IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case number: 2023/126318

[1]	REPORTABLE: NO
[2]	OF INTEREST TO OTHER JUDGES: NO
[3]	REVISED: NO

SIGNATURE **DATE:** 9 January 2024

In the matter between:

CLINT KRAMER	First applicant
ANTON MEYER	Second applicant

and

MINISTER OF JUSTICE, CONSTITUTIONAL DEVELOPMENT AND CORRECTIONAL SERVICES	First respondent
NATIONAL COMMISSIONER CORRECTIONAL SERVICES	Second respondent
THE AREA COMMISSIONER, JOHANNESBURG	Third respondent
THE HEAD OF CENTRE “C”, JOHANNESBURG CORRECTIONAL CENTRE	Fourth respondent
THE HEAD OF EDUCATION DEPARTMENT, JOHANNESBURG CENTRE “C”	Fifth respondent

JUDGMENT

PULLINGER AJ

[1] On 8 November 2023 the Supreme Court of Appeal handed down its judgment in **Ntuli**.[1]

[2] **Ntuli** concerned the use of personal computers by prisoners for purposes of academic work inside their cells. This was prohibited pursuant to the Department of Correctional Services' policy styled "Policy Procedure Directorate Formal Education Programs".

[3] The Supreme Court of Appeal held that:

> "[21] Mr Ntuli has not been prevented from enrolling in a computer studies course. However, a restriction has been placed upon his ability to pursue this course of study. As Mr Ntuli's affidavit makes clear, access to a computer is an essential requirement of computer studies. This is not disputed. While Mr Ntuli is confined in his cell, he could be studying with the use of his personal computer. He is prevented from doing so because the policy prohibits this activity. He is not required by the prison authorities to engage upon any other activity during this time.
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> [22] The prohibition in the policy inhibits the pursuit by Mr Ntuli of his studies. That is an infringement by the State of Mr Ntuli's right to further education, because the content of the right includes the right to pursue the course of study for which Mr Ntuli is enrolled. The policy prevents Mr Ntuli from using his personal

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[1] **Minister of Justice and Constitutional development and Others v Ntuli (Judicial Inspectorate for Correctional services intervening as *amicus curiae*)** [2023] ZASCA 146 (8 November 2023)

computer in his cell, and thereby restricts him from pursuing his studies. It is no answer to contend, as the appellants do, that adequate provision has been made for Mr Ntuli to have access to a computer in the prison's computer centre. And that the adequacy of that access is proven by Mr Ntuli having passed his course, without the use of his personal computer in his cell. The right of a prisoner to pursue further education is not determined by what might suffice to pass his chosen course of study. Rather, the right is to pursue the course he has chosen. That entails using time that is otherwise uncommitted, whilst confined in his cell, to study. And to do so in a way that is effective, which, in the case of Mr Ntuli's computer course, is with the use of a personal computer.

[23] It follows that the outright prohibition, of the policy, that excludes a prisoner from using a personal computer in his cell to study is an infringement of Mr Ntuli's right to pursue his further education, and is thus an infringement of s 29(1)*(b)* of the Constitution. Mr Ntuli's is a particularly clear case of infringement because access to a computer is so intrinsic to computer studies. There may be other courses of study where this is less so. But I observe that ever more educational materials are available in electronic form, and such materials are most conveniently and economically accessed on a computer. So too, course work is now routinely composed and submitted electronically. I have found that the right to further education includes the right effectively to pursue that education. This entails that, if a prisoner has a personal computer, it is a tool of indispensable value in the pursuit of many courses of further education."

And further:

"[25] The policy, as it stands, excludes all use of a personal computer by a prisoner for study in their cell. The blanket exclusion fails to have regard to the courses of study that prisoners may undertake in which the use of a personal computer in their cell is of benefit. This is unquestionably the case for Mr Ntuli and the course of computer studies he has undertaken. The policy thus infringes his right to further education."

[4] Accordingly, the Supreme Court of Appeal ordered:

"1 The appellants' applications for condonation and reinstatement of the lapsed appeal is granted.

2 The first and second appellants are to bear the costs of the applications for condonation and reinstatement, jointly and severally, on an attorney and client scale, including the costs of two counsel.

3 The appeal is partially upheld and the order of the court *a quo* is set aside and replaced with the following:

‘1. To the extent that the Policy Procedure Directorate Formal Education as approved by the second respondent and dated 8 February 2007 prohibits the use of personal computers in cells, it is declared invalid and set aside.

2. The order in paragraph 1 is suspended for 12 months from the date of this order.

3. The first and second respondents are directed, within 12 months from the date of this order, after consultation with the Judicial Inspectorate for Correctional Services ("JICS"), to prepare and promulgate a revised policy for correctional centres permitting the use of personal computers in cells for study purposes ("the revised policy").

4. The first and second respondents are directed, within one week after promulgating the revised policy, to disseminate that policy to the head of every correctional centre, and, where one is employed, to the head of education at each centre.

5. Notice of the revised policy must be posted on notice boards in all prisons where prisoners customarily receive information, and such notice must set out where prisoners may obtain copies of the revised policy.

6. Pending the revision of the education policy:

6.1 The applicant is entitled to use his personal computer in his cell, without the use of a modem, for as long as he remains a registered student with a recognised tertiary or further education institution in South Africa.

6.2 Any registered student in a correctional centre who needs a computer to support their studies, and/or any student who has registered for a course of study that requires a computer as a compulsory part of the course, is entitled to use their personal computer without the use of a modem in their cell for as long as they remain a registered student with a recognised tertiary or further education institution in South Africa.

6.3 The applicant or any other student who keeps a personal computer in their cell in accordance with paragraphs 6.1 and 6.2 above must make it available for inspection at any given time by the head of the correctional centre or any representative of the first and second respondents.

6.4 In the event of a breach of the rules relating to the use by a prisoner of their computer in their cell, the head of the correctional services centre may, after considering any representations the prisoner may make, direct that the prisoner may not use their computer in their cell.

7. The first and second respondents are to pay the cost of this application jointly and severally, the one paying the other to be absolved.'

4 The first and second appellants are to pay, jointly and severally, the costs of the application for leave to appeal before the high court.

5 The first and second appellants are to pay, jointly and severally, the costs of the appeal, including the costs of two counsel.

6 The first and second appellants are directed to disseminate this order to all correctional centres and make it available to prisoners, within ten days of the order."

[5] It is the applicants' case that the respondents failed or refuse to implement the order of the Supreme Court of Appeal. As a result, and on 30 November 2023, they caused an application to be launched seeking a declaration of contempt against the respondents, an order enforcing the decision of the Supreme Court of Appeal and certain interdictory relief.

[6] By the time that this application was launched, however, and on 29 November 2023, being the 15th day after the Supreme Court of Appeal's judgment was handed down, the Minister lodged an application for leave to appeal with the Constitutional Court.[2]

[7] Both parties before me accepted that the order of the Supreme Court of Appeal was suspended by operation of section 18(1) of the Superior Courts Act, 2013 notwithstanding the interim nature of paragraph 6 of the order that substituted that of the High Court.

[8] As a result of the respondents' application for leave to appeal, the applicants sought leave to amend their notice of motion to seek relief in accordance with section 18(3) of the Superior Courts Act, 2013. Ms Ali, who appeared for the Minister did not object to the amendment and it was accordingly granted.

[9] Ms Metzer who, appeared for the applicants, contended that there was irreparable harm to the applicants because, as found by the Supreme Court of Appeal, they are possessed of the right to education and this was being

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[2] In terms of Rule 19(2) of the Constitutional Court Rules, 15 days is afforded to a party seeking leave to appeal from a lower court to the Constitutional Court.

irreparably trammelled upon. Ms Metzer argued, further, that by virtue of the safeguards built into the Supreme Court of Appeal's order there would be no irreparable harm to the State. Thus, it was contended that there are exceptional circumstances present in the instant case because the applicants are possessed of the right to education and the State has failed to make provision of adequate facilities for the full enjoyment of that right.

[10] In all of the circumstances, the submissions advanced by Ms Metzer seem correct.

[11] Section 18(3) of the Superior Courts Act provides:

> "A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders."

[12] In **Incubeta**,[3] Sutherland J, as he then was examined the jurisdictional requirements for relief in terms of section 18(3) of the Superior Courts Act, 2013. The learned judge held:

> "[16] It seems to me that there is indeed a new dimension introduced to the test by the provisions of s 18. The test is twofold. The requirements are:
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> - First, whether or not 'exceptional circumstances' exist; and
> - Second, proof on a balance of probabilities by the applicant of —

[3] **Incubeta Holdings (Pty) Ltd and Another v Ellis and Another** 2014 (3) SA 189 (GJ); **Knoop N.O. v Gupta (Execution)** 2021 (3) SA 135 (SCA) at [45] to [50]

- o the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and

- o the absence of irreparable harm to the respondent/loser, who seeks leave to appeal.

[17] What constitutes 'exceptional circumstances' has been addressed by Thring J in *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another* 2002 (6) SA 150 (C), where a summation of the meaning of the phrase is given as follows at 156I – 157C:

> 'What does emerge from an examination of the authorities, however, seems to me to be the following:
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> 1. What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; "besonder", "seldsaam", "uitsonderlik", or "in hoë mate ongewoon.
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> 2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
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> 3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.
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> 4. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
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> 5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.'

> [18] Significantly, although it is accepted in that judgment that what is cognisable as 'exceptional circumstances' may be indefinable and difficult to articulate, the conclusion that such circumstances exist in a given case is not a product of a discretion, but a finding of fact."

[13] Ms Alli, however, constrained by the respondents' answering affidavit that raised only the issue of an application for leave to appeal to the Constitutional Court, argued that the policy struck down by the Supreme Court of Appeal remained effective pending the implementation of a revised policy. As such, she argued that there were neither exceptional circumstances nor was there any irreparable harm to the applicants because they still enjoyed the rights that they had prior to the Supreme Court of Appeal's judgment enjoyed.

[14] I am unable to agree with the submissions advanced by Ms Ali.

[14.1] The argument that the applicants' rights remain unaffected is incongruent with the interim mechanism which the Supreme Court of Appeal put in place.

[14.2] The interim mechanism was designed to fill the hiatus between 8 November 2023 and the promulgation of a new (lawful) policy some twelve months hence.

[14.3] The clear purpose of this interim arrangement is to give effect to the applicants' constitutional rights. Thus, the Supreme Court of Appeal was acutely aware that there was an ongoing infringement of

fundamental rights that had to be arrested pending the preparation and promulgation of a revised policy that permits the use of personal computers in cells for study purposes.[4] To my mind, this gives rise to exceptional circumstances.

[14.4] Ms Ali did not, nor was she able to given the answering affidavit filed on behalf of the respondents, advance a case that the applicants may not be the bearers of the rights that the Supreme Court of Appeal found.

[14.5] Once one accepts that the applicants are the bearers of proposition, there is, axiomatically, irreparable harm to the applicants because the State is standing in the way of the full enjoyment of their constitutional rights. In the instant case, the harm is a loss of time or opportunity to study and further academic pursuits. This can never be undone.

[14.6] In effect, the relief sought by the applicants is only the implementation of the interim relief granted by the Supreme Court of Appeal to cater for the aforesaid hiatus. There is no answer from the respondents as to how this may occasion irreparable harm to them. The interim order made by the Supreme Court of Appeal was expressly designed to mitigate risk of harm to the respondents.[5]

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4 **Ntuli** at [36]
5 *ibid*

[15] Now, ordinarily, the prospects of success of an appeal form part of the consideration of exceptional circumstances.[6] The respondents did not place their application for leave to appeal to the Constitutional Court into evidence. As such the grounds upon which leave to appeal is sought are unknown and the prospects of success cannot be considered.

[16] In the result, I am satisfied that the jurisdictional facts necessary to found relief in terms of section 18(3) of the Superior Courts Act, 2013 have been established.

[17] Finally, on the issue of costs. It is now settled law that in proceedings for the vindication of rights against the State the principle in **Biowatch**[7] finds application.

[18] Accordingly, the following order is made:

1. Pending the outcome of the respondents' application for leave to appeal to the Constitutional Court in **Minister of Justice and Constitutional development and Others v Ntuli (Judicial Inspectorate for Correctional services intervening as *amicus curiae*)** [2023] ZASCA 146 (8 November 2023) and any appeal that may follow thereupon, paragraph 6 of the replaced order is declared to be effective.

2. The first respondent is to pay the costs of this application.

[6] **University of the Free State v Afriforum and Another** 2018 (3) SA 428 (SCA) at [15]

[7] **Biowatch Trust v Registrar, Genetic Resources and Others** 2009 (6) SA 232 (CC) at [56]

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A W PULLINGER

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 9 January 2023.

DATE OF HEARING: **7 DECEMBER 2023**

DATE OF JUDGMENT: **9 JANUARY 2024**

APPEARANCES:

COUNSEL FOR THE APPLICANT:	**L METZER (Ms)**
ATTORNEY FOR THE APPLICANT:	**STRYDOM M AND ASSOCIATES**
COUNSEL FOR THE RESPONDENTS:	**N ALI (Ms)**
ATTORNEY FOR THE RESPONDENTS:	**STATE ATTORNEY**