THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case 2025-214685

(1) REPORTABLE: Yes☒/ No ☐
(2) OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒
(3) REVISED: Yes ☒ / No ☐

Date: 30 March 2026 [redacted]

In the matter between:

THABO BESTER	Applicant
and	
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Respondent
THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	Second Respondent
HEAD OF CENTRE: KGOSI MAMPURU II CORRECTIONAL CENTRE	Third Respondent

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JUDGMENT

DU PLESSIS J

Introduction

[1] The applicant, Mr Bester, launched this urgent application, seeking a declarator that his incarceration as a sentenced prisoner is unconstitutional, an order that his

status and classification as a sentence prisoner is unconstitutional, an order directing the respondents to re-classify him as a remand detainee pending the outcome of his current pending criminal trial in Bloemfontein, an immediate cessation of what he describes as solitary confinement, and a prospective order to the effect that, in the event of his acquittal on the escape and related charges, the respondents will be directed to restore him to the position he occupied as a free person prior to his return to South Africa on 13 April 2023. The application is opposed by the second and third respondents.

[2] None of the relief the applicant sought is competent for the following reasons.

[3] Mr Bester is currently detained at Ebongweni Correctional Centre. In 2011 and 2012, he was convicted of various serious offences, including murder and rape, in the Western Cape High Court and elsewhere. He was sentenced to life imprisonment, along with other substantial prison terms. There is no evidence in the papers that he has been released from those sentences by operation of a lawful mechanism under the Correctional Services Act ("the Act"),[1] the Criminal Procedure Act,[2] or the Constitution.

[4] The only facts that this court has on record regarding how Mr Bester came to be outside prison are set out in the respondent's answering affidavit, which I summarise insofar as necessary to explain the applicable legal principles. Mr Bester did not dispute their account in my material respect.

[5] Mr Qebengu, acting head of C-Max Correctional Centre (where Mr Bester was previously detained), explains Mr Bester's escape from G4S Mangaung in May 2022, during 2022, when Mr Bester was serving his sentence at the G4S Mangaung Correctional Centre in Bloemfontein ("Mangaung"). The details of the escape need not be repeated here and will form part of the criminal trial scheduled for later this year. What is important to note is that this section 39(3) of the Act dealt with below gets triggered at the moment of escape.

[1] 111 of 1998.

[2] 51 of 1977.

[6] In April 2023, Mr Bester and Ms Magudumana were detained in Arusha, Tanzania, by Tanzanian authorities for lacking lawful documentation. He was subsequently deported to South Africa. Mr Bester was transported directly from Lanseria Airport to Kgosi Mampuru II Correctional Centre, C-Max, by the Department of Correctional Services (DCS) to contin*ue* serving his sentences under the outstanding warrant of committal. He appeared in court within 24 hours, during which the National Prosecuting Authority stated that he was a sentenced inmate.

[7] Mr Bester states in his affidavit that he is currently detained at Kgosi Mampuru II, C-Max, as a sentenced offender (as indicated, he has since been moved). The respondents submit that he is there because he is serving his life sentence and other periods of imprisonment pursuant to warrants of committal arising from his 2011 - 2012 convictions. He is also an accused in a criminal case pending before the Free State Division of the High Court, Bloemfontein. The charges against him include escaping from lawful custody, violation of a human body, corruption, money laundering and arson. The matter is set down for commencement of the trial in July 2026. As of the date of this application, no evidence has been led in the criminal trial, and no finding has been made by the criminal court on any of the charges.

[8] He seeks the following specific relief:

a. A declaration that his current status and classification as a sentenced prisoner are unconstitutional, coupled with an order directing the respondents to re-classify him from a sentenced prisoner to a remand detainee pending the outcome of his criminal trial;
b. A declaration that he has been serving a prison sentence unconstitutionally since 13 April 2023, in contravention of section 35(3)(h) of the Constitution;
c. An order directing the respondents to re-classify him from a sentenced prisoner to a remand detainee pending the outcome of his criminal trial;
d. An order directing the respondents immediately to cease his solitary confinement or segregation and to reintegrate him into conditions consistent with humane standards alongside other remand detainees;

e. A prospective order that, in the event of his acquittal on the escape and related charges, the court will continue to presume that he was released legally, and the respondents will be directed to restore him to the position he occupied as a free person prior to 13 April 2023;
f. A reporting order requiring the respondents to file a written report confirming compliance; and
g. Costs against the respondents jointly and severally on a constitutional scale.

Legal framework: classification of incarcerated persons

[9] When it comes to his classification, it is important, at the outset, to distinguish between two issues. The first issue is whether the applicant is, in law, a sentenced offender. This is determined by the 2012 conviction and sentence and the warrants of committal issued by that court. This was not challenged, disputed, or denied, and requires no further analysis.

[10] The second issue is whether, given those existing warrants, the Department of Correctional Services is acting lawfully in classifying and treating the applicant as a sentenced offender. Only the second issue is relevant in this case. To answer the question, it is important to set out the definitions of "sentenced offender" and "remand detainee".

[11] The Act[3] draws a clear distinction between sentenced offenders and remand detainees. Section 1 of the Act defines a "sentenced offender" as a convicted person sentenced to incarceration or correctional supervision. A "remand detainee" is defined as a person detained in a remand detention facility awaiting the finalisation of his or her trial, whether by acquittal or sentence, <u>who has not commenced serving a sentence or is not already serving a prior sentence</u> [own emphasis].

[12] In *Zealand v Minister of Justice and Constitutional Development*[4] the Constitutional Court explained the reason for this distinction:

[3] Correctional Services Act 111 of 1998.

[4] 2008 (4) SA 458 (CC) para 30.

"The difference between the two prison sections is of great significance. It reflects the fundamental difference in status between, on the one hand, persons who are merely awaiting the completion of their trials, and on the other hand, persons who have been convicted of a crime and consequently sentenced to punishment by a court of law. Crucially, the former bear the right to be presumed innocent; the latter do not." (own emphasis)

[13] The court in *Zealand* further recognised an international obligation under article 10(2) of the International Covenant on Civil and Political Rights that accused persons shall, save for exceptional circumstances, be segregated from convicted persons. These principles do not require that a sentenced offender who faces new charges be reclassified as a remand detainee. As the respondents correctly note, Mr Bester is not a person who has not yet commenced serving a sentence; he is a person who was sentenced in 2012, commenced serving that sentence, and resumed serving it upon recapture. *Minister of Correctional Services v Kwakwa*[5] confirmed that serving prisoners who are convicted and sentenced on a previous occasion and who await the commencement of subsequent trials are not regarded as unsentenced prisoners.

[14] Section 39(3)[6] of the Act provides that the date of expiry of any sentence being served by a sentenced offender who escapes from lawful custody is postponed by a period during which the sentence was interrupted. The reason for this is self-evident: an escape does not terminate, extinguish or suspend a lawfully imposed sentence. The sentence endures. That means that upon recapture, the offender resume serving the sentence, with the expiry date adjusted to account for the period at large. Section 117[7] of the Act separately criminalises escape from lawful custody as a substantive offence.

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[5] 2002 (4) SA 455.

[6] S39 (3)The date of expiry of any sentence of incarceration being served by a sentenced offender who escapes from lawful custody or is extradited in terms of the Extradition Act, 1962 (Act No. 67 of 1962), and returns to the Republic or who absconds from the system of community corrections or who is unlawfully discharged is postponed by the period by which such sentence was interrupted. See also *Mthombeli v Minister of Justice* 2021 ZANWHC 68.

[7] 117. Escaping and absconding
Any person who—
(a) escapes from custody;
(b) conspires with any person to procure his or her own escape or that of another inmate or who assists or incites any inmate to escape from custody;

[15] Just on a plain reading of these provisions alone, Mr Bester's contentions regarding his classification cannot hold. He is still serving his original sentence while being charged with new crimes arising from his escape. That falls within the definition of "sentenced offender".

[16] Mr Bester does not dispute that he was convicted and sentenced in 2012, and that he was serving those sentences at Mangaung at the time of the events of May 2022. His further contention is more difficult to follow. He says that he is no longer a sentenced prisoner because he might, for instance, have received a presidential pardon. Since he is now accused of escaping, he says he has a right to be presumed innocent until proven guilty and that, until he has been so found, this court and the respondents must proceed on the basis that he was lawfully outside prison.

[17] That reasoning cannot hold. These are civil proceedings, determined on the pleadings before this court on a balance of probabilities. The applicant bears the onus of establishing that his absence from Mangaung was lawful. He does not allege that he was granted parole, that the sentence was suspended on any lawful basis, that he received a presidential pardon under section 84(2)(j) of the Constitution, or that any court has set aside his convictions or sentence. He says it is common cause that he was out of prison, and that the question of whether that was lawful or unlawful is still pending before the criminal court.

[18] The respondents, in contrast, have provided a detailed sworn account of the circumstances surrounding the applicant's departure from Mangaung and his subsequent return to South Africa. The applicant has not discharged the onus resting on him. Whether the State will ultimately prove, beyond a reasonable doubt, in the criminal proceedings, that the applicant's departure constituted an escape from lawful

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(c) is in possession of any document or article with intent to procure his or her own escape or that of another inmate;
(d) in any manner collaborates with a correctional or custody official or any other person, whether under the supervision of such correctional or custody official or person or not, to leave the correctional centre without lawful authority or under false pretences; or
(e) is subject to community corrections and where he or she absconds and thereby avoids being monitored,
is guilty of an offence and liable on conviction to a fine or to incarceration for a period not exceeding ten years or to incarceration without the option of a fine or both.

custody is a matter entirely for the Bloemfontein court. It is not necessary for this court to express any view on that question. What is clear is that the existing warrants of committal have never been set aside and remain enforceable.

[19] The lawfulness of his current detention as a sentenced offender therefore stems from his lawful and still valid warrants of committal from his 2012 convictions, not from the outcome of the pending escape prosecution. And as stated above, he offers no evidence that those warrants have been set aside. They remain in force. The Act, as set out above, expressly states that an offender who escapes and is recaptured *resumes* serving his sentence by operation of law. There is a complete and lawful basis for his current detention and classification as a sentenced offender.

[20] For these reasons, Mr Bester's classification and detention as a sentenced offender are lawful and constitutional.

Presumption of innocence

[21] Section 35(3)(h) of the Constitution provides

> "Every accused person has a right to a fair trial, which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings."

[22] This section is central to his argument as explained above. He contends that this section requires this court and the respondents to treat him, in effect, with a presumption that he never escaped from prison until the contrary has been established beyond a reasonable doubt in the criminal court. The classification as a sentenced offender is a usurpation of the criminal court's function and amounts to, in his view, a reversal of the burden of proof.

[23] It is necessary at the outset to be clear about what this submission entails. The applicant does not, in this application, seek to set aside his 2012 convictions or the warrants of committal issued pursuant to them. His complaint is rather that, because the escape charge is still pending, section 35(3)(h) precludes the respondents and this court from acting on his status as a sentenced offender for any purpose, including his

classification under the Act, as he might have been outside prison for lawful reasons. Put differently, he seeks to rely on the presumption of innocence on the escape charge so as to unsettle the legal consequences that flow from his prior sentences.

[24] Mr Bester's submission is a misconstruction of the function and breadth of the constitutional right to be presumed innocent. Section 35(3)(h) provides that every accused person has the right to a fair trial, including the right to be presumed innocent, to remain silent, and not to testify during criminal proceedings. The presumption of innocence is, as contained in the Constitution, an incident of the right to a fair trial. As the South African Law Reform Commission[8] expressed:

> "The constitutional right to be presumed innocent is specified in relation to the right to a fair trial. It therefore does not apply to proceedings outside the definition of a criminal trial."

[25] This is not merely a formalistic reading of the Constitution's wording. It also fits with the purpose and the structure of section 35(3)(h) in that the presumption of innocence in the provision directs the criminal court to the correct approach to guilt and burden of proof. It ensures that the State proves the criminal case to the appropriate standard before punishment may be imposed. It does not operate as a general rule that all courts, in all proceedings, must conduct a hearing as if no factual event occurred until the criminal court has adjudicated it.

[26] Moreover, the Constitutional Court in *S v Dzukuda and Others; S v Tshilo*[9] stated

> "An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused."

[8] In Discussion Paper 90 (Project 101) page 4. Also see Currie et al *The Bill of Rights Handbook* (6th ed,) p 755.
[9] 2000 (2) SACR 443 (CC) para 11.

[27] The Court further held that once an accused is convicted, the presumption of innocence under section 35(3)(h) no longer applies, even at the sentencing stage of the same proceedings. Its protective function is spent at the guilt-finding stage.

[28] Even more analogous to this situation, in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[10] in which the Constitutional Court emphasised that bail proceedings are not concerned with determining guilt, but with where the interests of justice lie pending trial. Even in bail proceedings (which form part of the same criminal process concerning the same accused), the court held that different considerations apply, and that a statutory provision placing an evidential burden on an accused at bail constitutes a permissible limitation of those rights, justified by the interests of justice. If section 35(3) rights yield even there, where the accused is not yet convicted, the presumption is alive, and the proceedings are part of the same criminal process, then, with even stronger reason, section 35(3)(h) cannot govern these entirely separate civil proceedings concerning the respondents' classification of the applicant as a sentenced offender.

[29] This argument is further without merit because there is a logical contradiction: Mr Bester asks this court and the respondents to treat him with the presumption that he never escaped from prison, but this would require this court and the respondents to make a positive finding, such as that, for present purposes, he was lawfully at large since May 2022. But that is not the function of the presumption of innocence. The presumption ensures that the burden of proving guilt rests on the prosecution in the criminal trial; it does not require another court, like this one, to make a finding of innocence, nor does it require the executive to do so when exercising lawful administrative functions, such as detaining a sentenced offender under a lawful, existing warrant of committal.

[30] The crux of this argument suggests that the description or classification of him as a sentenced offender amounts to a finding by the respondents that he is guilty of the escape charge. But this ignores that there are two legal questions: one, whether the applicant's continued detention as a sentenced offender is lawful (i.e. is there an

[10] 1999 (2) SACR 51 (CC).

original existing 2012 warrant of committal), and two, whether he is guilty of the escape charge. Just because he is classified as a sentenced offender (by operation of law) does not mean he has been found guilty of the escape from lawful custody, until so proven in a court of law during criminal proceedings.

[31] Thus, Mr Bester's rights under section 35(3)(h) in the Bloemfontein criminal trial are fully intact. The State will bear the onus to prove each element of the escape charge beyond a reasonable doubt. There, the applicant may elect to remain silent. The presumption of innocence will be applicable in those proceedings. None of that is affected by his classification as a sentenced offender in terms of the Act.

Conditions of detention

[32] Mr Bester alleges that he is held in solitary confinement, and that his conditions of detention adversely affect his physical and psychological health, and that his access to legal representatives for purposes of preparing his criminal defence is unduly limited by this. He relies on sections 35(2)(e) and (f), section 35(3)(h) and section 34 of the Constitution.

[33] "Solitary confinement" is defined in the act as being held in a single cell with loss of all amenities. The respondents deny that he is held in solitary confinement with loss of all amenities, and in any way in breach of his constitutional rights. The answering affidavit makes it clear that the applicant's placement in a single cell is consistent with the management of a high-security facility and is not punitive segregation, and lists the amenities that he enjoys, along with documentary proof of such (such as visits, phone calls etc).

[34] Just on the pleadings the applicant has not sufficiently pleaded any facts with any particularity the physical or psychological injuries he alleges to have sustained, their nature, their onset, etc. He has not placed before this court any medical evidence, or a psychological report or expert evidence to support this assertion. The same is true for his allegations regarding his legal representatives. The wide ranging relief that Mr Bester seeks, calls for stronger evidence, which is simply not there.

[35] In contrast, the respondents have given records of his contact with his legal representatives, as well as his visits to the psychologist and doctors, indicating that whatever physical and mental health issues there might be, are treated within the appropriate framework of incarceration.

[36] It is important to keep the rights of sentenced prisoners under section 35(2) of the Constitution in context. These rights are subject to section 36 of the Constitution (the limitation clause) and to lawful regulation under the Act. The respondents have placed him, as an offender of various serious crimes, in a C-Max facility, in a single cell. On the face of it, however, this is not constitutionally impermissible. The Act itself provides internal mechanisms for reviewing classification and segregation decisions, and Mr Bester has not exhausted those mechanisms before launching an urgent constitutional application.

[37] I am not satisfied that the applicant has made out a case for the broad relief he seeks in respect of the conditions of detention. His allegations are general, unsubstantiated and not supported by the evidence one would expect in support of an urgent constitutional application.

[38] This is not to imply that prolonged single-cell accommodation or segregation of sentenced prisoners can never raise constitutional concerns. The Correctional Services Act, read alongside the oversight mandate of the Judicial Inspectorate for Correctional Services, provides mechanisms for addressing any systemic or individual abuses that may occur in high-security facilities. Nothing in this judgment should be taken as endorsing indefinite or unjustified segregation regimes; it is limited to the record and relief presented before this court.

Acquittal relief

[39] Mr Bester lastly seeks an order that, in the event of his acquittal on the escape and related charges, this court shall continue to presume that he was released legally and honour that release, and direct the respondents to place him in the place he was in prior to his 13 April 2023 arrest, namely a free man.

[40] This relief is also incompetent.

[41] Firstly, it is premature. I cannot grant an order that is conditional upon a hypothetical future event such as this, and then bind the executive and another court to that particular outcome. I can only grant an order that is grounded in an existing, identifiable legal right that has been infringed.

[42] Secondly, this relief seeks to do away with Mr Bester's original sentence and his status under the Act, which is not possible, and not supported by section 39(3) of the Act. If Mr Bester is acquitted of escaping prison in the criminal court, that court might need to determine what, if anything, the impact of the acquittal is on his original sentence. To grant the relief he seeks here will usurp the functions of the criminal court and pre-empt the legislative scheme in the Act.

[43] Most importantly, even if Mr Bester were acquitted of the escape charge, it does not follow as a matter of course that he will be entitled to be placed "as a free man" in the position he was in prior to 13 April 2023. His 2012 sentences remain, for the reasons set out above. An acquittal on the escape charges does not extinguish those sentences.

Urgency

[44] I am not persuaded that the matter meets the requirements of Rule 6(12)(b) in the *ordinary* sense. The applicant has been aware of his classification since his return to South Africa in April 2023. He litigated on related constitutional grounds in August 2024. He does not provide a specific date on which he says he became aware of the alleged violation and offers no adequate explanation for the nearly three-year delay before approaching this court. Furthermore, he caused the removal of the matter from the roll in November 2025, and more than three months passed thereafter without any apparent harm visiting him.

[45] However, given the particular circumstances of this matter, urgency and merits are so closely intertwined that they cannot usefully be separated. The urgency case rests entirely on the premise that the applicant's classification and detention are

unconstitutional. If that premise holds, some urgency may be arguable. If it does not, there is no urgency at all, because there is no ongoing constitutional violation. I therefore deal with the merits, and for the reasons set out above, I have found that the premise does not hold. But to get to that conclusion, I had to enrol the matter.

Conclusion

[46] For the reasons given above, Mr Bester's application cannot succeed. That leaves me with the question of costs. The ordinary rule in constitutional litigation involving the State and a private litigant is that, if the litigant is unsuccessful, no costs order is made against him or her, in accordance with the principle in *Biowatch Trust v Registrar Genetic Resources*.[11] I am mindful of that principle. However, that principle is not absolute. It rests on the rationale that litigants should not be deterred from seeking to vindicate genuine constitutional rights by the threat of an adverse costs order.

[47] This application does not fall within that rationale. It is not a genuine constitutional challenge brought in the public interest to vindicate rights of broader significance. It is private litigation, framed in constitutional language, and brought by a prisoner convicted by a court of law on numerous charges, including murder, who is serving a lawfully imposed life sentence pursuant to a valid warrant, with the purpose of resisting the enforcement of that sentence. The *Biowatch* principle was not designed to insulate litigation of that character from the ordinary costs and consequences that attend unsuccessful proceedings. Costs should follow the result.

[11] 2009 (6) SA 232 (CC).

Order

[48] The following order is made:

1. The application is dismissed, with costs.

[redacted]

WJ du Plessis
Judge of the High Court, Gauteng Division,
Johannesburg

Date of hearing:	24 March 2026
Date of judgment:	30 March 2026
For the applicant:	In person
For the respondent:	LJS Madiba instructed by the State Attorney