REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

Date: ***21st January 2022*** Signature:

CASE NO: A312/2018

DATE: 21 JANUARY 2022

In the matter between:

MINISTER OF JUSTICE & CORRECTIONAL SERVICES	First Appellant
THE NATIONAL COMMISSIONER OF THE DEPARTMENT OF CORRECTIONAL SERVICES	Second Appellant
THE HEAD OF PRISON: ZONDERWATER PRISON	Third Appellant

and

PRETORIUS, WILHELM	First Respondent
PRETORIUS, DR JOHAN	Second Respondent
PRETORIUS, DR LETS	First Respondent

Coram: Mudau J, Adams J *et* Dippenaar J

Heard: 4 October 2021 – The 'virtual hearing' of the Full Court Appeal was conducted as a videoconference on *Microsoft Teams*.

Delivered: 19 January 2022 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 21 January 2022.

Summary: Constitutional law – Unfair discrimination – the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA') – limiting access by sentenced prisoners to computers adversely affect their equal enjoyment of their right to human dignity and their right to education and to study further – amounts to unfair discrimination – Official departmental *Policy Procedures* therefore unlawful and set aside –

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Swanepoel AJ sitting as Court of first instance):

(1) The appellants' appeal against the order of the court *a quo* is dismissed with costs, including the costs of the application for leave to appeal and the costs consequent upon the employment of two Counsel, one being a Senior Counsel, and which costs shall be paid by the first, second and third appellants jointly and severally, the one paying the other to be absolved.

(2) The order of the court *a quo* is confirmed.

JUDGMENT

Adams J (Mudau J *et* Dippenaar J concurring):

[1] In our Constitutional Democracy everyone is equal before the law and has the right to equal protection and benefit of the law. The State may not unfairly discriminate against anyone and, conversely, no person may unfairly discriminate against anyone else. This appeal concerns the aforementioned right to equality, in the context of convicted persons serving long term sentences of imprisonment. The appeal also concerns the proper interpretation of the national legislation enacted to prevent or prohibit unfair discrimination.

The fundamental rights in issue are the right to further education and the right to study, as well as the right to human dignity.

[2] In the Court *a quo* the first and second respondents, who are brothers, and their father, the third respondent, applied in the main for an order declaring that the prohibition on the use by them of laptops and computers in their cells as prescribed in the official published policy of the Department of Correctional Services ('the department'), constitutes unfair discrimination as contemplated by the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000 ('PEPUDA'), as against the respondents, who are all serving long-term prison sentences for high treason, culpable homicide and conspiracy to commit murder. They contended that the department, in limiting their access to their laptops and personal computers, used by them for tertiary educational and study purposes, unlawfully and unfairly infringed their rights to further education and therefore acted unlawfully and unconstitutionally.

[3] The court *a quo* (Swanepoel AJ) agreed with them and on the 10th of May 2018 granted the following order:

(1) The *Policy Procedures* on formal education programmes as approved by the second appellant (the National Commissioner of the Department of Correctional Services or 'the Commissioner), insofar as it relates to the use of personal laptops without a modem in any communal or single cell, is declared to constitute unfair discrimination in accordance with the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000, as against the respondents.

(2) First, second and third respondents shall be entitled to use their personal computers without the use of a modem in their cells for as long as they remain registered students with any recognised tertiary institution in South Africa.

(3) All of the respondents' computers shall be made available for inspection at any given time by any representative of the appellants.

(4) First and second appellants shall pay the costs of the application jointly and severally, the one paying the other to be absolved.

[4] This appeal is against the aforesaid order and is with the leave of the court *a quo*. In this appeal, the appellants contend that the court *a quo* erred by *inter alia* finding that the policy procedures as approved by the Commissioner on 8 February 2007 limit the rights of the respondents to study and that such limitation is not justified and is therefore unlawful. The appellants also submit that the court *a quo* erred and misdirected itself in rejecting their contention that allowing the respondents unlimited access to their laptops would pose a security risk, which justified a limitation of such access by time and space. So, for example, so it was argued on behalf of the appellants, computers may easily be turned into sites for liaison with outside criminal elements with a view to promoting and/or perpetuating criminality and involvement in a number of illicit organisations, including promotion and facilitation of prison breaks.

[5] Importantly, the appellants also contend that the court *a quo* was wrong in its finding that, to the extent that the policy prohibits computers in cells for study purposes, it unfairly discriminates against the respondents on the basis that it unjustifiably imposes disadvantages on them. The court *a quo* should not have found, so the appellants argued, that benefits, opportunities and advantages were being unlawfully withheld from the respondents, on the grounds that they are prisoners, thereby adversely affecting the equal enjoyment of their right to further education.

[6] The issue to be decided in this appeal is therefore whether the official policy of the department, as applied in the case of the respondents, constitutes unfair discrimination. That issue is to be decided against the factual backdrop in this matter as set out in the paragraphs which follow and which facts are by and large common cause.

[7] As already indicated, at the relevant time, the respondents were all post-graduate students kept as sentenced prisoners at the Zonderwater Correctional Centre in Cullinan, Gauteng. At the time, they were allowed access to their personal computers and laptops, only from 7:00 until 14:00 during weekdays, and only in the computer room, where their computers were kept and housed. This access was allowed by the prison authorities during the so-called ‘open

time' enjoyed by the prisoners, during which time prisoners would normally be unlocked. However, so it was contended on behalf of the respondents, in practice their access to computers was further limited in time and reduced to only a few hours per day due to a numbers of factors, notably: (1) Some of the open time had to be utilised to, for instance, attend clinic for check-ups and medical treatment, which would obviously cut into their 'open time' by between two to three hours on the affected days; (2) Sometimes the computer room would open later than 07:00 for a number of reasons; and (3) Often, no access to the computer room was allowed due to a general lockdown as a result of security concerns. Additionally, their 'open time' would regularly by reduced by them having to attend ablutions, have breakfast and receive visitors.

[8] The respondents were not permitted access to or allowed to utilise their computers or printers whilst locked up in their cells, which adversely affected their scholastic performances as post-graduate students, who needed access to their study material, so the respondents argued, for longer periods. This meant, so it was alleged by the respondents, that for at least twenty hours per day they were not able to access any computers, which, in turn meant that they had to write out long hand their task assignments and theses, which subsequently had to be captured onto their computers by them typing same out during open time. All of this hampered and impeded, unnecessarily so, their studying and their studies, which resulted in delays in the completion of their courses of study. The sum total of all of the aforegoing, so the respondents submitted, amounted to their rights to study and to further their education having been infringed unlawfully.

[9] As already indicated, most of the facts in this matter are common cause. The appellants do however dispute the claim by the respondents that they have been severely hampered in their studies and adversely affected by the limitation imposed by the respondents and their official policy on their access to their computers. This is evidenced, so the appellants argued, by the exceptional results attained by the respondents in their formal tests and examinations. This is denied by the respondents. I am of the view that there is no merit in this

contention by the appellants. The court must apply common sense. Limiting a student's study time, of necessity, will affect his or her performance.

[10] The appellants also contended in the court *a quo*, as they did in the appeal court, that allowing the respondents unlimited access to their personal computers and laptops would have posed a security risk in that the real possibility existed that the computers could have been used to gain access to the internet, which could and probably would have led to all sorts of criminal activities. This is denied by the respondents, who point out that appellants provided no evidence of a supposed security risk. On the contrary, so the respondents contend, at some point the first and the second respondents were allowed unfettered access to their personal computers in their cells for a period of eleven years. During two of those years the first and second respondents ironically even had modems attached to their computers, without them in any way putting the security of the Correctional Centre at risk. Moreover, so the respondents contended, whilst incarcerated for a period of at least fifteen years, their behaviour was impeccable and, at no stage, were they ever accused or found guilty of any breach of security. The point made by the respondents in that regard is that, at least in their case, the general and very bald allegations made by the appellants of the real risk of security breaches are unfounded and lack the necessary factual basis. The court *a quo* agreed with these submissions, as do I.

[11] The limitations by the appellants on the respondents' access to personal computers were imposed in terms of the official policy of the department, which was incorporated into a written document entitled: *'Department Correctional Services: Policy Procedures – Directorate Formal Education'*, which had been approved by the Acting Commissioner on 8 February 2007. This policy, under the heading 'Utilization of Desktop Computers / Note Books / Laptops (Personal Computers)', provided that access to computers was subject to certain requirements being met and a number of conditions being complied with, including that a prisoner must be a registered student who has a need for a computer as supportive to his or her studies and that the use of a computer was to be on application approved by the Head of the Correctional Centre in

question. Importantly, the policy also provided that a room within the Correctional Centre must be made available for the placement of computers of students and that structured time must be made available to students to have access to computers. It also expressly provided that no computer should be allowed in any cell, whether communal or single.

[12] It is not in dispute that the respondents complied with the requirements entitling them to the use of personal computers for study purposes. They were therefore allowed access to and the use of the laptops and computers as prescribed by the policy procedures. Their grievance related to the limitation on the time they were allowed such access.

[13] It is the case of the respondents that the policy infringes upon the rights of inmates to utilise education as a means to empower offenders for sustainable life after release, which conduct is at odds with the objectives of the policy. It also *prima facie* violates their right to human dignity and infringes on their right to further education. The policy therefore, so the respondents averred, falls foul of the provisions of section 29 of the Constitution, which provides that everyone has the right to further education, which the state, through reasonable measures must make progressively available and accessible. It is also submitted that the blanket prohibition is not consistent with section 18 of the Correctional Services Act, 1998 and the regulations promulgated in terms thereof.

[14] It was the case of the respondents that, in view of all of these infringements of their fundamental human rights, the policy procedures constitute unfair discrimination in terms of the provisions of the PEPUDA, which defines discrimination as ‘any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages, from any person on one or more of the prohibited grounds’.

[15] Prohibited grounds are defined as:

‘(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or

(b) any other ground where discrimination based on that other ground

(i) causes or perpetuates systemic disadvantage;

(ii) undermines human dignity; or

(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).’

[16] It was submitted on behalf of the respondents that the blanket prohibition contained in the policy is clearly designed and implemented to withhold opportunities from them thereby perpetuating systemic disadvantages and undermining human dignity. The case of the respondents in the court *a quo* and on appeal, in sum, was that the policy discriminates against them in that it ‘undermines [their] human dignity’ and adversely affects their equal enjoyment of their rights to further education and the right to study. They made out their case in the light of and on the basis of the constitutional and legislative provisions set out in the paragraphs, which follows.

[17] Section 35 (2) (e) of the Constitution provides 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 accommodation, nutrition, reading material and medical treatment.’ (Emphasis added).

[18] I agree with the respondents’ contention that, by limiting the time they have access to their computers, the policy of the respondents adversely affects their equal enjoyment of this right to be provided with reading material. This therefore amounts to discrimination in terms of the PEPUDA. Moreover, the policy undermines their human dignity, which comes with being able to better oneself by further education, which, in turn, prepares one for life after prison. For this reason alone, I am of the view that the policy unfairly discriminates against the respondents and the court *a quo* was correct in holding thus.

[19] A further right implicated by the policy procedures is the right to further education. In that regard, s 29 (1) (b) of the Constitution provides that everyone has the right to 'further education, which the State, through reasonable measures, must make progressively available and accessible'. There can be little doubt that the use of the word 'everyone' in this section of the Constitution, properly interpreted, means that the respondents are not excluded as falling into the category of persons entitled to enjoy this right. However, their equal enjoyment of this right to further education, so the respondents contend, is likewise adversely affected by the policy and its application as against them.

[20] I find myself in agreement with this contention. The adverse effect of the policy is self-evident as is the fact that the policy clearly infringes on the rights of the respondents to do research as set out in section 16(1)(d) of the Constitution, which provides that everyone has the right to freedom of expression which includes academic freedom and freedom of scientific research. I agree with the respondents' submission that they require access to reading material in order to exercise their rights to further education and research.

[21] As regards the appellants' contention that unlimited access to personal computers would pose a security risk, the respondents contend, rightly so, in my view, that where the rights of a prisoner are being curtailed, the appellants, being the ones who wish to impose a limitation on a basic right, bear the burden to justify such limitation.

[22] In that regard, Mr Du Plessis, who appeared on behalf of the respondents with Mr Theart, referred us to *Minister of Home Affairs v NICRO & Others*[1] in which the Constitutional Court, at pg 294D-F, held as follows:

'Where justification depends on factual material, the party relying on justification must establish the facts on which the justification depends. Justification may, however, depend not on disputed facts but on policies directed to legitimate governmental concerns. If that be the case, the party relying on justification should place sufficient information before the court as to the policy that is being furthered, the reasons for that policy, and why it is considered reasonable in pursuit of that policy to limit a constitutional right. That is important, for if this is not done the court may be unable to

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1 *Minister of Home Affairs v NICRO & Others* 2005 (3) SA 28 (CC).

discern what the policy is, and the party making the constitutional challenge does not have the opportunity of rebutting the contention through countervailing factual material or expert opinion. A failure to place such information before the court, or to spell out the reasons for the limitation, may be fatal to the justification claim. There may however be cases where despite the absence of such information on the record, a court is nonetheless able to uphold a claim of justification based on common sense and judicial knowledge.'

[23] *In casu*, so Mr Du Plessis submitted, the appellants' claim that the use of computers in cells would constitute a security risk is not based on fact. In any event, so the argument goes, the computers can be screened to ensure that they do not contain modems and, in that regard, the respondents have indicated their willingness to make available for inspection at any time their computers for that purpose. The court *a quo* in fact made an order to that effect.

[24] I agree. Moreover, as indicated above, the evidence suggested, contrary to the appellants' contention, that the security risk in the case of the respondents, if regard is had to their track record whilst they were in prison, is slim to non-existent. In their answering papers, the appellants had in fact conceded that on the occasion when the respondents' computers and its contents were inspected, nothing untoward was found.

[25] I am accordingly of the view that the court *a quo* was correct in its finding that no justification existed for the limitation on the basic rights of the respondents to study and to further education. Such limitation therefore constituted unfair discrimination against the respondents.

Further Contentions by the Appellants on Appeal

[26] Mr Moerane, who appeared on behalf of the appellants with Mr Ndebele, also submitted, on the basis of the decisions in *Thukwane v Minister of Correctional Services and Others*[2] and *Prinsloo v Van der Linde and Another*[3], that the appellants only differentiate on valid and lawful grounds between the

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2 *Thukwane v Minister of Correctional Services and Others* 2003 (1) SA 51 (T).

3 *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC).

respondents, as prisoners, and the rest of the citizenry of the Republic. There is no unfair discrimination, so it was argued.

[27] In *Prinsloo* the Constitutional Court held as follows:

'[25] It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as "mere differentiation". In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate government purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation …

[26] Accordingly, before it can be said that mere differentiation infringes section 8 it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it.'

[28] The appellants therefore submitted that *in casu* the differentiation between the inmates and free citizens bears a rational connection to a legitimate governmental purpose which is primarily to ensure the safe custody of offenders and good order in correctional centres with the ultimate aim of ensuring the safety of the public at large. I disagree. As I have already indicated, in this matter the facts do not support a conclusion, as contended for by the appellants, that allowing the respondents further access to their personal computers would jeopardise the security of inmates and other members of society at large. It therefore cannot be said that there is a rational relationship between the differentiation and the government purpose, which is supposedly aimed at ensuring security and good order at Correctional Centres.

[29] There is accordingly no merit in this defence raised by the appellants.

[30] Mr Moerane furthermore submitted that in terms of section 29(1)(b) of the Constitution, the respondents only have the right to further education and not the right to study. Such a right must be made progressively available and accessible by the State through reasonable measures. It was therefore submitted that the evidence before the court *a quo* proved compliance with this

constitutional requirement. There is no merit in this submission. The point is simply that the respondents clearly have the right to further education, and their enjoyment of that right had been infringed by the implementation of the policy procedures.

[31] The last submission made by the appellants is that the court *a quo* failed to observe or to accord deference to the principle of the separation of powers by usurping the powers and functions of the executive in a policy-laden matter. Having regard to the principle of the separation of powers, so the argument on behalf of the appellants goes, the court *a quo* should not have intruded into the domain of the executive and should have been slow to substitute its views for those charged with policy making decisions.

[32] Short thrift should and will be given to this point, which is clearly without merit. The point is simply that, in terms of the PEPUDA, a State authority cannot and should not issue policies, which unfairly discriminate against any person or any group of persons. To do so is unlawful, and whether that is indeed so, is an issue which, in terms of our Constitution, is required to adjudicated by a Court of Law. The courts have a duty to ensure that laws and conduct are lawful.

Conclusion

[33] In sum, I am of the view that the respondents have the following basic human rights: the right to human dignity; the right to study and the right to further education. They are entitled to the enjoyment of these rights, unless justifiable limitations are placed on the enjoyment of such rights. The Education Policy of the department infringes on those rights without justification, which means that they unfairly discriminate against the respondents as envisaged by the PEPUDA.

[34] In my view, these infringements do not serve a purpose that is considered legitimate by all reasonable citizens in a constitutional democracy that values human dignity, equality and freedom above all other considerations. They impose costs, especially for the respondents, that are disproportionate to the benefits that it obtains.

[35] The court *a quo* was therefore correct in its finding that the said policy constitutes unfair discrimination and that the relevant provision should be reviewed and set aside.

[36] Consequently, the appeal must fail.

Costs of Appeal

[37] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*[4].

[38] I can think of no reason to deviate from the general rule. The appellants should therefore pay the costs of the appeal of the respondents.

Order

[39] In the result, the following order is made: -

(1) The appellants' appeal against the order of the court *a quo* is dismissed, with costs, including the costs of the application for leave to appeal and the costs consequent upon the employment of two Counsel, one being a Senior Counsel, and which costs shall be paid by the first, second and third respondents, jointly and severally, the one paying the other to be absolved.

(2) The order of the court *a quo* is confirmed.

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

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[4] *Myers v Abramson*,1951(3) SA 438 (C) at 455

HEARD ON:	4th October 2021 – in a 'virtual hearing' during a videoconference on *Microsoft Teams*.
JUDGMENT DATE:	21st January 2022 – judgment handed down electronically
FOR THE FIRST, SECOND AND THIRD APPELLANTS:	Advocate M T K Moerane SC, together with Adv E B Ndebele.
INSTRUCTED BY:	The State Attorney, Pretoria
FOR THE FIRST, SECOND AND THRID RESPONDENTS:	Advocate R Du Plessis SC, with Advocate A D Theart
INSTRUCTED BY:	Julian Knight & Associates Inc, Pretoria