courts. In the matter of **Kos and Others v Minister of Home Affairs and Others**[5], the applicants included three transgender spouses who had been born male, but had subsequently undergone sex/gender changes to become female. Each had female spouses, whom they had married in terms of the Marriage Act 25 of 1961 ("Marriage Act"), prior to their sex/gender change. The application arose out of the difficulties being faced by the applicants in attempting to have their sex description altered on their birth registers. The Minister argued that the marital law regime precluded those married under the Marriages Act from remaining married if they subsequently underwent "gender reassignment" or from changing their sex description. The Court held that the Department was obliged to determine the applications submitted in terms of the Alteration of Sex Description and Sex Status Act 49 of 2003 ("the Alteration Act") irrespective of the person's marital status.

[71] The Court declared that the Department's conduct was inconsistent with the Constitution-

> "*and unlawful in that it-*
>
> *(a) infringed the said applicants' right to administrative justice;*
>
> *(b) infringed the said applicants' rights and those of the second, fourth and sixth applicants to equality and human dignity; and*
>
> *(c) was inconsistent with the state's obligations in terms of s7(2) of the Constitution."*

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[5] 2017 (6) SA 588 (WCC).

[72] The Court's reasoning for this conclusion appear from, amongst others, the following paragraphs:

> *"[70] What is also strikingly absent from the respondents' answer is any acknowledgement of the expressly enshrined constitutional principle that statutes must be interpreted in a manner consistent with the promotion of the spirit, purport and object of the Bill of Rights. Although s 39(2) of the Constitution places the interpretative duty on adjudicative bodies such as courts and tribunals, the provision necessarily implies that organs of state charged with administering legislation are expected to do so consistently with the meaning which the courts are called upon to give it. Organs of state fulfil that obligation by complying with s 7(2) of the Constitution, which obliges the state* 'to respect, protect, promote and fulfil the rights in the Bills of Rights'. ***The manner in which the applications by the transgender spouses were treated manifests a regrettable lack of compliance by the Department with its constitutional obligations in a number of respects.***
>
> ...
>
> *[82] The Marriage Act, moreover, does not contain anything prohibiting a party to a marriage duly solemnised in terms of the formula prescribed in s 30(1) from undergoing a sex-change or obtaining an altered birth certificate in terms of the Alteration Act. Any provision that had such an effect would, for a number of reasons, be of very doubtful constitutional validity. It would probably be found to offend against the basic rights of everyone to equality because it would be likely to unfairly discriminate against affected parties on one or more of the grounds set out in s 9(3) of the Bill of Rights, and also to unjustifiably infringe the right that everyone has to bodily and psychological integrity, including the right to security in and control over their body (s12(2)(b) of the Bill of Rights.*

[73] In **MEC for Education: KwaZulu-Natal and Others v Pillay**[6], the Constitutional Court held that: "*The Equality Act is clearly the legislation contemplated in section 9(4) and gives further content to the prohibition on unfair discrimination.*"[7]

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[6] 2008 (1) SA 474 (CC).
[7] Pillay at para 39.

[74] **Section 10** of the Constitution guarantees everyone the right to dignity. Dignity is also the first and foremost value upon which the Republic of South Africa is founded.[8] The right to and value of dignity infuse all other rights, including the right to equality. Section 10 reads as follows:

> *"**10. Human dignity:** -Everyone has inherent dignity and the right to have their dignity respected and protected."*

[75] The South African Constitutional Court dealt with the right to dignity in one of its first decisions after its inception in 1995:

"The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights."[9]

[76] **Section 12** deals with freedom and security and reads as follows:

> *"**12. Freedom and security of the person**-(1) Everyone has the right to freedom and security of the person, which includes the right –*
>
> *(a) not to be deprived of freedom arbitrarily or without just cause;*
>
> *...*
>
> *(e) not to be treated or punished in a cruel, inhuman or degrading way."*

[77] Langa J (as he then was) held that "*the common thread running through the assessment of each phrase [in s12(1)(e)] is the identification and*

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[8] Sec 1(a) of the Constitution of the RSA, 108 of 1996.
[9] **State v Makwanyane and Others** 1995 (3) SA 391 (CC).

acknowledgement of society's concept of decency and human dignity."[10]

4. Correctional Services Act 111 of 1998

[78] The Correctional Services Act 111 of 1998 ("CSA") determines the rules and regulations applicable in correctional centres. The relevant sections are as follows:

"12. Health care— (2) (a) Every inmate has the right to adequate medical treatment but no inmate is entitled to cosmetic medical treatment at State expense.

...

23. Disciplinary infringements— (1) A prisoner commits a disciplinary infringement if he or she-

(a) replies dishonestly to legitimate questions put by a correctional official or other person employed in a prison;

(b) disobeys a lawful command or order by a correctional official or fails to comply with any regulation or order;

(c) is abusive to any person;

(d) fails or refuses to perform any labour or other duty imposed or authorised by this Act;

(e) is careless or negligent with regard to any labour or duty imposed or authorised by this Act;

(f) uses insulting, obscene or threatening language;

(g) conducts himself or herself indecently by word, act or gesture;

(h) commits an assault;

(i) communicates with any person at a time when or a place where it is prohibited;

(j) makes unnecessary noise or causes a nuisance;

(k) without permission leaves the cell or other assigned place;

(l) in any manner defaces or damages any part of the prison or any article therein or any state property;

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[10] **S v Williams, *supra*, at para35**

(m) possesses an unauthorised article;

(n) commits theft;

(o) creates or participates in a disturbance or foments a mutiny or engages in any other activity that is likely to jeopardise the security or order of a prison;

(p) professes to be a member of a gang or takes part in gang activities;

(q) makes a dishonest accusation against a correctional official or fellow prisoner;

(r) conceals, destroys, alters, defaces or disposes of an identification card, document or any issued article;

(s) commits an act with the intention of endangering his or her life, injuring his or her health or impairing his or her ability to work; or

(t) attempts to do anything referred to in this section.

(2) A prisoner who assists, conspires with or incites another person to contravene a provision of subsection (1) commits a disciplinary infringement.

...

24. Procedures and penalties— (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."

5. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA")

[79] One of stated objects of the Equality Act is "*to enact legislation required by section 9 of the Constitution.*"

[80] "*Discrimination*" is defined in section 1 as-

"... any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-

(a) imposes burdens, obligations or disadvantage on; or

(b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds;"

The *"prohibited grounds"* are defined in section 1 as:

"(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; and HIV/AIDS status; or

(b) any other ground where discrimination based on that other ground-

(i) causes or perpetuates systemic disadvantage;

(ii) undermines human dignity; or

(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a);"

[81] **Section 4** is titled "*Guiding principles*" and subsection (2) provides:

"(2) In the application of this Act the following should be recognised and taken into account:

(a) The existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and

(b) the need to take measures at all levels to eliminate such discrimination and inequalities."

[82] **Section 6** provides that:

"Neither *the State nor any person may unfairly discriminate against any person.*"

[83] **Section 8** prohibits unfair discrimination on the ground of gender and reads as follows:

> *"Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, ..."*

[84] **Section 13** provides for the burden of proof as follows:

> *"(1) If the complainant makes out a* prima facie *case of discrimination-*
>
> *(a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or*
>
> *(b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds.*
>
> *(2) If the discrimination did take place-*
>
> *(a) on a ground in paragraph (a) of the definition of* 'prohibited grounds'*, then it is unfair, unless the respondent proves that the discrimination is fair;*
>
> *(b) on a ground in paragraph (b) of the definition of* 'prohibited grounds'*, then it is unfair-*
>
> *(i) if one or more of the conditions set out in paragraph (b) of the definition of* 'prohibited grounds' *is established; and*
>
> *(ii) unless the respondent proves that the discrimination is fair."*

[85] In order to determine the fairness or lack thereof, **section 14** lists the factors that must be taken into account. The relevant parts read as follows:

> *"(2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:*
>
> *(a) The context;*
>
> *(b) the factors referred to in subsection (3);*

(c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

(3) The factors referred to in subsection (2) (b) include the following:

(a) Whether the discrimination impairs or is likely to impair human dignity;

(b) the impact or likely impact of the discrimination on the complainant;

(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

(d) the nature and extent of the discrimination;

(e) whether the discrimination is systemic in nature;

(f) whether the discrimination has a legitimate purpose;

(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;

(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-

(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

(ii) accommodate diversity."

5. Alteration of Sex Description and Sex Status Act 49 of 2003 ("Alteration Act")

[86] The purpose of the Alteration Act is as stated in its preamble:

"To provide for the alteration of the sex description of certain individuals in certain circumstances; and to amend the Births and Deaths Registration Act, 1992, as a consequence; and to provide for matters incidental thereto."

[87] Although this Act does not give a definition of "gender", it does in **section 1** provide the following definitions:

> *" '**gender characteristics**' means the ways in which a person expresses his or her social identity as a member of a particular sex by using style of dressing, the wearing of prostheses or other means;*
>
> *'**gender reassignment**' means a process which is undertaken for the purpose of reassigning a person's sex by changing physiological or other sexual characteristics, and includes any part of such a process;*
>
> *...*
>
> *'**primary sexual characteristics**' means the form of the genitalia at birth;*
>
> *'**secondary sexual characteristics**' means those which develop throughout life and which are dependant* [sic] *upon the hormonal base of the individual person;*
>
> *'**sexual characteristics**' means primary or secondary sexual characteristics or gender characteristics."*

(b) International Law

1. South Africa's Obligation to consider

[88] A number of pieces of domestic legislation obliges courts to consider international law when interpreting the Bill of Rights. **Section 39** of the Constitution provides:

> *"**Interpretation of Bill of Rights***
>
> *39. (1) When interpreting the Bill of Rights, a court, tribunal or forum-*
>
> *(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
>
> *(b) must consider international law; and*
>
> *(c) may consider foreign law.*

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[89] **Section 3** of the Equality Act provides as follows:

"3 Interpretation of Act

(1) ...

(2) Any person interpreting this Act may be mindful of-

(a) Any relevant law or code of practice in terms of a law;

(b) international law, particularly the international agreements referred to in section 2 and customary international law;

(c) comparable foreign law. ..."

[90] The rights of transgender persons had been at the centre of numerous constitutional matters litigated globally in different jurisdictions. I found it necessary to take account of these international views when deciding this application.

2. International Covenant on Economic, Social and Cultural Rights

[91] The UN Committee on Economic, Social and Cultural rights (CESCR), General Comment 20, dealt with non-discrimination in economic, social and cultural rights. (See art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights[11]). It states at para 32:

[11] The ICESRC was signed on 3 October 1994 and ratified on 12 January 2015 by South Africa.

"Sexual orientation and gender identity

'Other status' *as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace."*

3. International Rights of Prisoners

[92] The basic principle for the treatment of prisoners was adopted and proclaimed by General Assembly Resolution 45/111 of 14 December 1990. In terms of these eleven principles, *inter alia*, all prisoners shall be treated with the respect due to their inherent dignity and value as human beings[12]. It also determines that there shall be no discrimination on various grounds including sex, birth or other status[13].

[93] **Principle 4** reads as follows:

"4. The responsibility of prisons for the custody of prisoners and for the protection of society against crime shall be discharged in keeping with a State's other social objectives and its fundamental responsibilities for promoting the well-being and development of all members of society."

[12] Principle 1.
[13] Principle 2.

[94] The Human Rights and fundamental freedom set out in the United Nations Declarations are all applicable to prisoners except for the limitation necessary by the fact of their incarceration.[14]

4. YOGYAKARTA PRINCIPLES

[95] Even though there is no international treaty pertaining exclusively to the rights of sex and gender minorities, in 2009, 29 experts from 25 countries developed the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity ("the Yogyakarta Principles"). In 2017, the same group of experts drafted and signed the Yogyakarta Principles Plus 10, expanding on the original principles.

[96] According to the Yogyakarta Principles, *"... all human beings are born free and equal in dignity and rights. All human rights are universal, interdependent, indivisible and interrelated."* Further that gender identity and sexual orientation *"... are integral to every person's dignity and humanity and must not be the basis for discrimination or abuse."*

[97] The Yogyakarta Principles defines "sexual orientation" and gender identity as follows:

> *"[1] Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and*

[14] Principle 5.

sexual relations with, individuals of a different gender or the same gender or more than one gender.

[2] Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."

[98] The following principles are of particular relevance:

- **Principle 6** includes "*the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relation with others.*"

That includes the obligation on the state to "*repeal any law that prohibits or criminalises the expression of gender identity, including through dress, speech or mannerisms, or that denies to individuals the opportunity to change their bodies as a means of expressing their gender identity*".

- **Principle 9** deals with the right to treatment with humanity while in detention. This principle gives everyone the right to be treated with dignity while in detention. It also affirms that gender identity is part of a person's dignity. It *inter alia* obliges states to:

"*a) Ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse;*

...

c) Ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity;

d) Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression

and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population;

...

g) Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity."

[99] **Principle 19** deals with the right to freedom of opinion and expression. This principle in its introduction reads as follows:

"*Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers."*

[100] **Principle 32** deals with bodily integrity. This Principle affirms that everyone has the right to bodily and mental integrity, autonomy and self-determination irrespective of sexual orientation, gender identity, gender expressions or sex characteristics.

F. DISCUSSION

[101] The respondents submitted that they refused to allow the applicant to express her gender identity for her own safety and therefore the discrimination was fair. Her detention was not in breach of the applicable substantive and procedural safeguards that apply under the Correctional Services Act.

[102] It is the case for the respondents, that the applicant's challenge does not pass the Equality Act test for the following reasons:

- There is no discrimination on a listed ground. The applicant is legally male and is treated as such;
- The applicant has not asserted discrimination on an unlisted ground nor is there any such discrimination;
- The applicant has not identified an appropriate comparator; it therefore follows that there is no discrimination;
- Should this court find discrimination on a listed ground, the respondents have met the requisite onus; and
- The applicant has not met the threshold of unfairness.

[103] It is further submitted by the respondents that the applicant's submission that the definition of gender as a listed ground *"includes transgender identity"* is incorrect as a matter of law for the following reasons:

- The constitution does not prohibit unfair discrimination on the ground of transgender identity, but rather on the grounds of gender and sex;
- The Births and Deaths Act provides for a binary model to sex identity of male or female. Transgender is not provided for;
- The sex identity legislative scheme provides for sex alteration;

- **Kos and others**[15] did not find that gender includes transgender identity;
- The Equality Act expressly defines "sex" to include "intersex" and excludes transgender persons; and
- The rights of transgender persons are recognised through the Sex Alteration Act. The applicant does not allege that the law precludes her from gender reassignment under the Sex Alteration Act.

a. Is "transgender" a listed ground under "gender" in the Equality Act, the Constitution and International Instruments?

[104] Herein below I will separate the incidents complained about by the applicant into two distinct actions. Firstly, the respondents disciplinary measure resulting in the applicant being detained in segregation and secondly, the first and fourth respondents' failure to allow the applicant to express her gender identity.

[105] Neither "sex", nor "gender" is defined in the Equality Act. It is safe to assume that there must be some distinction between the two, as each is listed as a separate ground.

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[15] *Supra.*

[106] C Albertyn & B Goldblatt make the following comments regarding sex and gender in ***Constitutional Law of South Africa*** **(Juta Online)** at OS 03 - 07, ch 35 - p55:

> "*Many national constitutions refer only to sex as a ground of discrimination. The Final Constitution's expansive list of grounds provides for sex and gender discrimination as well as pregnancy discrimination, a category often subsumed under sex. The Constitutional Court tends to use sex and gender interchangeably in the relatively large number of cases it has considered on these grounds. Sex is generally taken to mean the biological differences between men and women, while gender is the terms used to describe the socially and culturally constructed differences between men and women.*"

[107] This interpretation was used in **Kos and Others**[16] the Court stated that:

> "*Many might think that that is to state the obvious, but the literature on transgenderism describes that there is an all too common tendency to conflate sex, gender and sexuality, which is misconceived.*"

[108] The Oxford English Dictionary (OED) defines "sex" as: *"[e]ither of the two main categories (male and female) into which humans and many other living things are divided on the basis of their reproductive functions*",

and defines "gender" as:

> *"[e]ither of the two sexes (male and female), especially when considered with reference to social and cultural differences rather than biological ones. The term is also used more broadly to denote a range of identities that do not correspond to established ideas of male and female*".

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[16] *Supra*, at footnote 22 in para 20.

[109] In terms of usage the OED states:

> *"Although the words gender and sex are often used interchangeably, they have slightly different connotations; sex tends to refer to biological differences, while gender more often refers to cultural and social differences and sometimes encompasses a broader range of identities than the binary of male and female".*

[110] What needs to be determined in this matter, is whether the respondents in this case complied with the basic standard laid down in section 12 of the Constitution. In addition, whether her incarceration as a man denies her, her basic sense of humanness and identity. Accordingly, whether she is being subjected to cruel, inhumane or degrading treatment.

[111] *In casu,* the applicant is being caused severe mental suffering. Her treatment has resulted in feelings of fear, anguish and inferiority leading to humiliation. I am of the view that this renders her punishment and treatment foul of s 12(1)(e).

[112] Moreover, I agree with the arguments on behalf of the applicant, that it is entirely normal for her, as a transgender female, to want to transition socially, i.e. to present herself as a woman. Until such time as she can undergo medical treatment, presenting and expressing herself as a woman is the only way in which she can express her gender identity.

[113] Wearing certain clothes, applying make-up, fashioning one's hair in particular ways – as the applicant seeks to do – are all sorts of expressions. To deny someone the opportunity or ability to express themselves as such, in my view, limits their right under s 16(1). The respondents' conduct, therefore, limited her right to freedom of expression.

[114] The infringement of the right to freedom of expression is particularly severe when it is connected to another constitutional right such as the right to freedom of culture or religion. In this case, it is linked to the rights to dignity and equality. The applicant's choice of clothing is not merely an expression of taste or fashion, but the expression of her basic gender identity.

[115] I am in agreement with the submissions on behalf of the Amicus that the Equality Act must be interpreted to promote the spirit, purport and object of the Bill of Rights in line with s 39(2) of the Constitution. The state also has an obligation to fulfil, protect and respect the rights in the Bill of Rights in terms of s 7(2) of the Constitution. The Equality Act in s 14(3)(b), in addition, requires a consideration of the nature and extent of the discrimination when determining its fairness. I am of the view that this assessment cannot be done without considering the various other rights affected.

[116] I am accordingly of the view that, while the right to equality is the *primary focus* of the Equality Act, the impact of the applicant's other

constitutional rights is central. This approach was favoured in the matter of **MEC for Education: KwaZulu-Natal and Others v Pillay**[17]:

> *"It is unnecessary in this case to decide whether it is possible to rely directly on the right to freedom of expression under the Equality Act, or whether the ban on the nose-stud is an unjustifiable limit on that right. It suffices to say that the extent to which discrimination impacts on other rights will be a relevant consideration in the determination of whether the discrimination is fair and that the ban on the nose-stud limited Sunali's right to express her religion and culture which is central to the right to freedom of expression."*

[117] The right to dignity implies protection from conditions or treatment which offends a person's sense of worth in society.[18] Dignity entails recognising everyone's incalculable worth. It generates an entitlement to be treated with respect and concern. These ideas are at the centre of the rights culture which we as a country are aiming at. If the state undermines a person's self-worth through condemnation of conduct that forms part of a person's experience of being human, the state violates that person's right to dignity.[19]

[118] **Section 16 (1)** of the Constitution gives everyone the right to freedom of expression. The section deliberately uses the concept of "expression" and not "speech", because the right is far broader than just freedom of speech.

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[17] 2008(1) SA 474 (CC) at para 94.
[18] **City Council of Pretoria v Walker** 1998 (2) SA 363 (CC) at para 113.
[19] **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others** 1999 (1) SA 6 (CC) at para 28; **Minister of Home Affairs and Another v Fourie and Another** 2006 (1) SA 524 (CC) at para 71.

[119] Respect for human dignity thus requires the recognition of and respect for the unique identity and expression of each individual. The Indian Supreme Court has expressly held that the right to dignity includes the right to respect of one's gender identity. The South African Constitutional Court explained in **State v Makwanyane and Another**[20], that the right extends to everybody, including those being punished for their crimes.

[120] It also extends to the manner in which a person dresses. In **Pillay,** the Constitutional Court held that the wearing of a nose stud as a form of cultural and religious express was also "*central to right of freedom of expression*".[21] In **Antonie v Governing Body, Settlers High School and others**[22], the High Court held that a person's hairstyle and headgear constituted a form of protected constitutional expression.

[121] I find it necessary at this stage to refer to the Indian courts, in particular, matters dealing with the rights of transgender persons and pronounced clearly on their rights.

> *"Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's*

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[20] *Supra.*
[21] **MEC for Education: KwaZulu-Natal and Others v Pillay** 2008 (2) BCLR 99 (CC) at para 94.
[22] 2002 (4) SA 738 (C).

unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change."[23]

...

"*Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution.*"[24]

Finding in respect of "transgender" as a listed ground

[122] In the circumstances, I find that, even though "transgender" is not a listed ground under the Constitution, nor the Equality Act, it is the right to equality that is at the centre of this matter, and in particular how it relates to the right to dignity and the right to freedom of expression. In my view, the right of dignity includes the applicant's right to her gender identity.

b. Enforceability of International treaties

[123] This Court is obliged to consider international law when deciding this matter.

123.1 Section 39(1)(b) of the Constitution requires that *"[w]hen interpreting the Bill of Rights, a court ... must consider international law*". Though this case concerns the interpretation of PEPUDA, PEPUDA gives effect to s 9 of the Bill of Rights. To interpret PEPUDA is thus to interpret the Bill of Rights, and, therefore, international law must be considered.

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[23] **National Legal Services Authority v India WP (Civil)** No 604 of 2013 at para 1.
[24] **NLSA v India** at para 68.

123.2 Moreover, s 233 of the Constitution mandates that courts prefer interpretations of legislation – including PEPUDA- that are consistent with international law over those that are inconsistent.

[124] As stated by the Constitutional Court, there is "... *no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law*".[25]

[125] The Constitutional Court endorsed these comments in the context of the final Constitution in **Glenister**[26], where Moseneke DCJ and Cameron J referred to the judgment in Makwanyane[27] in support of their view that our courts are entitled to consider both binding and non-binding instruments of international law.

Finding in respect of the enforceability of International law

[126] Of course, the weight accorded to international law may vary, with more weight being given to international law that is binding on South Africa.[28] But even non-binding sources, including reports by international bodies, are important sources of international law, and therefore important aids in interpreting the Constitution.

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[25] **Glenister v President of the Republic of South Africa and Others** 2011 (3) SA 347 (CC) at para 202 ("**Glenister**").
[26] *Supra*.
[27] *Supra*, paras 34- 35.
[28] **Government of the Republic of South Africa and Others v Grootboom and Others** 2001 (1) SA 46

c. Effective relief

[127] From the above, it is evident that there is a constitutional imperative on the state to *"... respect, protect, promote and fulfil the rights in the Bill of Rights"* in line with s 7(2) of the Constitution. How this is to be achieved requires a thorough balancing consideration/act by the respondents.

Finding in respect of effective relief

[128] Reasonable accommodation is a factor this court must consider when determining the fairness of the discrimination in question. There are a variety of reasonable steps open to government to accommodate the applicant. These steps should balance the competing interests raised by this dispute. They should allow for gender expression, but also not undermine the safety of the applicant or detention facilities. In my view, the relief granted in *casu* should be nuanced and make provision for a balanced enforcement of the constitutional rights of the applicant and the constitutional obligations of the respondents.

d. International examples

[129] In complying with the obligation to consider international law, it is imperative to consider the different ways in which other countries have dealt with similar issues. Various jurisdictions dealt with this issue differently e.g.:

- adopting a policy which allows trans diverse and gender diverse inmates access to clothing and commissary items designated for female inmates only;
- deferring to a gender identity panel of doctors and therapists to make the decision, not just correctional officers;[29] and
- giving transgender inmates the right to access clothing and make-up appropriate for their self-identified gender; etc.

[130] Other, more liberal international examples also exist e.g. separate detention facilities exclusively for transgender inmates, thereby recognising the existence of a third gender, which includes transgender persons. Separating LGBT prisoners from other inmates within the same facility is also an option[30]

Finding in respect of international examples

[131] Considering these examples, it is evident how the rights of transgender people are respected by different countries and how these options aim at granting the most dignified and constitutionally compliant solutions. I am of the view that the respondents in *casu*, should endeavour to reach the same ultimate goal.

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[29] JE Mintz *'Treatment of Transgender Inmates – the Double Punishment' (2013);* McCauley, K Eckstrand, B Desta, B Bouvier, B Brockmann L Brinkley-Rubinstein 'Exploring Healthcare Experiences for Incarcerated Individuals Who Identify as Transgender in a Southern Jail' (2018) 3(1) *Transgender Health* 34 -41.

[30] https://www.efe.com/efe/english/life/thai-transgendered-inmates-pilot-seperate-jail-cells-to-stop-abuse/50000263-3216345; https://www.nbcnews.com/feature/nbc-out/thailand-seperates-lgbtq-inmsates-considers-segregated-prison-n713741.

[132] I am aware of the resource implications in following some of these options. It is common cause that our prisons are overcrowded and that accommodation in these centres are limited, resulting in insufficient space to ensure the safety of prisoners as well as overworked correctional officers. I am of the view that it would not be effective to order major physical changes to our current correctional centres in order to make provision for separate transgender accommodation. I would, accordingly, not order such major changes at this stage.

[133] However, this does not prevent the respondents from making some changes to ensure that all inmates, including the applicant, and all other transgender inmates are treated with the necessary dignity and respect which is their constitutional right.

e. Did the respondents unfairly discriminate against the applicant?

[134] The respondents submitted that they rebutted the applicant's claim that discrimination took place on a listed ground. In respect of the detention in segregation, based on the following evidence, the respondents have demonstrated that the alleged discrimination did not take place in that the applicant:

134.1 was belligerent, defiant, aggressive and used violent expressions and abusive language.

134.2 was informally disciplined by revoking certain privileges in terms of s 24(3)(c) of the CSA.

134.3 was moved to a single cell which is where inmates are accommodated when their privileges are forfeited.

134.4 was placed in a single cell not as a means of discipline but of protection.

[135] On their version, the complaints relating to make-up, underwear, etc., was not based on a prohibited ground because, while the applicant may identify as a transgendered person, she has not undergone gender reassignment and therefore remains male as a matter of law.

[136] On behalf of the applicant it was submitted that the fourth respondent did not justify his discrimination against her in any way.

[137] Moreover, that the first respondent has not addressed the issue of fairness under sections 14(2) and (3) of the Equality Act. Instead, he has argued that, to the extent that his refusal to allow the applicant to express her gender identity constituted discrimination, it was "reasonable and justifiable" in the circumstances. If he had allowed the applicant to express her gender identity, she would have been at risk of being sexually assaulted.

[138] The alleged security of the applicant (and other inmates), if she were allowed to express her gender identity, bring the following factors under section 14(3) of the Equality Act to the fore:

- Section 14(3)(f) – whether the discrimination has a legitimate purpose
- Section 14(3)(g) – whether and to what extent the discrimination achieves its purpose.
- Section 14(3)(h) – whether there are less restrictive and less disadvantageous means to achieve the purpose.

[139] It is the applicant's submission that the first respondent has failed to establish that the discrimination against the applicant was fair, in that the first respondent has failed to provide any evidence to demonstrate that the applicant would be a target for sexual assault if she were permitted to express her gender identity.

[140] Considering the submission on both sides it needs emphasising that the respondents are inevitably meant to provide a safe environment for all inmates irrespective of their gender or sexual orientation.

[141] To protect the applicant from sexual assault while detained in a communal cell, the responds have a less restrictive measure available,

namely for her to be detained in a single cell. On the first respondent's own version, this particular measure is available.

[142] The context in which the discrimination has occurred is that the applicant is incarcerated under the authority and the control of the respondents. In addition, she will remain incarcerated for at least the next four-and-a-half years.

[143] It is common cause that there was a verbal altercation between the applicant and the first respondent. It is further common cause that she is subject to the disciplinary rules of the correctional centre. In my view, the first respondent was entitled to discipline the applicant in terms of s 24(3) of the CSA, and her detention in a single cell for violation of this section by disrespecting the first respondent was therefore not unfair as it was punishment that would be meted out to any other inmate who behaved in a similar manner. Moreover, am I in agreement with the first respondent that allowing her to express her gender identity under unsafe circumstances, would have put her at risk of being sexually assaulted.

[144] Our courts have recognised the extreme vulnerability of prisoners. The Supreme Court of Appeal has held in this regard that *"[p]risoners are amongst*

the most vulnerable in our society to the failure of the state to meet its constitutional and statutory obligations."[31]

[145] In the **National Coalition** case, the Constitutional Court held as follows in relation to discrimination against homosexual men and lesbian women:

> "*The impact of discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves. They are accordingly almost exclusively reliant on the Bill of Rights for their protection.*"[32]

[146] In coming to this finding, the Constitutional Court cited with approval the following excerpt from an article by Cameron J[33]:

> *"Traditionally disadvantaged groups such as women and blacks both constitute a majority of the South African population. Gays and lesbians, by contrast, are by definition a minority. Paradoxically, their perpetuation as a social category is dependent on the survival of the procreative heterosexual majority. Their seclusion from political power is in a sense thus ordained, and they will never on their own be able to use political power to secure legislation in their favour.*"[34]

[147] I am in agreement with the sentiments expressed in the **National Coalition**[35] case and those expressed by Cameron J in the above article. The incident complained about by the applicant in *casu* however, does not relate to the applicant's transgender nature, but rather to a sign of disrespect

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[31] **Lee v Minister of Correctional Services** 2013 (2) SA 144 (CC)
[32] **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others** 1999 (1) SA 6
[33] E Cameron, "*Sexual Orientation and the Constitution: A test Case for Human Rights*" (1993) 110 SALJ 450-472
[34] Above at p458.
[35] *Supra.*

towards the first respondent. In my view therefore, the detention in segregation was not a form of discrimination.

[148] In respect of the wearing of make-up and related issues, the first respondent states the following in his answering affidavit:

> "*Applicant was identified as a male on the warrant, which was confirmed by identity document. ... As a male inmate, on admission applicant received and continues to receive toiletries and clothing according to his gender. Applicant is allowed to wear his hair in any style consistent with the health hygiene, security and safety measures within the Helderstroom male correctional facility.*"

[149] Unlike my finding above in respect of the detention in segregation, my finding in respect of the applicant expressing her gender identity differs. I am of the view that the first respondent's neutral application of the rules applicable to all its inmates at Helderstroom, (and correctional services facilities generally), including the applicant, is discriminatory as it does not make provision for transgender inmates. In the result, the neutral application of the rules to the applicant causes discrimination against her on the basis of her gender identity.

[150] Moreover, should there indeed be a threat, the respondents have alternative less restrictive measures available to ensure her safety instead of refusing her to allow her to express her gender identity. In line with its

obligation, the first respondent should ensure that she is not exposed to any known threat of violence while legitimately disciplining her for an infringement.

[151] Under section 14(3)(i) and (ii) of the Equality Act, the principle of "*reasonable accommodation*" requires the respondents to take reasonable steps to accommodate diversity.[36] Thus, the respondents are under an obligation to do so.[37]

[152] The extent to which such steps have been taken or not, is therefore an important factor in determining whether the discrimination is fair or not. This is particularly so where, as in this case, the discrimination arises from a rule or practice that is neutral on its face, but which has a marginalising effect on certain portions of society, or certain portions of the prison community.

[153] In **Pillay**, the Constitutional Court applied the principle of reasonable accommodation to the facts before it as follows:

> "*The discrimination has had a serious impact on Sunali and, although the evidence shows that uniforms serve an important purpose, it does not show that the purpose is significantly furthered by refusing Sunali her exemption. Allowing the stud would not have imposed an undue burden on the school. A reasonable accommodation would have been achieved by allowing Sunali to wear the nose ring. I would therefore confirm the High Court's finding of unfair discrimination.*"[38]

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[36] **Pillay** above at para 72.
[37] **Pillay** above at paras 75-78.
[38] Pillay above at para 87.

Finding in respect of the unfair discrimination

[154] On the basis of what is set out above, it is evident that not permitting the applicant to express her gender identity has caused her extreme hardship and prejudice, and that it is fundamentally important to her to do so.

[155] The respondents have not demonstrated any prejudice or hardship (to them or to her inmates) that would arise if they permitted the applicant to do so.

[156] Thus, the respondents' failure to apply the principle of reasonable accommodation to the applicant and to allow her to express her gender identity renders the discrimination in this regard against her manifestly unfair.

G. CONCLUSION

[157] It is common cause that all people in our country, including the applicant, is entitled to their constitutionally enshrined human rights. Yet the applicant is not being afforded that recognition, protection and respect. She is prevented from expressing her identity. Conduct which is part of her experience of being human is being condemned. She is being denied the personal freedom to develop and express her true nature, therefore her dignity is being impacted on severely by the conduct of the respondents.

[158] That she is incarcerated and being punished for crimes, does not vitiate the applicant's right to dignity in any way. The Constitution guarantees that all detained persons must be detained consistently with human dignity. To imprison her contrary to her right to dignity violates s 10 and s 35(2)(e) of the Constitution.

[159] This case is not about whether the binary model used in South Africa should be expanded to include a third gender, i.e. transgender. This binary model is therefore unchallenged and still in force. This case is also not about whether the applicant should be allowed to undergo medical treatment in order to transition. The applicant remains a transgender woman who has not transitioned medically and is therefore, still legally classified as a man. This is and will remain the position until she completed the process of gender reassignment.

[160] This does, however, not give the state permission to neglect seeking effective relief in complying with its constitutional obligations.

[161] The respondents do not appear to be willing to take any reasonable steps to give effect to the applicant's constitutional rights. There are a number of simple measures available to the respondents to achieve the desired outcome without placing extra burdens on their resources or exposing the applicant or other inmates to an increased safety risk. In this sense, the respondents have failed in their duty to accommodate the applicant reasonably.

[162] This attitude is contrary to that which is required from an organ of state within a constitutional democracy. Subsequent to the hearing of this matter, the South African Government, in the matter of **Castor Semenya v International Association of Athletics Federations (IAFF)**[39] displayed the correct attitude, in my view. The constitutional rights of the applicant in that matter was venerated in all respects. This same respect is needed when that obligation rests on the respondents in this matter. What is absent from the respondents' answer is any recognition of their constitutionally enshrined obligation to respect, protect, promote and fulfil the rights in the Bill of Rights, in particular where the applicable legislative framework points in the opposite direction.

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[39] CAS 2018/0/5794 and CAS 2018/0/5798.

[163] What is sought in this matter is a far cry from major physical changes to the correctional centres in the country nor a change to the binary model to sex identity currently used in South Africa, i.e. of male and female. This court is cognizant of the inherent safety risks in prisons and for that reason, the order that I make, will attempt to balance the rights of both parties.

[164] Now that it is clear what this case is not about, I find it necessary to emphasise what this case is actually about. This case is primarily about equality. Not only equality, but it is also about dignity, freedom of expression, dignified detention, and the prohibition of inhumane treatment or punishment. As a result, there are various constitutional rights and duties at stake in this matter, and in addition, numerous international legal obligations. All these rights and duties point towards granting some relief to the applicant.

H. ORDER

[164] **In the circumstances, I make the following order:**

1. **It is declared that the first respondent's failure and or refusal to allow the applicant to express her gender between March 2016 and June 2017 by-**

   1.1 Not allowing her to wear female underwear and make-up;

   1.2 Ordering her to cut her hair; and

   1.3 Refusing and/or failing to address her as a woman or through the use of the female pronoun, constituted unfair

discrimination under section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA") and is therefore unlawful and unconstitutional.

2. **The first respondent is ordered to remove from the applicant's correctional services' record/file, all charges or infractions that were entered against her prior to the date of this order, only relating to her expressing her gender identity.**

3. **Clause 2.3(a) and (b) of the Standing Order on Personal Hygiene is declared to be unlawful.**

4. **The illegality of clause 2.3(a) and (b) should be cured by striking out the word "underpants" and "panties" and, in its place, reading in the words "gender appropriate underwear".**

5. **Respondents are ordered to issue the applicant (and other transgender female prisoners) with female underwear and/or to allow her to wear such.**

6. **It is declared that the fourth respondent's failure and/or refusal to allow the applicant to express her gender by-**

   6.1 **Not allowing the applicant to wear female underwear, make-up and jewellery; and**

6.2 Not allowing the applicant to wear her hair long and in feminine styles; and

6.3 Refusing to address the applicant as a woman, and through the use of the female pronoun constitutes unfair discrimination under s 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA"), and is therefore unlawful and unconstitutional.

7. Until such time as the applicant has undergone gender reassignment treatment, the respondents are directed to take reasonable steps to give effect to the applicant's constitutional rights by considering one or a combination of the following options:

7.1 The applicant remains in a single cell in a male prison and is allowed to express her gender identity safely and securely in line with the amended (in terms of 4 above) Standing Orders on Personal Hygiene by:

7.1.1 Returning to the applicant her female underwear, make-up and jewellery, allowing her to use such in future and not confiscating such in future;

7.1.2 Allowing the applicant to wear her hair long and in feminine styles;

7.1.3 Addressing the applicant as a women and using the female pronoun; and

7.1.4 Directing all correctional service officials who are employed under their authority to do the same.

Alternatively:

7.2 The applicant is transferred to a single cell at a female prison and is allowed to express her gender identity safely and securely in line with the amended (in terms of 4 above) Standing Orders on Personal Hygiene by:

7.2.1 Returning to the applicant her female underwear, make-up and jewellery, allowing her to use such in future and not confiscating such in future;

7.2.2 Allowing the applicant to wear her hair long and in feminine styles;

7.2.3 Addressing the applicant as a woman and using the female pronoun; and

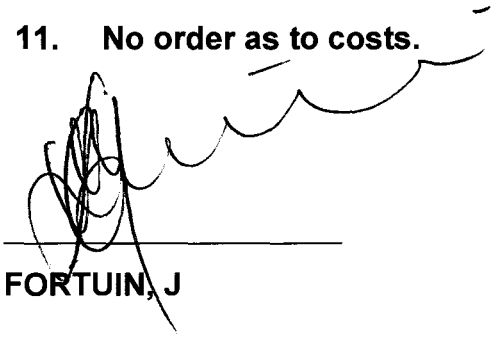
7.2.4 Directing all correctional service officials who are employed under their authority to do the same.

8. **The respondents are ordered to introduce transgender sensitivity training for all Department of Correctional Services' employees as part of the training of new employees, and a specific course for current employees.**

9. **The respondents are ordered to exercise the option in 7 above within 2 (two) months of this order.**

10. **The training in 8 above is to be introduced within 12 (twelve) months of this order.**

11. **No order as to costs.**



FORTUIN, J