IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2017/47927

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

15 December 2017 .....

SIGNATURE

In the matter between:

KREJCIR, RADOVAN	Applicant
And	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
NATIONAL COMMISSIONER, DEPARTMENT OF CORRECTIONAL SERVICES	Second Respondent
REGIONAL COMMISSIONER, DEPARTMENT OF CORRECTIONAL SERVICES	Third Respondent
AREA COMMISSIONE, DEPAERTMENT OF CORRECTIONAL SERVICES	Fourth Respondent
HEAD OF PRISONS, LEEWUKOP MAXIMUM CORRECTIONAL FACILITY	Fifth Respondent

---

JUDGMENT

SPILG, J:

INTRODUCTION

1. The applicant brought an urgent application under case no 30573/2017 seeking a number of declaratory orders against the Department of Correctional Services ("*Correctional Services*" or *"DCS"*).

2. The case was heard by Opperman J who on 5 October 2017 granted certain of the relief sought.

3. The orders granted relate to:

    a. The nature of the applicant's incarceration while awaiting trial (prayer 2.1 and 2.2);

    b. Access to a USB device and a computer (prayer 2.3)

    c. Access to a number of medical practitioners (prayer 2.4)

    d. Access to an educationist to determine the applicant's needs (prayer 2.5)

    e. The conditions of incarceration. It is broad ranging and covers matters from visitation rights to listening to music, from an entitlement to legally privileged consultations to making purchases at the kiosk and from writing Christmas letters to accessing recreational facilities (prayer 2.6)

4. On 23 November Mr Krejcir's attorney, Mr Frank Cohen, addressed a letter to Correctional Services alleging that the orders were not being complied with.

5. The applicant alleges that Correctional Services failed to reply which compelled him to bring the present application under case no 47927/2017 declaring certain persons who were cited in their official capacity guilty of contempt of the court order and committing each to six months imprisonment.

6. The applicant brought the application personally. However the papers were prepared by Attorney Frank Cohen. It therefore appears that access to facilities for court proceedings in cases where the applicant elects to use legal representation is not in issue. What is in issue is the applicant's ability to prepare for the various court cases in which he is involved and which are not limited to criminal cases but also include applications for his extradition.

7. The original application was limited to contempt proceedings against persons in their representative capacity who, save for the Head of Leeuwkop Maximum Correctional Facility, could not have been directly involved in any alleged failure to comply with the court order.

8. At the hearing the applicant handed up a draft order which also directed the respondents to comply with Opperman J's order. I allowed it to the extent that the respondents would not be prejudiced.

CONTEMPT PROCEDINGS

9. It is settled that a criminal sanction is sought in contempt proceedings the applicant must prove the order relied on, that it was served and that one or more

of its terms was not complied with. It is then for the respondent to satisfy the court that there is a reasonable doubt that it did not act wilfully or was not *mala fide*. See generally *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at paras 41 and 42. In other words, if the respondent acted deliberately but did not do so *mala fide* then the application will fail.

10. While there is an evidential burden, in motion proceedings for final relief the *Plascon Evans*[1] rule remains intact; namely,

> *"An applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so farfetched or clearly untenable that the court is justified in rejecting them merely on the papers."*[2]

URGENCY

11. The respondents dispute that the matter was urgent. The main thrust of the argument is that there is no degree of urgency which requires any of the issues to be dealt with now instead of at the hearing set down for 29 January 2018 when the balance of the issues contained in the main application, and which were not dealt with in Opperman J's order, will be determined.

In addition it was contended that the documents which the applicant said he required to be copied for his pending cases would only be necessary from about

---

[1] *Plascon Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 E to 635 C
[2] *Whiteman t/a JW Construction v HeadFour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) at para 12

20 January when he was next in court. Suffice it to point out that preparation requires a consideration of the case and the papers in advance of a hearing and that court vacation commences next week.

12. By contrast the applicant claimed that every contempt of a court order is urgent. I believe that is too broad a statement. It would however self-evidently be so when there is a continuing violation that has immediate prejudicial consequences.

13. In the present case there are a number of alleged transgressions of the court order some of which have immediate prejudicial consequences while others do not. I therefore will not deal with the issue of urgency separately.

14. It is however necessary to point out that Opperman J did not grant the order pursuant to making a determination. The respondents had in fact presented the judge with a draft setting out effectively the protocols they were prepared to put in place in order to accommodate the applicant's complaints regarding the alleged infractions of his constitutional rights and those accorded to him under the Correctional Services Act 111 of 1998 (*"the Act"*) and, presumably, its Regulations.[3]

15. It will be more convenient to consider separately each term of the order which it is alleged has been breached.

---

[3] Despite an extensive search and numerous enquiries the court file containing the original application that was placed before Opperman J could not be located.

ACCESS TO A COMPUTER AND TO PRINTING FACILITIES

16. Para 2.3 of the order reads:

> "*The applicant shall be entitled to have access to his legal documents provided to him on a USB device by utilising a computer, which is to be accommodated in an office within the Unit where the applicant is incarcerated alternatively within the applicant's cell, the exact location i.e. Whether in an office within the Unit or within the applicant's cell, being a decision falling within the discretion of the 5th respondent* (Head of Prisons, Leeuwkop Maximum Correctional Facility). *Such access is to be given to the applicant during the day from 08h00 to 15h00 weekends included, should the computer be accommodated in an office within the Unit.*
>
> *Should the computer be housed in the applicant's cell, there shall be no time restrictions on when he may use it.*
>
> *Should the applicant want to peruse documents overnight, print-outs of the said documents are to be made available to him within 2 hours of such written request being made to the Head of the Centre (the 5th respondent) or his delegate but such request shall be made no later than 12h00 on the day that the documents are required. The production of documents only arises should the computer be housed in an office within the Unit."*

17. On analysis it appears that the applicant relies on four alleged breaches of this part of the order. Firstly that, having regard to its intended purpose, he has not been given access to a suitable computer: Secondly, that prison officials did not

provide him with print-outs of legal documents despite the applicant making requests in the manner stipulated in the order. Thirdly, that the computer is not placed in his cell but in a nearby office which is used by DCS officials, inmates and others who make concentration difficult. And finally, which is bound up with the previous complaint, that he is not afforded the times as directed in the order to access the computer.

18. Save for DCS failing to print-out three sets of legal documents when requested to, on the facts presented none of the other complaints can be construed as a breach of the terms of the order, let alone that it was wilful and *mala fides*. In short:

a. The acting head of the facility stated that the computer is fully operational, that it was upgraded with both Windows 7 and MS Office 2010 and that it does open the applicant's USBs. The applicant also informed the court that DCS had replaced the computer with another one, although he did not as yet have an opportunity to test its functionality;

b. The decision as to whether the computer is to be placed in the applicant's cell or in a location within the applicant's unit is a discretion exercised by the responsible DCS official. This arises by reason of the provisions of s4(2) of the Act which provides that:

> *(2) (a) The Department must take such steps as are necessary to ensure the safe custody of every inmate and to maintain security and good order in every correctional centre.*

(b) The duties and restrictions imposed on inmates to ensure safe custody by maintaining security and good order must be applied in a manner that conforms with their purpose and which does not affect the inmate to a greater degree or for a longer period than necessary.

(c) The minimum rights of inmates entrenched in this Act must not be violated or restricted for disciplinary or any other purpose, but the National Commissioner may restrict, suspend or revise amenities for inmates of different categories.

There is no challenge that the official did not exercise his discretion in a manner that would render it subject to review. In any event none have been raised and this court cannot second guess the basis of the decision.

c. The complaint that the applicant is not afforded adequate time to access the computer and that it is located in an area where the applicant cannot concentrate on the work he is entitled to do in preparation for his cases cannot result in a court ordering that the computer be placed in his cell as the decision not to permit it is a security one taken under s 4(2) of the Act.

The respondents have accepted that the computer is to be relocated and have in fact moved it to an adjoining cell which the applicant already uses to store his papers.

The applicant complains that the area is too small. He also complains that his cell is too small and does not comply with minimum standards. That is an issue not raised in the papers. It cannot be covered by the amended

compliance order now sought. The reason is that the issue concerns where the applicant should be incarcerated and if the location has only small cells then that is an issue which would have to be addressed by considering competing rights and interests; issues that have not been raised in these papers. The question of whether there is enough time available to the applicant to access the computer is really a time management issue.

It is for these reasons too that a compliance order cannot succeed.

19. That leaves DCS's failure to print out legal documents when requested to in terms of the order. It is common cause that on 12 December the fifth respondent was prepared to print out certain requested documents but the applicant said that he would only need copies of these documents after the court appearance in this matter.

20. However there is silence on the part of the respondents in respect of the requests for documents to be printed out on three earlier occasions for which proof was provided. The first was made during November with regard to a murder case and the other two related to requests made on 2 December and 5 December in respect of the extradition proceedings. In all cases the matter had to be postponed because the applicant was not ready to proceed as the applicant was unable to produce these documents.

21. The respondents have conceded that there was an unfortunate delay. It was also submitted that this was one infraction out of some twenty terms that were contained in the court order. I have already mentioned that the terms were those presented by the respondents and which were made an order of court. It does not lie in a respondent's mouth to now say that it is insignificant. While it may go to culpability in the form of *mala fides* the court must take the alleged delay in a very serious light. This is so for two reasons: This part of the order deals with the broader considerations of a breach of an accused's fair trial rights and secondly it resulted in unnecessary delay by reason of the adjournment of a court case and the squander of resources in an already overstretched judiciary.

22. I consider that having regard to the respondents' failure to provide an explanation for the delay, not once but on three occasions, the fifth respondent should be required to ensure that systems are put in place to provide print-outs of the documents in terms of this part of the order.

APPLICANT'S MEDICAL TREATMENT

23. Para 2.4 of the order provides that:

> "*The applicant shall be entitled to have reasonable access to an orthopaedic surgeon, urologist and psychiatrist. The decision whether to perform procedures, to administer treatments and when this shall occur shall lie with such professionals alone.*"

24. The applicant's complaint is that he has been denied proper access to the orthopaedic surgeon, urologist and psychiatrist.

25. Irrespective of the extent of the complaint, the order itself provides that the decision regarding the level of treatment is within the exclusive prerogative of the medical practitioner concerned. There is insufficient on the papers to support a contention, as advanced during argument, that the practitioners have been directed not to assist. The evidence of the respondents is that there are only one or two diagnosed symptoms for which extensive medication is provided, that a psychiatrist attends once every three months (the last being in October) and that other medication is provided and blood pressure readings are performed daily despite no apparent condition warranting it.

26. There can be no finding of wilful disregard of the court order or *mala fides*. Save possibly for the issue of an orthopaedic bed there is also no justification for urgency.

27. The applicant was recommended for a special mattress. The specialist apparently indicated that the applicant should be provided with an orthopaedic bed. He claims that he has been provide with a sponge mattress which could never qualify as a firm support for his diagnosed back problem for which he also receives medication.

28. While I would have thought that a reasonable person would make enquiries from the specialist as to the appropriate mattress to be provided it cannot be said that there was wilful disobedience. However having regard to the diagnosis and the treatment being received I am satisfied that at the least there was a failure of communication and a compliance order is appropriate once the fifth respondent has established from the specialist the nature of the mattress required and

whether the one that has been provided is adequate. If an orthopaedic bed is necessary and having due regard to any security issues regarding its components, construction and the like, bearing in mind the possible ability to conceal objects, then the applicant has confirmed that he will be liable to pay for its procurement by DCS.

ACCESS TO AN EDUCATIONIST

29. In terms of para 2.5 of the order:

> " *The applicant is to be allowed reasonable access to an educationist serving the Centre for the determination of his needs. Should the applicant wish to register for the next academic year, he is to register such request with the Educationist serving the Centre in writing providing the line of study and the Academic Institution where such studies are to be pursued. Such a request shall be acted upon without undue delay.*"

30. The applicant contends that he wished to enrol for both an LIb. and a Visual Basic Course at UNISA but was thwarted. It is common cause that the Educationist informed the applicant that he would have to be transferred to Johannesburg Central since that is where inmates who are registered for these UNISA courses must be placed. The applicant then declined to be transferred.

31. In my view unless the applicant can show that the Educationist was untruthful then he must look for courses which can be completed at the facility where he is detained. If he believes that the Educationist is untruthful then his attorney should direct a request to UNISA to establish if the Educationist was correct.

32. I therefore cannot find a failure to comply with this part of the court order and accordingly there is no basis to issue a compelling order.

ACCESS TO SAPS AND IPID

33. Para 2.6.12 provides that:

> *2.6 The applicant shall be entitled to the following within the Department of Correctional Services … prescripts:*
>
> *2.6.12. Reasonable access to consultation with members of SAPS and IPID*

34. The applicant advised that this term of the order was introduced because of a complaint he lodged against members of SAPS with IPID. IPID has neither opened a docket or initiate a prosecution. It was for this reason that he needs to approach them to pursue the complaint.

35. Although the applicant had been visited by an IPID official it turned out that the person was a co-accused of one Paul O' Sullivan who is a complainant in a

pending case against him. The applicant also averred that SAPS officials have ignored his requests for an interview.

36. In my view the order does no more than ensure that DCS does not frustrate the applicant's right to consult or be interviewed by either IPID or SAPS. It does not amount to an order which requires DCS to compel IPID or SAPS to consult with the applicant or ensure that a suitable person undertakes the interview. It is for the applicant's attorney to address a demand to IPID and SAPS to comply with their statutory obligations. Accordingly there can be no failure to comply with the order and the applicant is at liberty to instruct his attorney to compel SAPS and IPID to comply with their statutory functions.

GENERAL

37. The order which DCS originally requested Opperman J to grant is broad. But the DCS has only itself to blame. Irrespective of its breadth, the implementation of the order is always subject to at least the provisions of s 4(2) of the Act. Accordingly DCS may still require that the course requested, whether it involves encryption or computer programming, has to pass s 4(2) scrutiny: This may result in the legitimate imposition of a limitation to unrestricted access to centres of learning or to the nature of courses that can be undertaken in cases where security risks are raised in respect of providing access to sophisticated technology (the capabilities of which may not be readily appreciated) or of a potential risk of loss of life.

38. It may well be that the solution to undiagnosed medical complaints is for the applicant to select one practitioner from a pool of three nominated by the respondents. However this court is not required to streamline the terms of the order to avoid interminable visits if there is no condition justifying it. At this stage such issues are not before the court.

COSTS

39. Each party seeks a costs order against the other. The applicant has been partially successful on matters which impact on the due administration of justice and the applicant's fair trial rights. DCS has also belatedly acted in accordance with the order in one or two respects. Moreover although attorney Frank Cohen assisted in the drawing of the papers and a candidate attorney was present in court the firm is not appointed as attorney of record.

On the other hand the balance of the application cannot support a finding of contempt or justify a compelling order.

40. There are orders sought by the applicant which are frivolous and which may have resulted in an adverse costs order, even though a constitutional right was asserted. In my view the applicant is saved because he has been successful in asserting an important constitutional right.

In all the circumstances a fair order is that each party pays its own costs

ORDER

41. It is for these reasons that I order:

1. *The fifth respondent is personally required to ensure that systems are put in place for the proper and prompt compliance of para 2.3 of the order of 5 October 2017 insofar as it relates to making available to the applicant the printing-out of documents within 2 hours of a written request which complies with the terms of that paragraph;*

2. *In the event of any print-out not being made available in terms of the preceding paragraph then the fifth respondent will have to show cause why he should not be held accountable and not be in contempt of this order*

3. *The fifth respondent is to establish from the orthopaedic surgeon the exact type of mattress recommended for the applicant having regard to his back condition as already diagnosed , which recommendation is to be motivated and reduced to writing and signed by the orthopaedic surgeon with a copy provided by the fifth respondent to the applicant forthwith.*

4. *If the present bed and mattress provided to the applicant is not suitable then, subject to due regard to any safety and security issues regarding their components and construction and acting within the exercise of the powers conferred by s4(2) of the Correctional Services Act 111 of 1998 and any other relevant legislation, including regulations, pertaining to safety, security and good order, the fifth respondent is to secure the requisite bed and mattress, or if it is beyond the reasonable budget provisions therefor that the applicant is to be liable to pay for its procurement by the Department of Correctional Services as undertaken by him.*

5. *Should the fifth respondent fail to comply with any term of this order then the applicant may approach the court on three days' notice on the same papers duly supplemented.*

6. *Each party is to pay its own costs.*

SPILG J

DATE OF HEARING:	14 December 2017
DATE OF JUDGMENT:	15 December 2017
FOR APPLICANT:	In person
FOR RESPONDENT:	Adv EB Ndebele
	The State Attorney