

REPUBLIC OF SOUTH AFRICA



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

Case Number: 038179/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
17 January 2024	_____
DATE	SIGNATURE

In the matter between:

NDHLOVU, XOLANE ZIGGY

Applicant

and

THE MINISTER OF JUSTICE & CORRECTIONAL SERVICES

First Respondent

THE AREA COMMISSIONER LEEUWKOP CORRECTIONAL SERVICES

Second Respondent

THE HEAD OF LEEUWKOP CORRECTIONAL CENTRE

Third Respondent

THE HEAD OF CASE MANAGEMENT COMMITTEE LEEUWKOP PRISON

Fourth Respondent

JUDGMENT

MIA, J

- [1] The applicant brings an application seeking the review and setting aside of the decision taken by the respondents on 18 May 2022 to transfer the applicant from Leeuwkop Medium C Prison to Ebongweni Correctional Centre. The applicant seeks an order that he be transferred to Johannesburg Medium B or Devon facility forthwith and that the respondents pay the costs of the application. The respondents opposed the application.
- [2] The application that was served before me referenced annexures attached to the application, which included a previous application when the applicant sought urgent relief from this court in June 2022 and November 2022. The applicant did not obtain relief in both previous applications. They were struck from the roll for lack of urgency.

Background facts

- [3] The applicant indicated in the founding affidavit that he is serving a sentence of 16 years cumulatively on three counts, on charges including attempted murder, impersonating a police officer and possession of an unlicensed firearm. The sentence was handed down in October 2014. He anticipated he would be eligible for parole in October 2022. The applicant maintains that his conduct was exemplary throughout the period he served his sentence. He attached reports from a correctional officer indicating his participation in programmes to rehabilitate offenders. He also relied upon his enrollment at Oxford Academy. He also relied on a donation to the prison of several television sets and a substantial sum of R500 000 (five hundred thousand rands) to support his excellent conduct and suggest he worked toward being released on parole.
- [4] In contrast to the above good conduct, the applicant mentions that he experienced difficulties with a senior official, namely Ms Magabane. These difficulties arose, he noted after he disclosed that the official was a beneficiary of drug-related activities. He was assaulted at the instance of Ms Magabane. The applicant stated that he laid charges in respect of the assault. The matter was not investigated as detectives were busy with other matters. He required a

transfer to a different facility and approached this court for an order. As a result, he was transferred to Leeuwkop Correctional Centre.

- [5] After the applicant was transferred to Leeuwkop Correctional Facility in terms of an order of this court, an incident occurred on 18 May 2020 where inmates in possession of knives attempted to assault Correctional Centre officials. The encounter resulted in two inmates being killed. A lockdown was declared, and cells were searched. The applicant occupied a cell with thirty other sentenced offenders. When prison officials entered the cell, they found the applicant's laptop, which he declared was required for study purposes. They also found a cell phone in the cell on this occasion. Given the value of the cellphone, the officials believed that the applicant was the owner. The applicant denied this. He indicated he was previously found in possession of a cell phone and was aware of the consequences of such an offence.
- [6] He maintained that he was assaulted by the correctional centre officials and required hospitalisation. When he returned from the hospital, he was summoned to a disciplinary enquiry relating to the cellphone. According to the applicant, he did not attend the disciplinary enquiry, and he was not informed of the outcome of the disciplinary enquiry. Shortly after the enquiry, he and other inmates occupying the same cell were transferred to Ebongweni Correctional Centre. After he made enquiries, he discovered that it was suspected that they were involved in the assault incident at Leeuwkop Correctional Centre relating to the stabbing of the correction centre officials and the possession of the cellphone. Therefore, they were transferred to Ebongweni Correctional Centre. The matter was referred to the Hawks, who took possession of the cell phone to access information on the phone.
- [7] He maintains that his enquiries and his investigations led him to conclude that the difficulties that he had with Ms Magabane, who was stationed at Modderbee Correctional Centre whilst he was there, was the reason for his transfer. He believes his difficulties with Ms Magabane arose when he exposed drug operations from which he alleged she benefitted. In response, he maintained he was assaulted at her direction after which he laid a charge of

assault at Benoni Police station which did not progress. He stated that Ms Magabane followed him to Leeuwkop Correctional Centre. Against this background, he concluded that his transfer to Ebongweni Correctional Centre in Kokstad “was irrational”. He was surprised that it was a maximum security facility, not a medium security facility, when, to his mind, he was “left with a lousy 4 months” for him to be considered for parole.

[8] In *Dyantyi v Rhodes University and Others*,¹ the Court stated —

“In Hoexter & G Penfold *Administrative Law in South Africa* 3 ed (2021) at 501 it is said that:

'(P)rocedural fairness is a principle of good administration that requires a sensitive rather than heavy-handed application. Context is all-important: the content of fairness is not static but must be tailored to the particular circumstances of each case. There is no room now for the all-or-nothing approach to fairness that characterised our pre-democratic law, an approach that tended to produce results that were either overly burdensome for the administration or entirely unhelpful to the complainant.'

At common law the opportunity of an individual to present evidence that supports his or her case and to controvert the evidence against him or her 'is the essence of a fair hearing and the courts have always insisted upon it'. See Lawrence Baxter *Administrative Law* 1 ed (1984) (3rd impression 1991) at 553. Today this forms part of the reasonable opportunity to make representations under s 3(2)(b) (1)(ii) of PAJA.

In accordance with the position at common law, there is no general right to legal representation under PAJA. Unless a relevant instrument extends the right to legal representation, it is limited by s 3(3)(a) to serious or complex cases. Even in such cases there is no general right to the services of a specific legal representative or representatives. Whether, when and to what extent an affected person should be permitted or enabled to obtain or retain the services of a particular legal representative has to be determined by a similar balancing exercise to the one referred to in the previous paragraph.”

[9] The issues for determination are thus —

¹ *Dyantyi v Rhodes University and Others* 2023(1) 32 (SCA) para 21-22.

- a. The point *in limine* raised by the respondents.
- b. Whether the decision taken by the respondents should be reviewed and set aside?
- c. In considering the above, the lawfulness of the respondent's conduct, the rationality is to be considered as well.

[10] I deal with the point *in limine* first. Counsel appearing on behalf of the respondents submitted that the applicant relied on hearsay evidence in the supplementary affidavit. There was no confirmatory affidavit to support the affidavit of Mr Quinton Khumalo, where he referred to his discussion with the head of Ebongweni Correctional Centre, namely Mr Phakade. The applicant relied upon the information furnished to Mr Khumalo orally by Mr Phakade to support the finding of unlawfulness. Mr Khumalo's affidavit indicates that Mr Phakade permitted him to have insight into the record of the disciplinary hearing as requested in the correspondence dated 30 May 2022.

[11] The applicant was granted access to the information requested in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA)². However, he also referred to information Mr Phakade allegedly communicated beyond having insight into the record of the disciplinary enquiry. He maintained that this constituted support for the irrational and unlawful basis of the transfer. There is no corroboration or confirmation from Mr Phakade. The only documents appended to the applicant's application refer to reasons for transferring him to the Ebongweni Correctional Centre. These refer to the applicant being a high-risk offender.

[12] The applicant's written request regarding PAIA was to have insight into the record of the disciplinary enquiry. This insight was furnished to the applicant's attorney. In addition, counsel for the respondent submitted that the applicants were permitted to take a written copy which they have not placed before this court. Given the *Dyanti* decision above and the consequences of a finding against the applicant that would affect his parole, I am of the view that the consequences are serious. In the absence of the disciplinary enquiry record, it

² Section 18(1) Promotion of access to Information Act 2 of 2000

is impossible to determine whether he was denied legal representation. The record of a disciplinary enquiry attached suggests that a disciplinary enquiry was postponed for legal representation. It is not the disciplinary enquiry referred to. I have also considered counsel for the respondents' submission that the two issues were conflated. The legal representation at the disciplinary enquiry and the decision to transfer the applicant.

- [13] Counsel for the respondents' argued *in limine* that the applicant was granted access to the record in terms of PAIA and was allowed to secure a copy of the record and did not attach a copy. To the extent that the applicant seeks to have the decision taken at the disciplinary enquiry reviewed, the record is required, and the applicant ought to have attached the written record of the disciplinary enquiry. This is so especially when there is a dispute relating to whether the applicant was permitted legal representation or not. The applicant in this application relies on Mr Khumalo's insight into the record, which is not sufficient for review purposes.
- [14] Where the applicant has not attached the record of the decision he seeks to review, whether it is the disciplinary enquiry or the reason for the transfer, it is impossible to consider whether the decision is rationally connected to the purpose for which the power has been given. Moreover, the applicant relies on hearsay evidence and fails to attach a confirmatory affidavit. In this circumstance, the point *in limine* is upheld. I am of the view that this is dispositive of the matter. If I am wrong on this issue, I deal with the remainder of the issues raised.
- [15] On the further aspect I have invited counsel to make further submissions regarding whether the applicant has exhausted the internal review prior to approaching this court. I have considered the submissions made by both counsel.
- [16] Counsel for the applicant argued that the disciplinary enquiry found the applicant guilty and demoted him contrary to section 24(3) of the Correction Services Act 111 of 1998 (the Act). Counsel also submitted that he was denied

legal representation referring to the record and argued that the applicant had a right of appeal. It is evident that this right of appeal was not exercised as the applicant lodged the present application. Counsel submitted that the applicant was not aware of the record. At the time that the matter came before this court applicant or his counsel had had sight of the record. Counsel for the respondent submitted that the respondent did not exhaust internal remedies moreover that he failed to lodge a proper review. In support of these submissions, it was argued that the applicant failed to seek reasons for the transfer and failed to make any enquiries prior to lodging the application for relief.

[17] Counsel for the applicant noted in submissions that a court could not consider a review of administrative action until the internal remedies provided were exhausted. The submission noted the applicant's grievance with the lack of legal representation at the disciplinary enquiry and the penalty handed down in terms of section 24 of the Act. The applicant disputes participation in the proceedings and disagrees with the penalty. The only request was to have insight into the record which was furnished. The written copy was eventually also made available. Section 24 of the Act provides:

“(3) Where the hearing takes place before the Head of the Correctional Centre or the authorized official, the following penalties may be imposed severally or in the alternative:

- (a) a reprimand;
- (b) a loss of gratuity for a period not exceeding one month;
- (c) restriction of immunities for a period not exceeding 7 days.

.....

(4)....

(5) Where the hearing takes place before a disciplinary official, the following penalties may be imposed severally or in the alternative:

- (a) reprimand;
- (b) a loss of gratuity for a period not exceeding 2 months;
- (c) a restriction of amenities not exceeding 42 days
- (d) in the case of series were repeated infringements, segregation in order to undergo specific programs aimed at correcting his or her behavior cover

with a loss of gratuity and restriction of amenities as contemplated in paragraphs (b) and (c)

- (6) The penalties referred to in subsections (3) and (5) may be suspended on such conditions as the presiding official deems fit.
- (7) At the request of the inmate proceedings resulting in any penalty other than a penalty contemplated in subsection 5D must be referred for review to the National Commissioner.”

[18] The applicant is permitted to refer to the outcome of the disciplinary enquiry proceeding to the National Commissioner in terms of section 24(7) of the Act for review. There is no indication that this decision was referred in terms of section 24(7) of the Act. The applicant is aware that internal remedies ought to have been utilised before approaching this court, as is evident from counsel submissions.

[19] On the facts before me, the applicant has not exhausted the internal remedies available, consequently I am not able to consider the matter in terms of PAJA until the applicant has exhausted internal remedies.

[20] Consequently, I grant the following order —

- 1.The application is dismissed.
- 2.There is no order for costs.

SC Mia
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant:

Mr Q Khumalo
Instructed by Quinton Khumalo Inc

For the Respondent:

Adv N Ali
Instructed by The State Attorney

Heard: 07 August 2023

Delivered: 17 January 2024