

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG
SITTING AS AN EQUALITY COURT

Case Number: 2024/070075

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
DATE: 10/11/2025	

In the matter between:

NTHABISENG MOKOENA

COMPLAINANT

And

**HEAD OF JOHANNESBURG CORRECTIONAL
CENTRE: MEDIUM B**

First Respondent

**THE AREA COMMISSIONER FOR CORRECTIONAL
SERVICES
(JOHANNESBURG MANAGEMENT AREA)**

Second Respondent

**NATIONAL COMMISSIONER OF
CORRECTIONAL SERVICES**

Third Respondent

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Fourth Respondent

MEC: GAUTENG DEPARTMENT OF HEALTH

Fifth Respondent

MINISTER OF HEALTH

Sixth Respondent

JUDICIAL INSPECTORATE FOR
CORRECTIONAL SERVICES

Seventh Respondent

ACCESS CHAPTER 2 LAW CLINIC

Amicus Curiae

Summary:

Constitutional law - Human rights - Right of inmates to adequate medical treatment in section 35(2)(e) of Constitution of the Republic of South Africa Act 108 of 1996

adequate health care to which inmates entitled under section 35(2) includes gender affirming health care to transgender inmates for whom it has been prescribed.

Inmates diagnosed with Gender Dysphoria are entitled to access to a greater standard of health care for their condition than that to which transgender persons outside of a prison environment are entitled.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
failure to provide gender affirming health care to transgender inmate constitutes unfair discrimination and harassment.

Refusal to allow transgender inmate to wear feminising clothing, accessories, cosmetics and toiletries; the failure to use her chosen pronouns constitutes unfair discrimination and harassment.

JUDGMENT

FISHER J

Prologue

- 1] Ancient civilizations and early philosophical thought were influenced by notions of natural forces, myth, and polytheistic interventions which accommodated gender fluidity and a broader and more nuanced view of human sexuality.
- 2] The movement towards monotheism in the Common Era (or AD) ultimately led to doctrinal societal frameworks that prescribed binary heteronormative constructs of gender and sexuality as the norm. These frameworks have served to suppress non-conforming identities through moral and institutional mechanisms.
- 3] Contemporary scientific research has since challenged these assumptions. For example, studies in neurobiology and endocrinology reveal that gender identity is shaped by a complex interplay of genetic, hormonal, and environmental factors.
- 4] The extent to which a legal system accommodates gender diversity—through constitutional protections, statutory frameworks, and judicial interpretation—serves as a measure of its commitment to equality, dignity, and freedom. In jurisdictions where, non-conformity is met with punitive responses, including criminal sanction and social exclusion, the tension between biological diversity and socio-political orthodoxy becomes starkly evident.
- 5] Regardless of whether the condition of *Gender Dysphoria*¹ is approached on the basis that it is an affliction which requires treatment, as the first to fourth

¹ Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), is the primary reference manual used by mental health professionals to diagnose mental disorders. It contains the term **Gender Dysphoria** and sets specific symptoms and conditions that must be met for diagnosis. It defines **Gender Dysphoria** as: **a marked incongruence between one's experienced or expressed gender and assigned gender, lasting at least six months, and accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning.**

Another classification system, the International Classification of Diseases (ICD) was developed by the World Health Organization (WHO) and is used globally in public health systems, hospital discharge

respondents approach it in their opposition to this application, or on the basis that it is a manifestation of the expectation of conformity and lack of acceptance and respect for a naturally occurring human condition, the result is the same. The profound misery and distress that is experienced by transgender persons when their ability to exist in state of psychological and emotional integration is denied them, is accepted by all parties in these proceedings and the examination of rights proceeds in this context.

Introduction

- 6] The complainant and applicant for relief - I will refer to her as the applicant - Nthabiseng Beverly Mokoena, is a transgender woman who is currently an inmate of Johannesburg Central Prison (the Prison).
- 7] She approaches this court sitting as an Equality Court as constituted in terms in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA).
- 8] The applicant alleges that she is being subjected to harassment and discrimination as contemplated by PEPUDA at the hands of the State and particularly the first to fourth respondents – who are collectively the Department of Correctional Services (DCS).

data, and medical aid claims. In its latest version (ICD-11), the concept of gender dysphoria is replaced with **Gender Incongruence** and it is not classified as a mental disorder.

- 9] She seeks, essentially, that the DCS be ordered to comply with and enforce its own Standard Operating Procedures (SOPs) which apply to transgender inmates and that she receives medical treatment of her diagnosed condition of gender dysphoria at the expense of the State.
- 10] The medical relief sought is relatively modest. It is confined to gender affirming hormonal therapy which has been prescribed to the applicant by her attending clinicians.
- 11] The application is brought in the applicant's own interest and also in the public interest in terms of section 20(a) and (d).

Background

- 12] The applicant, was assigned male at birth. She began expressing her gender identity as female from the age of seven.
- 13] She chose to wear clothes traditionally associated with girls, used makeup, and identified internally as a girl, despite lacking the vocabulary to articulate this.
- 14] She grew up in Honeydew in close proximity to her grandmother and cousins who reacted negatively to her behaviour. She was often beaten and bullied.
- 15] The community in Honeydew ostracized her for not conforming to traditional gender norms.
- 16] The abuse and isolation extended into her school life, leading her to drop out at age 17 while still in Grade 6.

- 17] As a teenager, she began spending time in secluded areas and associating with desperate people who occupied the fringes of society. This led to her involvement in criminal activities.
- 18] In 2010 she was arrested and later convicted of murder, robbery, and possession of illegal firearms, for which she received a life sentence.
- 19] She was committed to Johannesburg Correctional Centre and initially housed in Medium A section of the prison. Here she was allowed to express her gender identity by keeping her hair long and wearing makeup and women's clothes and accessories.
- 20] She was later transferred to Medium C Section, where she alleges, she has faced harassment and discrimination. She is currently housed in C Single Section which is a segregated or solitary confinement unit within the broader Medium C section of the prison.
- 21] This section is available to accommodate inmates in single-cell accommodation, used for disciplinary custody, protective custody, or the housing of high-risk inmates.
- 22] Inmates who were police officers before their incarceration are among those regarded as high-risk inmates.
- 23] It is not disputed that there are former police inmates and other occupants of single cells in this section. The applicant is not housed in a single cell despite requests that she be so accommodated.
- 24] The applicant was diagnosed with gender dysphoria in March 2021 by Dr Frans Lotz.

- 25] Multiple expert assessments by Dr Gérard Labuschagne, Dr Indhrin Chetty and Dr Bruno Pauly have confirmed this diagnosis. She has, thus, been prescribed gender-affirming health care which includes that she receives hormone therapy. The DCS has refused to provide this treatment.
- 26] She has, out of desperation, begun self-medicating with oral contraceptives (*Triphasil*) to simulate oestrogen effects. This has resulted in some physical changes. She expresses a strong desire for surgical transition, including breast augmentation and genital surgery in due course.
- 27] She does not seek, in terms of this application, that she receive treatment other than hormone therapy. She accepts that transitioning is a process which requires multidisciplinary interventions at appropriate stages and she asserts that what is needed now is that she be allowed to be treated with gender affirming hormone therapy with a view to complete transitioning.
- 28] It stands to reason that such hormone therapy must, of necessity, include all ancillary treatments and protocols which are consistent with the proper and safe prescription and dispensing of such treatment. This treatment, with all these necessary inclusions is referred to in this judgment as “gender affirming therapy”.
- 29] Despite multiple requests and legal correspondence from her attorneys, Lawyers for Human Rights (LHR), the applicant has been denied access to gender-affirming therapy, with officials in the DCS initially claiming it is “cosmetic” and as such specifically excluded from her right to health care.

- 30] The Judicial Inspectorate for Correctional Services (JICS), which has as its primary function the oversight and monitoring of inmate treatment and detention conditions, received a complaint from the applicant on 12 April 2023.
- 31] On making inquiries of Head of the Centre (HOC) JICS was informed that overcrowding precluded the applicant being accommodated in a single cell and that the best that could be done for her was that she be accommodated in a single cell with two cisgender gay men. It seems she is now accommodated with only one cisgender male.
- 32] It was acknowledged by the HOC that she had been disallowed visits because she did not wish to wear the male attire and was not allowed to wear gender affirming clothing and other accoutrements outside of her section.
- 33] The DCS is the only opponent to the relief sought. It's opposing affidavit is made by the National Commissioner of Correctional Services and is confirmed by a Director of the Prison.
- 34] JICS has been joined as the seventh respondent in the proceedings and Access Chapter 2 Law clinic has been admitted as amicus curiae in terms of Rule 16A.

The relief claimed and the respective positions taken by the respondents thereto

The applicant's claim

- 35] The primary overarching submission by the applicant is that the anti-discriminatory and harassment provisions of PEPUDA are implicated in the manner in which she is being treated by the DCS.

36] The applicant seeks:

- a. orders declaring that the DCS' failure or refusal to allow her to express her gender by not allowing her to wear feminising clothing, cosmetics and toiletries at all times throughout the prison; the misgendering of her in the failure to relate to her as a woman or using the "she/her" pronoun and the bullying which she contends for constitutes unfair gender discrimination under section 8 of PEPUDA and harassment;
- b. that the relevant State respondents be ordered to assist her with changing her gender marker in terms of section 2 of the Alternation of Sex Description Act No. 49 of 2003 and to assist her with changing her forenames in terms of section 24 of the Births and Deaths Registration Act No. 51 of 1992.
- c. that the DCS accommodate her in a single cell, alternatively with transgender persons;
- d. That the State respondents be ordered to provide her with adequate health care in the form of gender-affirming hormonal therapy at State expense.

37] The claim for medical relief is sought under PEPUDA and in terms of sections 35 of the Constitution and 12 of the Correctional Services Act 111 of 1998 (the CSA) both of which oblige the State to provide "adequate" health care to her at its expense.

38] She argues that "adequate" health care includes the furnishing of the required gender affirming therapy and that the failure to provide her with this therapy is demeaning and creates a hostile and intimidating environment which is related her gender and specifically her identification as a transgender woman.

- 39] She alleges that, considering her having been diagnosed with gender dysphoria and the recognition by the State respondents that the condition causes her to be vulnerable and suffer profound psycho-social and emotional harm, the refusal to provide the therapy constitutes a form of harassment. Such harassment is, she argues related to her gender and entails a refusal to accept that the condition should not be distinguished from other medical suffering of inmates.
- 40] The applicant relies on *September v Subramoney NO and Others*² for the proposition that failing to allow transgender inmates to express their chosen gender identity and failing to treat them in accordance with such gender identity constitutes unfair discrimination, offends against their section 9 constitutional rights to equality and impacts on their right to be treated with dignity.

The DCS

- 41] The DCS does not join issue with the correctness of *September*. It argues, however, that it has taken steps to prevent the discrimination found in *September* to have taken place in the JHB Central Prison and generally and that, to this end, it has adopted special SOPs relating, inter alia, to the rights of transgender inmates. Under these SOPs, officials are required to respect, recognise, and affirm diverse gender identities and expressions, use appropriate and inclusive language when interacting with LGBTQIA+³ inmates; avoid derogatory and hurtful words; not make assumptions about an inmate's gender identity; and to ask for and use an inmate's preferred pronouns.

² *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (23 September 2019).

³ LGBTQIA+ is an inclusive acronym that represents a diverse range of sexual orientations, gender identities, and expressions. It stands for Lesbian; Gay; Bisexual; Transgender; Queer or Questioning; Intersex; Asexual

- 42] It agrees that, under the regulations to the CPA relating to accommodation of vulnerable inmates and the SOPs, inmates should be accommodated in cells appropriate to their gender identity, where feasible and safe.
- 43] It says that it has dealt with the applicant's complaints and, to this end, it has conducted an investigation and taken steps to remedy the infractions found. But it also says that it denies that the conduct complained of occurred.
- 44] In relation to the change to the gender marker it concedes that it must facilitate the application process to be undertaken by the Department of Home Affairs which is not a party. It makes the point that it readily supports and accommodates all processes required by inmates in relation to their requirements in relation to Home Affairs.
- 45] Its approach to the order sought to the effect that gender affirming health care be held to be part of the health care offering that the DCS is obliged to provide under the Constitution and the CSA is somewhat jumbled and confusing. It must be said that the manner in which the medical relief is framed⁴ may be responsible for some of the confusion. However, what is sought by the applicant is clear: that the DCS be ordered to provide hormone therapy as part and parcel of its obligation to provide adequate health care.
- 46] The case of the DCS in relation to the claim for health care is that there are three levels of health care provided by the State which are primary health care (which is a first point of contact with a patient); secondary health care (which provides more specialized care); and tertiary health care which entails the offering of highly specialized services).

⁴ It was sought that gender affirming health care be read into the definition of "primary health care" in the CSA when there is no such definition.

- 47] The Department of Health (DOH) in its explanatory affidavit sets out a broad overview of the structures that exist in the national health care system with reference to gender affirming health care.
- 48] The DOH explains that gender affirming therapy is available at tertiary-level public hospitals. The treatment is specialist in nature and there are waiting lists. It explains that these restraints are most pronounced at the stage of gender transitioning that entails surgical intervention. It states that in August 2019, gender affirming hormones were approved by South African National Essential Medicine List Committee (NEMLC) for tertiary-level care for the treatment of gender dysphoria.
- 49] The DCS argues it is only obliged to provide *primary* health care at State expense, that gender affirming health care in the form prayed for by the applicant is obtained at a secondary or tertiary level and thus, to the extent that this specialized treatment is required, it must be sourced at the expense of the applicant.
- 50] The DCS also argues that the principles of progressive realisation contemplated in section 27 of the Constitution are relevant limiting factors in relation to its obligations under section 35(2)(e) of the Constitution and section 12 of the CSA.
- 51] It argues further that the complexity of the process of diagnosis and treatment is such that it is not practicable for this form of treatment to be undertaken within the correctional centre, although it does not explain why this is the case.
- 52] In relation to accommodation in a single cell, whilst the DCS admits that the accommodation claimed is prescribed by its SOPs, it states that it is not possible to accommodate the complainant for two reasons: over-crowding and the fact that the complainant is the only transgender person in the centre. The suggestion

appears to be that the lack of space requires that a minimum of two inmates be accommodated per cell. But it concedes that inmates who were previously police officers and inmates who are students are accommodated alone in the same section where the applicant is being housed.

- 53] The DCS states that the complainant has “characterised her wish to be female as transphobia and gender dysphoria” and that these conditions are mental illnesses which “require treatment accordingly”.
- 54] It invokes the Mental Health Care Act 17 of 2002 in this regard and admits that, to the extent necessary, inmates suffering from mental illness are entitled to specialist psychiatric care.
- 55] This characterisation of the condition suggests a lack of understanding of what gender dysphoria entails and how it is treated. It, however, concedes to an understanding, at least, that the treatment involves important psychological considerations which must be sensitively approached.
- 56] It is important that the applicant has been diagnosed with the condition and does not herself “characterise” the condition. This is not seriously disputed.
- 57] The particular psychological vulnerability of the transgender inmate is acknowledged generally and specifically by the State respondents with reference to the complainant’s condition.
- 58] The DCS argues that a change of the *definition* in the CSA to include gender affirming health care would require a redesignation of the DCS health care centres and an amendment of the CSA. It must be stated up front that there is no merit in this contention, mainly because there is no such definition. More on this later.

- 59] A low point in the affidavit of the DCS is the following statement: “there are families affected by her conduct, she is not a victim, the victims are the families affected by her conduct, Nevertheless, although she may have lost some of her rights, our Constitution enjoins the DCS to maintain some of her rights”.
- 60] The DCS, despite its apparent lack of sensitivity, accepts that the gender affirming treatment which is recommended to treat the applicant is the standard form of treatment for persons suffering from gender dysphoria.
- 61] It also, now, accepts in these proceedings that the treatment is not “cosmetic” in nature having, initially, characterised it as such.
- 62] Essentially then, the DCS denies that it has unfairly discriminated against the applicant. In the alternative to this denial, it raises that the discrimination has a legitimate purpose and that there are no less restrictive means to achieve its purpose which is to preserve the safety and security of the complainant. In the words of PEPUA its defence is that the discrimination is “fair”.

The DOH

- 63] The sixth respondent, the Department of Health (DOH) does not oppose the application. It provides an overview of the health care structures that exist in South Africa generally and in relation to gender affirming health care.
- 64] It states that the health services are provided to the public through a tiered system that is structured to ensure access to services at different levels of need and complexity and that these levels of care are generally categorised as primary health care which is the first point of contact for individuals within the health care system generally at clinics; secondary health care which provides specialist

services and more advanced care at district and regional hospitals on a referral basis from primary structures and tertiary health care which is specialised care provided at central hospitals and academic or teaching hospitals and which is, generally accessed on referral from the secondary tier.

JICS

- 65] The seventh respondent, JICS has provided valuable background information both from a general and case specific perspective.

- 66] In terms of section 85(2) of the CSA, JICS' primary statutory mandate is to facilitate the inspection of correctional centres and remand detention facilities so that the Inspecting Judge - currently retired Constitutional Court justice Edwin Cameron - may report on the treatment of inmates, the conditions under which they are detained in these facilities, and any corrupt or dishonest practices there. It does this by, inter alia, discussing complaints with the Heads of Correctional Centres and monitoring how these complaints have been dealt with.

- 67] From the perspective of JICS, it is noted that despite the adoption of SOPs it has observed that the rights of LGBTQIA+ inmates are frequently violated in practice. It reports that JICS has received complaints from LGBTQIA+ inmates alleging discrimination and misgendering, assault, denial of access to gender-affirming health care, and cruel, inhuman, and degrading treatment.

- 68] JICS has identified systemic contributors to such violations which include lack of compliance by DCS with its own SOPs and lack of sensitivity and awareness among officials.

69] I note that an investigative report put up by the DCS in this application makes the recommendation that the LGBTQIA+ be brought to the attention of officials. This suggests that there may be a lack of sensitisation of officials on the subject.

70] JICs opines that, properly implemented, the SOPs have the potential to ensure dignified, equal treatment for LGBTQIA+ inmates. JICS has documented successful implementation at facilities such as Durban Medium B Correctional Centre, where a dedicated LGBTQIA+ unit has fostered a respectful and affirming environment.

Issues arising

71] From these respective positions the following issues arise for determination by this court:

- a. whether the applicant has made out her case for discrimination and harassment and, linked to this, whether the DCS has shown that the discrimination which has been established is fair, that it has a legitimate purpose and that there are no less restrictive means to achieve its purpose which is to preserve the safety and security of the applicant.
- b. whether hormone treatment for the condition of gender dysphoria constitutes “adequate” treatment under the Constitution and the CPA.

72] The process of evaluation under PEPUDA takes place in the context of the principles which relate to the operation of respective onuses of proof. I turn now briefly to explain the operation of these onuses.

The onus of proof under PEPUDA

- 73] Section 13 of PEPUDA requires only that the complainant makes out a prima facie case of discrimination on one or more of the prohibited grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status (the listed grounds) or on any other ground where the discrimination complained of causes or perpetuates systemic disadvantage, undermines human dignity or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a listed ground (a comparable ground).
- 74] Once an applicant has established, prima facie, that there has been discrimination on one or more of such grounds then the respondent must prove, that such discrimination did not, in fact, take place as alleged or that the conduct is not based on one or more of the listed grounds or a comparable ground.⁵
- 75] If, the discrimination on a listed or comparable ground is established to have taken place then it is unfair, unless the respondent proves it is fair.⁶
- 76] Thus, in sum, when it is established by an applicant that there has been discrimination on a listed or comparable ground then the respondent must prove that the discrimination is fair.
- 77] Section 11 of PEPUDA prohibits harassment which is defined to mean unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to sex, gender or

⁵ Section 13(1) of PEPUDA

⁶ Id Section 13(2)

sexual orientation, or a person's membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.

- 78] The applicant's complaint falls within the definition of harassment. The subjecting her to confinement with cisgender males, albeit that they are queer, when the DCS acknowledges that this is a source of deep distress which is caused by her identification as a woman and is disproportionate to mere inconvenience of sharing a confined space serves to humiliate her and profoundly impacts her right to privacy.
- 79] The refusal or neglecting to acknowledge the applicant's gender identification by misgendering her is experienced by her as hostile and the limitations placed on the areas of the prison where the applicant can dress and groom herself in feminine attire is experienced by her as hostile and calculated unreasonably to induce her submission to a condition which she finds intolerable.
- 80] She argues that the conduct she contends for constitutes unfair discrimination under section 8 of PEPUDA which deals with gender discrimination.
- 81] In *September*⁷ the respondent argued against the applicant's submission that the definition of gender as a listed ground "includes transgender identity". It argued that the Constitution does not prohibit unfair discrimination on the ground of transgender identity, but only on the grounds of gender and sex.
- 82] In her assessment of the kind of discrimination which the complaint entailed, Fortuin J was careful to emphasize that her judgment should not be read to

⁷ *September* supra n.2 at para 103

suggest that the binary model used in South Africa should be expanded to include a third gender.⁸

83] Much has been said in foreign jurisdictions on the application of this binary gender model. Fascinating as the subject is, an analysis of these principles is beyond the scope of this judgment.

84] The fact is that the relief sought by the applicant is not dependent on a finding that the applicant is being subjected to discrimination of the ground of gender; it suffices that she establish that the conduct is such that it relates to gender and causes and perpetuates disadvantage in the prison system; that it undermines her dignity; and adversely affects the equal enjoyment of her rights and freedoms in a serious manner that is comparable to gender discrimination.

85] Once she has done so, the DCS bears the onus to prove that the discrimination is fair.

Discussion

86] The diagnosis of gender dysphoria is admitted as is the fact that this condition is characterised by profound distress. It is, furthermore, not in dispute that this distress is worsened by the privations suffered by the systemic withholding from her or limiting her rights to gender affirming expression and accommodations, including treatment for the condition and accommodation in a single cell.

87] To my mind, the applicant has established the discrimination and harassment contended for.

⁸ Id para 159.

- 88] The DCS does not dispute that not allowing her to wear the clothing, cosmetics and toiletries that express her gender identity; the misgendering of her in the failure to relate to her as a woman or using the "she/her" pronoun would constitute discrimination and or harassment if it were not shown by it to be fair.
- 89] The approach of the DCS is contradictory. It both concedes that it has received complaints from the applicant which it has had to deal with through its disciplinary and other formal structures but seems to suggest that it has fulfilled its responsibilities to the applicant and, generally, simply by the adoption of the SOPs.
- 90] JICS' explanatory affidavit notes that, despite the adoption of the SOPs it has observed that the rights of LGBTQIA+ inmates are frequently violated in practice because the SOPs are not enforced. As I have said, the DCS's own investigations have suggested a lack of awareness in relation to the SOPs and the DCS' responses to JICS' queries themselves admit of failure to comply with the SOPs.
- 91] The DCS alleges that it is entitled to place restrictions on where the applicant is entitled to wear gender affirming attire and make-up for what it claims are "security reasons". However, it provides no details as to what the security concerns entail or how they can be alleviated.
- 92] It is difficult to conceive of any dangers which are not taken account of on the basis that the the applicant and other inmates are properly supervised whilst outside of their sections. The applicant, for her part, states that she perceives no threat to her safety outside of the confines of her section.
- 93] The DCS concedes that it is obliged to facilitate the formal interaction with the Department of Home Affairs relating to changing her recorded gender marker in terms of section 2 of the Alternation of Sex Description and Sex Status Act 49 of

2003 in due course, but it does not agree that this entails that it provides the health care sought at state expense. It agrees also that it is obliged to facilitate the applicant's approach to The Department of Home Affairs to assist her with changing her forenames in terms of section 24 of the Births and Deaths Registration Act 51 of 1992. It denies that it has been obstructive in facilitating this access and it explains that it facilitates such access to all inmates who require it.

- 94] To my mind, the undertaking by the DCS to facilitate such access to the Department of Home affairs suffices. The applicant is represented by attorneys and will have medical practitioners assisting her as well.
- 95] In relation to her accommodation in a single cell, alternatively with transgender inmates, it is conceded by the DCS that single cells are made available to accommodate students and inmates who were police officers.
- 96] There is no basis established by the DCS for the inability to provide single accommodation in respect of the applicant. There is also no reason why her needs should not be prioritized over those of others who are accommodated in single cells.

Conclusion on fairness

- 97] The limitations placed on the applicant by the DCS are, to my mind, unreasonable and obstructive. They evidence a cynical disregard for the rights of the applicant as they are framed under the DCS' own SOPs.
- 98] I accept the evidence of JICs that, despite the SOPs, it has observed that the rights of LGBTQIA+ inmates are frequently violated in practice. I accept also that

the DCS is able to create an environment which is conducive to fairness by simply observing and enforcing the SOPs.

- 99] The applicant has, to my mind, established that because of her transgender status, her treatment at the hands of the DCS and the resultant symptoms of gender dysphoria, she is subject to systemic disadvantage; her dignity is undermined and her enjoyment of her rights and freedoms are seriously compromised in a manner that is, at least, comparable to gender discrimination.
- 100] The DCS has, to my mind, not established that the treatment of the applicant is fair.
- 101] The refusal to provide gender affirming hormone treatment is discriminatory in relation to her condition which relates to her gender identity and, thus, is properly dealt with under PEPUDA.
- 102] The defence raised is that the gender affirming health care falls outside of the obligation to provide adequate health care under the Constitution and the CSA.
- 103] The fact that the DCS acknowledges that the therapy sought is standard to treat a condition which it does not dispute the applicant suffers from, and yet withholds such treatment suggests a disregard for the severity of the distress which the applicant is enduring.
- 104] The withholding of gender affirming health care amounts to unfair discrimination if it is refused when the State has the obligation to provide it.
- 105] The question whether the right to adequate medical treatment includes the right to gender affirming health care is also a subject on its own. I turn now to deal with this issue.

The right to adequate health care and gender affirming treatment

106] Section 35(2)(e) of the Constitution guarantees that “everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at State expense, of adequate medical treatment.” (Emphasis added)

107] The CSA puts into operation this constitutional imperative by imposing a duty on the DCS to provide adequate health care.

108] The DCS does not cogently raise any impediment to the furnishing of hormonal treatment based on limited resources or otherwise. It merely argues that the applicant is not entitled to such treatment based on its argument that it need do no more than provide primary health care services which gender affirming hormone therapy is not.

109] Brand J, as he was, in *van Biljon v Minister of Correctional Services*⁹, examined the right to adequate health care in the context of treatment of inmates in the HIV/AIDS epidemic.

110] The court found that all that it is necessary for the applicant to establish is that anything less than a particular form of medical treatment would not be adequate. Once this is established the applicant has the constitutional right to that form of treatment.¹⁰ I am in agreement with this finding and it applies with equal force in this case.

⁹ *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C).

¹⁰ *Id* para 60

111] In *van Biljon* there were questions of the State's ability to roll out a treatment programme of the kind envisaged from a costs and resources perspective. The court held that whilst, in principle, the right to adequate health care by inmates was absolute in that it was not limited concepts such a progressive realization as in the case of rights in section 27, the ability of the State to provide the health care was not entirely irrelevant.

112] I do not accept that a case has been made out by the State that the ability to provide the gender affirming care sought is affected by lack of resources or ability. The DCS simply argues that the treatment is not of a type or category which is routinely made available to inmates on the basis of its invocation of the three-tier health care system argument.

113] The argument on the primary healthcare limitation goes as follows: section 12(1) of the CSA prescribes an internal limitation of access only to primary health care services; the gender affirming health care prayed for does not fall into the category of primary health care; thus, the applicant is not entitled to gender affirming health care.

114] The DCS' resort to this primary health care limitation is fallacious on two fronts: First, it entails reliance on section 12(1) which is not currently in operation; Second, even if section 12(1) were in operation, properly construed, it does not impose a limitation of the right of inmates to only primary health care services on the facts of this case or generally.

115] Section 12(1) does not state that only primary health care services need be offered, it merely makes reference to "primary health care principles" which is not defined. Neither, for that matter is, "primary health care services".

116] I deal with each of these fallacies in the argument below.

Section 12(1) is not in operation.

117] Although the parties have dealt with section 12 of the CSA on the basis that the whole of it is operational, this is not the case.

118] The National Health Insurance Act 20 of 2023 (NHIA) which brings about amendments to the CSA, although it was assented to on 15 May 2024 and published in the Government Gazette on 16 May 2024, has not, as of yet, been proclaimed to be in force in relation to the amendments to section 12 of the CSA. The NHIA is to take effect by staged proclamation and the stage of implementation of the amendments to section 12 of the CSA has not been reached.

119] Section 12 of the CSA reads as follows but the stricken parts of the section are not yet proclaimed:

“12 Health care

~~(1) The Department must 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.”~~

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

(b) Medical treatment must be provided by a correctional medical practitioner, medical practitioners or by a specialist or health care institution or person or institution identified by such correctional medical practitioner ~~except where the medical treatment is provided by a medical practitioner in terms of subsection (3).~~

~~(3) Every inmate may be visited and examined by a medical practitioner of his or her choice and, subject to the permission of the Head of the Correctional Centre, may be treated by such practitioner, in which event the inmate is personally liable for the costs of any such consultation, examination, service or treatment.~~

(4) Every inmate should be encouraged to undergo medical treatment necessary for the maintenance or recovery of his or her health.

120] In sum, only the following currently operative principles emerge from section 12 of CSA:

- Every inmate has the right to adequate medical treatment but no inmate is entitled to cosmetic medical treatment at State expense.
- Medical treatment must be provided by a correctional medical practitioner, medical practitioner, medical practitioners or by a specialist or health care institution or person or institution identified by such correctional medical practitioner.
- Every inmate should be encouraged to undergo medical treatment necessary for the maintenance or recovery of his or her health.

121] Thus, the section specifically makes provision for specialist health care to be provided and requires that inmates be encouraged to undergo medical treatment necessary for the maintenance their health.

122] The applicant has, to my mind, established that the treatment prescribed to her and recommended by the clinicians attending to her condition is necessary to maintain her health.

Even if it were operational, section 12(1) does not serve to limit the obligation to provide gender affirming health care.

123] This is because a reference to the obligation to provide health care “in accordance with primary health care principles” cannot be read as limiting the right to adequate health care.

124] The applicant has asked that this court declare that hormone treatment falls within the definition of primary health care in the CSA. The DCS resists this declaration.

125] However, these respective positions add a non-existent hurdle to the overall dispute. There is no such definition in the CSA.

126] The National Health Act, 2003 Act 61 of 2003 (NHA) establishes a national health system aimed at achieving equitable and quality health services for all, including inmates. The DOH has set out, in broad overview, the nature and scope of services provided by the State.

127] Sections 2(a)(ii) and 21(2)(b)(vi) of the NHA explicitly require the State to ensure that such health services are extended to persons in detention.

128] Primary Health Care Services are defined in the NHA to mean such health services as may be prescribed by the Minister to be primary health care services.

129] Indeed, the NHA, far from restricting the type and scope of health services, provides for the creation of holistic system which is accessible to all. No case is made out for the Minister having made any prescription in relation to the limitation which is argued for by the DCS.

130] There certainly is no statutory provision which can be construed as limiting access to the health system in the case of inmates to the primary tier of that system. On the contrary, inmates are singled out in the Constitution and the CSA

as having absolute rights to the health care that is needed by them because of their inherent vulnerability.

131] All the, as yet, un-proclaimed section 12(1) provides for is that the DCS must 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”.

132] It seems that the DCS has seized on this provision for its argument that only primary health care has to be provided to inmates. This is a central fallacy in its case.

133] “health status” is defined in the regulations under the CSA to mean the “assessment of the health of a person in terms of the absence of disease or disability and also of personal health habits, family history, occupational and environmental conditions and influences or a combination thereof which affect long-term health”.

134] Regulations under the CSA define ‘primary health services’ to mean “universally accessible, first-level contact, clinic-based health services essential to enable the prisoner population to acquire, maintain and promote health”.

135] These definitions go no way to supporting the proposition that such services are all that inmates are entitled to.

136] On the contrary; “Health care service” is defined in CSA as: “All services providing any or all of preventive, promotive, curative or rehabilitative services.” (Emphasis added)

137] It is also not even established for that matter that the treatment sought by the applicant is not available at a primary health care level in the DOH once there has been a diagnosis of the condition and a prescription of a course of treatment.

138] At common law it has been held repeatedly that prisoners retain all basic rights not temporarily taken away or necessarily inconsistent with being prisoners.

139] As long ago as 1912, in Innes J in *Whittaker v Roos & Bateman; Morant v Roos & Bateman*¹¹ dealt as follows with a contention on behalf of the prison authorities that a prisoner may only claim such rights as the prison regulations confer:

“(T)he directly opposite view is surely the correct one. They were entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed.”¹²

140] This principle was restated by Corbett JA in *Goldberg and Others v Minister of Prisons and Others*¹³ where it was explained that, although there are infringements which incarceration necessarily makes on a prisoner's rights, “there is a substantial residuum of basic rights which he cannot be denied.”

141] This residuum principle was approved and adopted in *van Biljon*.¹⁴

¹¹ *Whittaker v Roos & Bateman; Morant v Roos & Bateman* 1912 AD 92

¹² Id at 122-123.

¹³ *Goldberg v The Minister of Prisons* 1979 (1) SA 14 (A).

¹⁴ *Van Biljon n. 8 supra* at para 41 to 49.

142] In my view, in a prison environment, gender dysphoria is likely to require more complex treatment protocols than those required by the general populace who suffer from the condition. The facilities of freedom of movement and expression which are, obviously, palliating factors are unavailable to an inmate.

143] To my mind, these privations are such that transgender inmates, such as the applicant are entitled to access to a greater standard of health care for their condition than that to which transgender persons outside of a prison environment are entitled.

144] It was held in *van Biljon*¹⁵ that the State owed a higher duty of care to HIV positive prisoners than to citizens outside prison suffering the same affliction. To my mind, a similar position maintains in this case.

145] The Constitution itself draws a distinction between prisoners and those outside prison on the basis that the rights of prisoners are, in principle, absolute, and not, as contended for by the DCS, subject to internal limitations¹⁶. Furthermore, no case is made out by the DCS as to the impossibility of the immediate realisation of this prescribed treatment for the applicant's diagnosed condition.

146] In *Minister of Correctional Services v Lee*¹⁷ the court held:

“A civilised and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation to see to the physical welfare of its prisoner.”

¹⁵ Id at para 52

¹⁶ Id at para 49

¹⁷ *Minister of Correctional Services v Lee* (2012 (3) SA 617 (SCA),

147] The fact that the DCS acknowledges that the therapy required is the standard to treat the condition and that it does not raise with any cogency that its available resources prevent it from making the treatment available, suggests an inherent disregard of the severity of the distress suffered which, to my mind, is based on a failure to accommodate the applicant's gender identity.

148] Thus, I find that adequate health care as envisaged under the Constitution and the CSA includes the providing of hormone replacement therapy and all the supportive and associated treatment that this therapy entails and that the DCS is obliged forthwith to take all steps to accommodate access to such treatment at the cost of the State.

149] It was argued behalf of the applicant that, if it is found that she is entitled to such health care, such entitlement would endure at every stage of restriction to which she was subjected arising from her conviction and sentencing, including periods of parole and other forms of incarceration. This was not disputed by the DCS.

Costs

150] The applicant seeks costs against the DCS. To my mind, given that the litigation is under PEPUDA and concerns public interest litigation which is foundational to State obligations generally, costs are unwarranted.

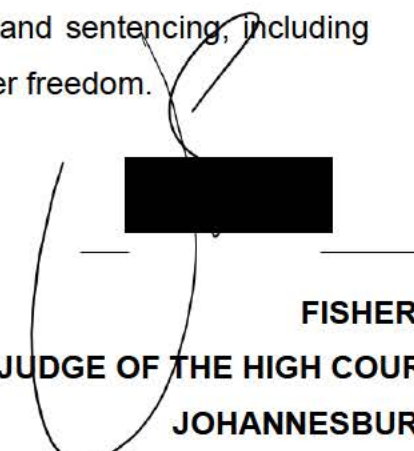
Order

151] I grant an order in the following terms:

1. The DCS is ordered to allow the applicant to wear the clothing, accessories, cosmetics and toiletries that express her gender identity at all times throughout the Johannesburg Correctional Centre and to ensure that the applicant will be addressed as a woman or using the "she/her" pronoun and to take all

reasonable steps to enforce the SOPs as they relate to transgender inmates, including by means of appropriate disciplinary interventions.

2. The DCS is ordered to accommodate the applicant in a single cell or in the same cell with inmates of the same gender identity.
3. The State is ordered to provide the applicant with gender affirming health care in the form of hormonal treatment and all other treatments and assessments which are essential to the prescription, administration and support of a transgender person undergoing such hormonal treatment.
4. Such health care is to be provided during all forms of restriction to which the applicant is subjected arising from her conviction and sentencing, including periods of parole and other forms of limitation on her freedom.



FISHER J
JUDGE OF THE HIGH COURT
JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 10 November 2025.

Heard: 12 September 2025

Delivered: 10 November 2025

APPEARANCES:

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