



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2016/19144

(1)	REPORTABLE: <input checked="" type="checkbox"/>
(2)	OF INTEREST TO OTHER JUDGES: <input checked="" type="checkbox"/>
(3)	REVISED: <input checked="" type="checkbox"/>
10/11/18 30 November 2017	

[Signature]

In the matter between:

SIBUSISO M SIGUDO

Applicant

and

THE MINISTER OF HIGHER EDUCATION

First Respondent

THE CHIEF DIRECTOR OF HIGHER EDUCATION

Second Respondent

(NATIONAL EXAMINATION AND ASSESSMENT)

THE MINISTER OF CORRECTIONAL SERVICES

Third Respondent

**THE NATIONAL COMMISSIONER FOR CORRECTIONAL
SERVICES**

Fourth Respondent

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

Fifth Respondent

**THE HEAD OF EDUCATION (JOHANNESBURG
MANAGEMENT AREA)**

Sixth Respondent

THE HEAD OF CORRECTIONAL CENTRE B

Seventh Respondent

THE HEAD OF EDUCATION MED B

Eighth Respondent

JUDGMENT

WILLIS AJ:

1. The applicant appears^{ed.} in person. He is incarcerated at the Johannesburg Medium-B Correctional Centre ("the Correctional Centre").
2. The state attorney acted for the opposing respondents.
3. The court file is testimony to the fact that the applicant is not represented and that the representatives of the respondents had no regard for their responsibility to ensure that a properly organised court file and ordered set of papers were prepared for the court in all the circumstances. I have exercised a reasonable measure of benevolence toward the applicant. I have done so mindful of the respondents' rights and without prejudice thereto. As can be expected I have had to distil the applicant's case from his notice of motion, founding affidavit and annexures. I did not have regard to the applicant's draft supplementary affidavit because same had not been deposed to. I was also mindful of the fact that the applicant's heads of argument contained factual matter not contained in the founding affidavit.

4. In the court file under the above case number there were three different notices of motion each with its own founding affidavit and only one with an answering affidavit.¹
5. Both the applicant and counsel appearing for the respondents, confirmed that it was the third application dated 11 September 2016 with eight respondents which had been set down for hearing.

The applicant's case

6. The applicant seeks to vindicate a personal right which he articulates as vesting under section 29 of the Constitution of the RSA and the Correctional Services Act 111 of 1998, which he considers to have been infringed by the eighth respondent (the head of education at the Correctional Centre), who

¹ The first application is dated 4 June 2016 (issued 6 June 2016) and lists five respondents on its face (they are not cited in the founding affidavit). The second application is dated 11 June 2016 (issued 15 June 2016) and has eight respondents on its face (again none of whom are cited in the founding affidavit) and differs from the other two in as much as it purports to be a review application in terms of rule 53 of the Uniform Rules of Court. The third application is dated 11 September 2016 (issued 12 September 2016) and lists eight respondents on its face (again not cited in the founding affidavit). In the court file are four court orders (as endorsed on the court file) by different judges. On 9 June 2016 Wepener J struck an application for want of urgency. Clearly this was the first application. The applicant explains in his heads of argument that he then attempted to enrol this matter for hearing but did so on the unopposed roll and on 7 September 2016 Crutchfield AJ postponed the application *sine die*. According to the applicant's heads of argument his second application, evidently brought urgently, came before Masipa J. He explains that this matter was set down for hearing on 14 September but was postponed *sine die* by Van Oosten J in chambers for want of service on certain of the parties. The third application issued on 12 September 2016 appears to have come before Wright J on 14 September 2016. I say appears, because the heading to the Wright J order is that of the first application and not that of the third application. However for the reasons dealt with below I accept the heading ought to have reflected the third application. Per this order Wright J postponed the application *sine die* and directed the applicant to file a supplementary affidavit by Friday 16 September 2016, the respondents to answer by Tuesday 20 September 2016 and the applicant to reply by Wednesday 21 September 2016. In the court file is a draft supplementary affidavit under the heading of the third application. It is filed under a filing sheet dated 16 September 2016 but bearing the heading of the first application. It does not bear a registrar's stamp. An answering affidavit dated 20 September 2016 deposed to by the state attorney Mr Poole appears under a filing sheet evenly dated but again bearing the heading of the first application. Once again there is no registrar's stamp. There is then an order by Swartz J dated 29 September 2016 striking a matter (the heading is that of the first application) off the roll. This must have been the third application, because there is no indication at all that the first or second applications were ever ripened or enrolled again.

he says is effectively preventing him from completing his studies. He contends that the eighth respondent does so for "*invalid reasons and misinterpretation*" of a 2015 memorandum² by the Department: Higher Education and Training³ ("the Education Department") regarding the implementation and admission requirements for its national examinations.

7. Effectively the applicant seeks an order by way of which he be allowed to apply to register to write the requisite examinations with the Education Department in order to complete his National Certificate (N6) in electrical engineering.⁴
8. The applicant was confused as to the scope of relief which he requires, and probably for this reason, cited the plethora of respondents and prayed the clumsy and ill-conceived prayers which he did. However his predicament and necessary relief is identifiable on the papers and he confirmed what I understood his case to be in submissions made in the hearing. In fact the respondents' heads of argument identified that the applicant effectively sought declaratory relief.
9. The applicant has achieved his Certificate of Achievement N5 Engineering Studies with effect from 1 December 2013 having passed industrial electronics, electro technics, engineering physics and mathematics at the N5 level.⁵

² Memo 46 of 2015.

³ Cited as the first and second respondents

⁴ Application read together with practice note and heads of argument.

⁵ Annexure "SM4" to the founding affidavit. The certificate is issued by the Director-General of the Department of Higher Education and Training represented in this application by the first and second respondents. See the foot of annexure "SM4".

10. The Correctional Centre is registered with the Education Department under examination centre number 0899990863 to offer N1 – N6 certificates in engineering studies.⁶
11. On or about 26 May 2016, and in order to register with the Education Department for his N6, the applicant was given an Examination Entry Form ("SM1") by Mr Mokgadile who is the education head of the Correctional Centre (the eighth respondent), which the applicant completed and handed in for submission to the Education Department by the 2nd June 2016.
12. The applicant highlights, which is indicated on SM1, that in respect of attendance (i.e. class attendance) the Education Department distinguishes between and caters for both full time and part time study. The applicant registered for part time study in industrial electronics and engineering physics.⁷ The applicant's argument as I understood it is that he does not require the Correctional Centre to provide any specific tutoring services.
13. Prior to the closing date for submission of the form namely 2 June 2016, the applicant was advised that his form would not be submitted as he does not qualify to be registered because he does not have the requisite Internal Continuous Assessment marks outlined in a memorandum by the second respondent a copy of which he was furnished with.⁸ The memorandum by the second respondent cited new requirements for admission to national examinations and referred to dates of implementation provided for in an annexure "A" which was attached thereto. The applicant argued that the memorandum did not affect him.

⁶ Annexure "SM1".

⁷ Annexure "SM1".

⁸ Annexure "SM2".

The case for the respondents

14. The respondents' answering affidavit was deposed to by its attorney employed by the Office of the State Attorney. The principal attack in the answering affidavit was on urgency as the commencement date of classes was 12 September 2016 of which the applicant was alleged to have been aware of as early as 8 June 2016.
15. The answering affidavit dealt briefly with the merits under paragraph 5. There was no confirmatory affidavit nor factual foundation laid for why the content of paragraph 5 let alone any other part of the answering affidavit was admissible evidence. In paragraph 3.2 the deponent stated and I quote:

"3.2 I do not intend in this affidavit to traverse the allegations made in the founding affidavit of the applicant due to the fact that I did not have sufficient time to fully canvass the issues raised therein with everyone involved in the matter and the difficult time limits imposed by the applicant which are impossible to comply with."
16. This affidavit was signed on the 20th September 2016 pursuant to the order of Wright J. On all accounts the application then became before Swartz J on 29 September 2016 when it was struck from the roll. As I have indicated no replying affidavit was in fact filed and from that stage until the hearing of the matter before me the respondents did not file a supplementary answering affidavit.
17. The answering affidavit essentially relied on a letter addressed by Mr Mogadile to the applicant on 28 June 2016 advising that:

- 17.1. Johannesburg Medium-B does not provide engineering N6 studies, only N1 – N3 engineering studies, due to a shortage of tutors and workshops for practical assessment.
- 17.2. The department of higher education policy for examinations stipulates that any student sitting for exams for N1 to N6 is required to obtain 80% of class attendance.
- 17.3. Due to the abovementioned reasons applicant was advised to apply for a transfer to another prison which offers N4 to N6 engineering studies.

The real issue

18. By the hearing of the application the date by which the applicant had to apply for the next enrolment had long since expired. The real issue however was the failure of the eighth respondent acting under the authority vested in him by one or more of the third to seventh respondents, to act in accordance with the applicant's constitutional right under section 29 and the Correctional Services Act 111 of 1998 (at least ss 36 and 41 thereof) and to submit the form to the Education Department. Put differently the issue was whether the eighth respondent was entitled to not submit the applicant's examination entry form.
19. Prisoners' rights are not taken away from them upon incarceration. Per *S v. Makwanyane*⁹ prisoners "*retain all the rights to which every person is entitled under the Bill of Rights subject only to limitations imposed by the prison regime that are justifiable under s33 of the interim Constitution.*"

⁹ 1995 (3) SA 391 (CC) [142] – [143]

20. In fact in *Goldberg and Others v Minister of Prisons and Others*,¹⁰ which was decided at a time when the Legislature was supreme and where the transgression of human rights was not susceptible to constitutional challenge, the following appears per Corbett JA: *'It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties . . . of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed.'* This became known as the *Residuum* principle.

21. Section 29(1) of the Constitution of the RSA under chapter 2, Bill of Rights, entrenches the applicants right to education where it reads:

"29. Education

(1) Everyone has the right –

*(a) to a basic education, including adult basic education;
and*

*(b) to further education, which the State, through
reasonable measures, must make progressively
available and accessible.*

..."

22. S 35 of the Bill of Rights details the rights of all detained persons. The manner in which prisoners are treated should not be out of line with the values on which the Constitution is based. Human dignity and the

¹⁰ 1979 (1) SA 14 (A) at 39C-D

advancement of human rights and freedoms and respect for the rule of law are not just hollow phrases. They must be made real. See the judgement of Navsa JA in *Minister of Correctional Services and Others v KwaKwa and Another*.¹¹

23. Chapter IV of the Correctional Services Act 111 dealing with sentenced offenders, under s 36 dealing with the "*Objective of implementation of sentence of incarceration*" states: "*With due regard to the fact that the deprivation of liberty serves the purposes of punishment, the implementation of a sentence of incarceration has the objective of enabling the sentenced offender to lead a socially responsible and crime-free life in the future.*" (my emphasis), and under s 41 dealing with "Treatment, development and support services" states: "*(1) The Department must provide or give access to as full a range of programmes and activities, including needs-based programmes, as is practicable to meet the educational and training needs of sentenced offenders.*" (my emphasis).
24. There can be no doubt that an unlawful interference with the applicants right to education is a constitutionally invalid act.
25. On the facts of the application: in the face of no evidence to support the respondent's version that the Correctional Centre does not in fact offer N6 engineering studies, the applicant's version falls to be preferred. If I am wrong in doing so, the applicant's examination entry form was based on part time study which does not appear to be impacted upon by the memorandum by the Department of Higher Education and Training. If I am wrong in this regard too and the memorandum did impact upon the

¹¹ 2002 (4) SA p463 (SCA) [33]

applicant's form and submission, this was not a decision for the eighth respondent to make but for the Education Department to make.

26. In *August and another v Electoral Commission and others* where the rights of prisoners to vote was considered, the following said can be applied in regard to a prisoners right to further education in terms of Section 29 of the Constitution: *"They must submit to the discipline of prison life and to the rules and regulations which prescribe how they must conduct themselves and how they are to be treated while in prison. Nevertheless, there is a substantial residue of basic rights which they may not be denied; and if they are denied them, then they are entitled to legal redress."* (my emphasis).
27. It was suggested in argument that to come to the applicant's aid would be tantamount to sitting as a super civil servant as envisaged in *Jivan and others v Louw and Another*.¹² However I have had regard to the following by Gubbay CJ in *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Others*¹³ : *'Traditionally, Courts in many jurisdictions have adopted a broad "hands off" attitude towards matters of prison administration. This stems from a healthy sense of realism that prison administrators are responsible for securing their institutions against escape or unauthorised entry, for the preservation of internal order and discipline, and for rehabilitating, as far as is humanly possible, the inmates placed in their custody. The proper discharge of these duties is often beset with obstacles. It requires expertise, comprehensive planning and a commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Courts recognise that they are ill-*

¹² 1950 (4) SA 129 T at 131 D-E

¹³ 1992 (2) SA 56 (ZS) at 60G - 61A

equipped to deal with such problems. But a policy of judicial restraint cannot encompass any failure to take cognisance of a valid claim that a prison regulation or practice offends a fundamental constitutional protection. Fortunately the view no longer obtains that in consequence of his crime a prisoner forfeits not only his liberty but all his personal rights, except those which the law in its humanity grants him. For while prison officials must be accorded latitude and understanding in the administration of prison affairs, and prisoners are necessarily subject to appropriate rules and regulations, it remains the continuing responsibility of Courts to enforce the constitutional rights of all persons, prisoners included.' I am satisfied that to come to the applicant's aid with an appropriate order would not be tantamount to sitting as a super civil servant as envisaged in *Jivan and others v Louw and Another*.

28. In the result I make the following order: It is declared that the eighth respondent is obliged to submit to the Department of Higher Education and Training the applicant's examination entry form for N6 Engineering studies.
29. I make no order as to costs.

A handwritten signature in dark ink, consisting of a large, stylized 'W' followed by a horizontal line extending to the right.

[RS Willis]

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 21 April 2017

Judgment Delivered: 10 January 2018

APPEARANCES

On Behalf of the Applicant: In person

On Behalf of the Respondent:

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