REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: **2026-011761**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

13 FEBRUARY 2026 [redacted]

In the matter between:

ORPHAN MOTSWERE Applicant

and

NATIONAL COMMISSIONER FRO CORRECTIONAL SERVICE First Respondent

THE MINISTER OF CORRECTIONAL SERVICE Second Respondent

HEAD PRISON: KGOSI MAMPURU II CORRECTIONAL SERVICE C-MAX Third Respondent

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 13* ***February 2026.***

JUDGMENT

KUBUSHI, J

[1] The applicant's complaint is that the decision of the first respondent (the National Commissioner) to transfer him to the maximum security unit of the Kgosi Mampuru II Correctional Centre (C-Max), alternatively, the continuous and prolonged detention thereat, is unlawful, arbitrary, and unconstitutional. He has, as a result, approached this Court, on an urgent basis, for an order declaring the said decision as such and that it be set aside. He further seeks to be immediately transferred to the Medium Section of the Kgosi Mampuru II Correctional Centre (A-Unit). Alternatively, that he be charged and subjected to a disciplinary hearing in relation to the allegation of being in possession of a cell phone, within 14 (fourteen) days of the order sought.

[2] The application is opposed by the respondents on the basis that the decision of the National Commissioner to transfer the applicant to C-Max, is lawful, in that: first, the applicant consented to the transfer; second, the National Commissioner's decision was an immediate corrective action; and last, the applicant pleaded guilty to the charge of possession of a cell phone and charger, at an informal disciplinary hearing, and upon conviction he was declassified from A-Unit (Medium unit) prisoner to C-Max. In addition, the respondents are attacking the application on an *in limine* point of urgency.

[3] The applicant was originally convicted for an offence of theft, possession of suspected stolen goods, fraud and forgery and was accordingly sentenced to an effective imprisonment of 29 years on 20 August 2012. Immediately before the occurrence of the issues that brought him before this Court, he was serving sentence at Baviaanspoort Correctional Centre (Baviaanspoort). He is currently incarcerated at C-Max, by the decision of the National Commissioner on the basis of the different reasons proffered by the parties.

[4] According to the applicant, he is detained at C-Max for the wrong reasons and under misleading circumstances. His story is that during June/July 2025, whilst detained at Baviaanspoort, he was a victim of identity fraud at the hands of his fellow

inmates who stole his identity document and used it to scam the public. He decided to expose these inmates and other illegal activities taking place at Baviaanspoort. The information pertaining to these crimes was leaked to e-TV and as a result a raid was carried out by the Department of Correctional Services, where cell phones and various contraband items were found and confiscated. In order to hide his identity as a whistleblower, he was interrogated together with the implicated inmates. An arrangement was made that he be transferred to C-Max where he will spend a maximum of a month and thereafter be transferred to another medium correctional centre to avoid being returned to Baviaanspoort. He was transferred to C-Max as *per* arrangement between him and the National Commissioner. Five months later he still had not been transferred from C-Max as *per* that arrangement, and when in November 2025 he enquired about the transfer, he was informed that he can only be transferred after 18 months as *per* the Standard Operating Procedures of C-Max because he was part of the inmates who were found in possession of cell phones.

[5] In accordance with the evidence tendered by the respondents, the applicant is one of the inmates who were found in possession of cell phones and other contraband items. This was as a result of a raid that was carried out at Baviaanspoort emanating from intelligence provided by a civilian whistleblower which indicated that a group of inmates had phones which they were actively using to scam members of the public. The raid, which was carried out on 4 July 2025, resulted in the confiscation of several phones and other contraband items. As part of the immediate corrective action, all inmates who were found to be involved in the scam were, as *per* the decision of the National Commissioner, transferred to C-Max. The applicant was one of those alleged to have been found with cell phones and transferred to C-Max.

[6] On 5 July 2025, the applicant was, in an informal disciplinary process, charged with the unlawful possession of a cell phone and a charger, and having pleaded guilty and convicted as such, he was reclassified as a high-risk offender and recommended for placement at C-Max. The applicant is denying that he was involved in these proceedings on the grounds that first, on 5 July 2025 he had already been transferred to C-Max, and that the signatures on the charge sheet purporting to be his, are not.

[7] At the commencement of the hearing counsel for the respondents, with the consent of counsel for the applicant, sought a postponement of the matter to the urgent

court roll of next week in order to get an opportunity to file the confirmatory affidavit of the National Commissioner. The postponement could not be granted on the basis of the practice of this court of not allowing matters on the urgent court roll to be postponed to the next court roll. What ought to happen was for the applicant to remove the matter from this week's roll and set it down in the next week's urgent court roll. However, the applicant's counsel was not amenable to taking that risk. He as a result requested the court to decide the matter on the point of law of the unlawfulness of the decision of the National Commissioner. This, then was how the matter was approached in court.

[8] Although counsel went at length to argue the alleged informal disciplinary process, it became evident during that argument that the disciplinary process was undertaken in support of the decision of the National Commissioner that was already taken. It also became common cause that the applicant was transferred to C-Max *per* the decision of the National Commissioner that was taken on 4 July 2025 whilst the disciplinary process was carried out on 5 July 2025. It was also not in dispute that the applicant was transferred to C Max on 4 July 2025 which is the same day that the National Commissioner made his decision. Both counsel were, thus, *ad idem* that the decision that should be assailed is that taken by the National Commissioner on 4 July 2025.

[9] Counsel for the applicant's contention, in this regard, was that nothing in the Correctional Services Act 111 of 1998 (the Act) empowered the National Commissioner to transfer the applicant to C-Max without following proper process. Counsel's argument was that the proper procedure of transferring the applicant to C-Max was in terms of section 24(4) read with section 24(5)(e) of the Act. This as counsel argued was after a penalty of segregation is imposed at a formal disciplinary hearing in terms of section 24(4) of the Act. The National Commissioner could only come into the picture where there was a review of the decision of the formal disciplinary process in terms of section 24(7) of the Act. As this process did not take place before the National Commissioner made the 4 July 2025 decision, the decision was therefore unlawful, so the argument went.

[10] In opposition, counsel for the respondents argued that the decision taken by the National Commissioner was lawful as he was empowered by the Act, even though counsel could not remember the empowering section at the time of argument. He

further argued that the decision, whether correctly or wrongly taken, would remain extant until set aside lawfully.

[11] I am persuaded by the argument raised by the applicant's counsel that the decision of the National Commissioner is unlawful and ought to be set aside. There is no evidence before this Court to support the respondents' contention that the National Commissioner ought to have taken that decision. It became common cause during argument that the decision to transfer the applicant to C-Max could only be done after formal disciplinary proceedings and if the penalty imposed was that of segregation as contemplated in section 24(5)(e) of the Act. In terms of the Act, the National Commissioner has no power to transfer an inmate to C-Max except under section 7(2) of the Act which is not applicable in this matter.

[12] Even if the applicant's version that he consented to be transferred to C-Max can be accepted, the transfer remains unlawful. There is nothing in the Act and/or Regulations promulgated in terms thereof empowering the National Commissioner to transfer an inmate, by consent, to C-Max. The decision of the National Commissioner having been found to be unlawful, renders the matter urgent. In the premises, the relief sought by the applicant ought to be granted.

[13] The following order is made

1. The draft order marked with "XX" is made an order of court.

[redacted]

E.M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Applicant:	Adv D Melaphi – (061 495 8006)
Instructed by:	M E Makgapa Attorneys
	Tel: 012 320 0124

For the Respondent:	Adv O Mulibana – (061 910 8395)
Instructed by:	State Attorneys
Date of the hearing:	13 February 2026
Date of judgment:	13 February 2026