



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 539/2020

In the matter between:

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

FIRST APPELLANT

**THE NATIONAL COMMISSIONER OF
CORRECTIONAL SERVICES**

SECOND APPELLANT

**HEAD OF LEEUWKOP MEDIUM “C”
CORRECTIONAL CENTRE**

THIRD APPELLANT

and

MBALENHLE SIDNEY NTULI

RESPONDENT

**JUDICIAL INSPECTORATE
FOR CORRECTIONAL SERVICES**

AMICUS CURIAE

Neutral citation: *Minister of Justice and Constitutional Development and Others v Ntuli (Judicial Inspectorate for Correctional services intervening as amicus curiae)* (539/2020) [2023] ZASCA 146 (8 NOVEMBER 2023)

Coram: DAMBUZA, MEYER, MATOJANE and GOOSEN JJA and UNTERHALTER AJA

Heard: 13 September 2023

Delivered: 8 November 2023

Summary: Constitutional law – the right to further education – s 29(1)(b) of the Constitution – unfair discrimination – Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) – whether the Policy Procedure Directorate Formal Education Programmes (the Policy) of the Department of Correctional Services constitutes unfair discrimination in terms of the Equality Act – high court had no jurisdiction to make an order in terms of the Equality Act – whether the Policy constitutes an infringement of the right to further education of prisoners and is therefore inconsistent with the Constitution – the Policy prohibiting a prisoner from using their personal computer in their cell to further their studies is an infringement of s 29(1)(b) of the Constitution – content of the right includes the right to pursue further education without state interference – security concerns not established as a ground of limitation.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Matsemela AJ, sitting as court of first instance):

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.

JUDGMENT

Unterhalter AJA (Dambuza, Meyer, Matojane and Goosen JJA concurring):

Introduction

[1] The respondent, Mr Ntuli, is a prisoner. He is serving a 20 year sentence of imprisonment. He has, since July 2018, been imprisoned at the Johannesburg Medium C Correctional Centre. With the support of his family, Mr Ntuli registered with the Oxbridge Academy to pursue a computer studies course, with a focus upon data processing. Mr Ntuli requires the use of a computer to do so. On 6 August 2018, Mr Ntuli addressed a request to the head of the prison to use his personal computer in his cell to progress his studies. On 16 August 2018, Mr Ntuli received a terse answer: ‘Not approved. Educational policy is clear. No personal computers in cells’. He escalated his request to the Regional Commissioner, with no better outcome. She responded as follows: ‘Due to security challenges of offenders utilising computers and laptops for other activities except for study purposes at most Correctional Centres, the offender cannot be allowed to have the computer in his cell but will be afforded an opportunity to use the computer room for study purposes.’

[2] Mr Ntuli brought proceedings in the Gauteng Division of the High Court, Johannesburg (the high court), to challenge the Policy Procedures Directorate

Formal Education (the policy), pursuant to which his request to use his personal computer in his cell for the purpose of his studies was declined. The high court (*per* Matsemela AJ) found that the policy was an unjustified limitation of Mr Ntuli's constitutional right to further education (s 29(1)(b) of the Constitution) and constituted unfair discrimination in terms of the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act). The high court declared that Mr Ntuli is entitled to use his personal computer in his cell, without a modem, for so long as he remains a registered student with any recognised tertiary institution in South Africa, subject to inspections, at any time, by prison staff.

[3] The appellants, the Minister of Justice and Correctional Services, the National Commissioner of Correctional Services and the Head of Central Prison Johannesburg, sought leave to appeal. The high court refused, but this Court granted leave. The appellants come to this Court as applicants to condone the late filing of the appeal record and to reinstate their appeal, which had lapsed.

[4] The first issue we must determine is whether the appellants should be granted condonation for the late filing of the appeal record and the reinstatement of the appeal. Mr Ntuli opposed this relief.

[5] The appellants had filed their application for leave to appeal to this Court out of time. Condonation was granted. The appellants failed to file the record of appeal, as required, on 21 October 2020. They did not cure this failure, and on 29 January 2021 the appeal lapsed. It was only on 28 June 2021 that the appellants filed their application for condonation and the reinstatement of the lapsed appeal. All the while the appellants have failed to permit Mr Ntuli the benefit of the high

court order, to which he became entitled on the lapsing of the appeal. The appellants' principal explanation for its serial failures is the inexperience of their attorneys.

[6] That explanation, such as it is, neither justifies the period of the delay in prosecuting the appeal, nor is it a sufficient explanation. Those who take on appellate work assume the responsibility of knowing the rules, and litigants cannot be supine. They must monitor the progress of their litigation, and replace attorneys who do not do their work. The failure to comply with the high court order, once the appeal had lapsed, is egregious conduct and counts strongly against reinstatement. Those who flout the law should not seek the court's indulgence. However, the issues that arise in this matter are of great importance, not just for Mr Ntuli, but for prisoners throughout the country. The policy that Mr Ntuli has challenged governs how prisoners may study in prison. That concerns the welfare and rights of many prisoners. For this reason, an authoritative decision is required as to the legality of the policy. This warrants the reinstatement of the appeal, and the grant of the condonation sought. But the conduct of the appellants cannot go without sanction. An award of attorney client costs will be made to mark the court's displeasure.

The challenge to the policy

[7] I turn then to the merits of the appeal. Mr Ntuli has been denied the use of his personal computer in his cell so that he might further his studies. That decision rests upon the policy. The policy was approved in 2007 by the Acting Commissioner. The policy has a laudable objective: 'to utilise education as a basis for further development opportunities for offenders'. It was rightly recognised by the appellants that encouraging prisoners to follow a course of formal education is not only a good in itself, but enhances the capabilities of prisoners, and their life chances upon release. The policy contains certain sensible measures, including

computer based training. As to the use of personal computers by prisoners, this is what the policy states, in relevant part: ‘only registered students who have a need for a computer as supportive of his/her studies . . . are allowed to have a personal computer within the Correctional Facility. . . . A room within the Correctional Centre or at the School must be made available specifically for the placement of the personal computers of students. . . . No computer shall be allowed in any cell (communal and/or single).’

[8] The policy permits a prisoner registered for a course of study to use their personal computer. But only in a designated room, at set times, and under supervision. The policy prohibits a prisoner from using their personal computer in any cell. That prohibition has been applied to Mr Ntuli. In his founding affidavit, Mr Ntuli explained that he needs the use of his personal computer to complete his course of study. His course focuses upon data processing; a computer is both the object of study and the means by which that study takes place. Although Mr Ntuli has had access to the prison’s computer centre, the centre is only open from 09h00 to 14h00, Monday to Friday. Mr Ntuli is confined in his cell for 17 hours and 45 minutes every day. This long stretch of time could be used for study with the use of his personal computer. However, he complains, the policy prohibits such use, and thus restricts his ability to pursue his studies. Mr Ntuli, however, recognises that his use of a personal computer in his cell should be subject to inspection and the restriction that he may not connect his personal computer to the internet via a modem.

[9] In his founding affidavit, Mr Ntuli challenged the policy on two grounds. First, the prohibition upon the use of his personal computer in his cell to further his studies is an unjustified limitation upon his constitutional right to further

education. Second, the policy amounts to unfair discrimination in terms of the Equality Act. This is so, he contended, because the policy restricts the opportunities of prisoners to enjoy the right to further education in comparison to persons not imprisoned, and thereby unfairly discriminates against prisoners. Furthermore, the application of the policy unfairly discriminates even as between classes of prisoners. Mr Ntuli avers that he was permitted the use of his personal computer in his cell, in order to study, when he was imprisoned in Johannesburg Medium 'B' Correctional Centre, but he was prevented from doing so upon his transfer to Johannesburg Medium 'C' Correctional Centre.

[10] With the benefit of securing legal representation, Mr Ntuli's challenge has been enlarged by way of submission. The policy, it is submitted, is inconsistent with the Constitution and invalid on the following grounds:

- (a) it unjustifiably limits the conditions of detention consistent with human dignity, including access to reading material, in terms of s 35(2)(b) of the Constitution;
- (b) it offends against the prohibition of unfair discrimination in s 9(3) of the Constitution;
- (c) it infringes Mr Ntuli's right to human dignity in s 10 of the Constitution;
- (d) it is inconsistent with the principle of legality in that it is *ultra vires* and irrational.

[11] These grounds stand with Mr Ntuli's original challenge based upon his right to further education in terms of s 29(1)(b) of the Constitution and the unfair discrimination brought about by the policy in terms of the Equality Act. We were invited to consider these rights together (or to use the current terminology, as intersectional) and assess the impact of the policy upon these rights, so understood.

The appellants objected to the expansion of the rights now invoked by Mr Ntuli as this case was not made in his founding affidavit.

Unfair discrimination

[12] I consider, first, Mr Ntuli's challenge to the policy under the Equality Act. Did the high court enjoy jurisdiction to entertain this challenge? I think not. A person wishing to institute proceedings under the Equality Act must notify the clerk of the equality court and a presiding officer of the equality court must decide whether the matter is to be heard in the equality court (s 20(3)(a)). Although every high court is an equality court in its area of jurisdiction, a judge of the high court can only serve as a presiding officer of the equality court if so designated (s 16(1)).

[13] Designation is a ministerial act taken by the Minister after consultation with the Judge President (s 16(1)(b)). A high court judge, once designated, serves as a presiding officer of the equality court. Until so designated, a high court judge enjoys no such competence. When a matter comes before the high court which raises claims both under the Equality Act and outside of it, the judge of the high court before whom this matter is brought has the power to entertain all of these claims only if he or she is a judge designated as a presiding officer of the equality court. If the judge of the high court has not been so designated, then the judge cannot entertain those claims which have been brought under the Equality Act.

[14] We raised this matter with the parties. They could not demonstrate to us that Matsemela AJ, who presided in the court below, had been designated as a presiding officer of the equality court. Once that is so, Matsemela AJ enjoyed no power to entertain Mr Ntuli's claim under the Equality Act. The court below made

an order that the policy is declared to constitute unfair discrimination in terms of the Equality Act. Matsemela AJ had no power to make such an order, and, as a result, that order must be set aside.

Constitutional rights

[15] There is a principle in our law, of some considerable pedigree, that the power of the State to punish with imprisonment those convicted of certain crimes does not deprive prisoners of all their fundamental rights. In *Whittaker & Morant v Roos & Batemen*,¹ Innes CJ formulated the principle in this way: ‘True, the plaintiffs’ freedom had been greatly impaired by the legal process of imprisonment; but they were entitled to demand respect for what remained. The fact that their liberty had been curtailed could afford no excuse for a further illegal encroachment upon it.’ This principle was followed in *Goldberg & others v Minister of Prisons & others*² and *Mandela v Minister of Prisons*,³ and given yet fuller expression with the entrenchment of the Bill of Rights under the Constitution. In *S v Makwanyane & another*,⁴ Chaskalson CJ framed the principle thus:

‘Imprisonment is a severe punishment; but prisoners retain all the rights to which every person is entitled under chap 3, subject only to limitations imposed by the prison regime that are justifiable under section 33.’

[16] This principle is often referred to as the *residuum* principle. This description is inapt, if the principle is properly located within the Constitution. Before the

¹ *Whittaker & Morant v Roos & Batemen* 1912 AD 92 at 122.

² *Goldberg & others v Minister of Prisons & others* 1979 (1) SA 14 (A) at 39-40.

³ *Mandela v Minister of Prisons* 1983 (1) SA 938 (A) at 957 E-F.

⁴ *S v Makwanyane & another* [1995] ZACC 3; 1995 (3) SA 391 (CC) 1995 (3) SA 391 para 143. The case was decided under the interim constitution and hence reflects the provisions of that constitution that entrenched fundamental rights and provided for limitation. See also *Sonke Gender Justice NPC v President of the Republic of South Africa* [2020] ZACC 26; 2021 (3) BCLR 269 (CC) para 34.

Constitution, the *residuum* principle was shorthand for the proposition that whatever was not lawfully taken away from a prisoner to exact punishment was retained by the prisoner as of right. This was an important protection, but nevertheless vulnerable to the expansive powers of legislative supremacy. Under the Constitution, however, prisoners have the rights given to all persons, entrenched in the Bill of Rights, subject to a regime of punishment that meets the criteria of limitation set out in s 36 of the Constitution. Hence, a prisoner does not have a *residuum* of rights. A prisoner enjoys the rights the Constitution extends to all persons and those specifically given to every sentenced prisoner (s 35(2)), unless these rights are limited by a law of general application in terms of s 36. So understood, it is for the State to justify a measure that compromises a prisoner's constitutional rights. Following what is said in s 36, it must be a measure that is a law of general application; and that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[17] There may be cases in which the generosity of this constitutional framework gives rise to difficult issues of constitutional justification as to what a regime of punishment requires. But this appeal proceeds from an uncontroversial premise, upon which the parties are agreed: prisoners should be permitted to pursue their further education. It is a good in itself; it promotes self-development; it uses time fruitfully; and it may serve the broader aim of rehabilitation. The dispute before us is not whether a prisoner's pursuit of further education should be permitted, but how it should be done.

[18] Mr Ntuli relies upon a number of rights as the basis of his claim to make use of his personal computer in his cell to study. I commence by considering one of the

rights invoked by Mr Ntuli: the right to further education. Section 29(1)(b) of the Constitution provides that:

‘(1) Everyone has the right –

....

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

[19] We are not here concerned with the positive duty resting upon the State to take reasonable measures to make further education available and accessible. Mr Ntuli does not require the State to make available to him resources to pursue his further education. His family has supported him to enrol in his course of study and has provided him with a personal computer to do so. What this case turns upon is whether the State may prevent Mr Ntuli from using his personal computer to study in his cell.

[20] The analysis must thus begin by determining the content of the right to further education. It is the right of every person, at a minimum, to enjoy the freedom to enrol in a course of study for which they qualify, into which they have been selected, and for which they have paid. They should then be able to pursue this course of study. The right may well have a richer content. But the negative freedom the right confers is to restrain the State from taking measures, absent justification, that restrict a person from taking these actions.

[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.

[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 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.

[24] I should make clear what this conclusion does not decide. First, it does not hold that the State is under an obligation to provide prisoners with a computer for use in their cells to further their education. This issue engages the positive right of s 29(1)(b), and it does not arise in this case. Second, I do not hold that every course of further education requires that a prisoner must be allowed to make use of their personal computer in their cell. Such use will be indispensable for certain courses, if a prisoner is to pursue their studies with diligent application. For other courses, the use of a personal computer for sustained study will be a material benefit. And there may be courses where this is not so. In every case, what matters is whether the ability of a prisoner to pursue their chosen course of study would benefit from access to a personal computer during periods of time when a prisoner is confined to their cell. If there is such a benefit, its removal infringes the right of a prisoner to further education. The extent of the infringement and the justification for doing are then further issues for determination.

[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.

[26] As I have explained, Mr Ntuli's challenge to the policy now relies upon a number of rights, in addition to his right to further education. He also contended that the policy is *ultra vires*. These rights, it was submitted, should be considered as intersectional. The appellants objected to this expansion of Mr Ntuli's challenge to the policy. This objection need not be decided for the following reason. There are cases in which an intersectional approach to the infringement of rights is warranted. For example, where two or more infringements of different rights operate simultaneously, in an inseparable manner, to produce a harmful result, an intersectional analysis may be indicated. But this is not such a case. Here, there is a specific constitutional right to further education, the essential content of which has been infringed by reason of the blanket exclusion effected by the policy. The policy may be assailable by recourse to other constitutional rights which are additive to the right to further education. However, in this case, that exercise of legal analysis appears to me, at best, duplicative of the conclusion to which I have already come. I find it unnecessary, therefore, to consider the additional rights invoked by Mr Ntuli.

Limitation

[27] The policy was approved by the Acting Commissioner. There was some question as to whether the policy constitutes a law of general application. That question is resolved on the basis that s 134(2) of the Correctional Services Act 111 of 1998 provides that the National Commissioner may issue orders, not inconsistent with the Act and the regulations, which must be obeyed by all correctional officials. The power of the National Commissioner to issue orders is a species of delegated legislative action. The policy is such an order, falling within the residual power conferred by s 134(2)(pp), and thus constitutes a law of general application.

[28] In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) & Others*,⁵ a case concerning the right of prisoners to vote, the Constitutional Court affirmed the proposition that limitation requires demonstrable justification. In particular, it must be clear what objective is sought to be achieved by a policy and how the means have been crafted to fulfil that objective.

[29] Here we are concerned to understand the basis of the blanket exclusion contained in the policy that renders it impermissible for a prisoner to make use of their personal computer in their cell for study purposes. The affidavits filed on behalf of the appellants offer, in essence, a two-fold justification for the blanket exclusion. First, Mr Ntuli enjoys access to the computer based training facilities in the prison, Medium “C”, in which he is serving his sentence. These facilities, it is contended, offer Mr Ntuli sufficient access to computers to permit him to pursue his chosen course of study. Second, Medium “C”, it is claimed, has been ‘experiencing issues with inmates smuggling in cell phones which can be used as hotspots for laptops if such is permitted in the cell.’ The evidence offered is a register which reflects that, together with money and dagga, cell phones have also been found and confiscated.

[30] The first justification cannot do the work required of it. Mr Ntuli’s case is not that he has been afforded no access to a computer to pursue his chosen course of study. Rather, he complains that his right to further education should permit him to make use of the many hours when he is confined in his cell to study. And to do this, he requires the use of his personal computer. The use of his time in this way is

⁵ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) & Others* [2004] ZACC 10; 2005 (3) SA 280 (CC) 2004 (5) BCLR 445 (CC) para 65.

an aspect of Mr Ntuli's right to further his education. It is no answer for the appellants to say that less access to a computer suffices. Suffices, it may be asked, for what? It is the curtailment of access that requires justification in circumstances where Mr Ntuli is confined in his cell and it is not suggested that enforced idleness serves some proper punitive purpose. That Mr Ntuli may have been able to pass his course with limited access to a computer is a credit to him, but it does not serve to justify why he should not be permitted to benefit from the access he seeks to study further and, it would seem, better.

[31] As to the second justification, the maintenance of security in prisons is a matter of great importance. It is necessary for the welfare of prisoners, officials who work in the prisons, and the public at large. The evidence indicates that cell phones are smuggled into prisons. Unsupervised access by prisoners to cell phones undoubtedly poses a security risk. The particular risk identified and relied upon by the appellants is that a personal computer, even without a modem, may be paired with a cell phone to secure access to the internet and email.

[32] Even if this is so, it does not provide any objective assessment of the incremental risk posed by allowing prisoners to study with the use of a personal computer in their cells. Prisoners who have smuggled cell phones into prison already have unauthorised access to the outside world. Whatever security risk that poses is already in place. So the question is: how much additional risk comes about because of the access that certain prisoners would enjoy to personal computers in their cells? That is unanswered on the papers. Absent some factual basis to suppose that some significant additional risk arises, there is nothing but speculation to weigh in the balance against the blanket prohibition that infringes Mr Ntuli's constitutional right to further education. This second justification is thus

unavailing. Once that is so, the policy's blanket exclusion falls far below the standard of demonstrable justification.

Remedy

[33] For the reasons given, the provision of the policy that prohibits the use of personal computers in cells infringes the right of prisoners to further education, where such prisoners require the use of a personal computer to pursue their studies. The high court was correct to recognise this infringement and the insufficiency of the justification relied upon by the appellants. The appeal must therefore fail, save only in one respect. The court below declared that the offending provision of the policy constituted unfair discrimination under the Equality Act. It had no power to make this order, and the order must be set aside.

[34] Mr Ntuli has therefore been substantially successful. Therefore, there is no reason why he should not be awarded costs, including the costs of two counsel. As to the appellants' application for reinstatement and condonation, as I have explained, their attorney's conduct was not acceptable, and attorney and client costs must attach to the grant of condonation and reinstatement.

[35] As to the substance of the remedy, the blanket prohibition in the policy upon the use by prisoners of personal computers in their cells cannot stand. It is invalid and must be set aside. There are different ways in which the policy could be formulated so as to bring it into conformity with the Constitution, and the appellants should be afforded an opportunity to do so. Twelve months would be a reasonable time within which to accomplish this task. I consider that it would be just and equitable, therefore, to suspend the order of invalidity for this period of time to allow the appellants to revise their policy. The Judicial Inspectorate for

Correctional Services was admitted as an *amicus curiae*, and we are grateful for the assistance its counsel gave to us. Given its interest in this case, it would be helpful if the appellants were to formulate a revised policy on the use of personal computers in cells, after consultation with the Judicial Inspectorate.

[36] The suspension of the order of invalidity should not, however, deprive Mr Ntuli, in the interim, of the right he has vindicated in these proceedings. But that vindication is of wider import, and other prisoners who are pursuing their studies should also enjoy their right to further education in the interim. The interim remedy is fashioned to recognise the right of prisoners to make use of their personal computers in their cells, where the course of study for which they have registered requires the use of a computer to support their studies or where a computer is a compulsory part of the course. That access is, however, made subject to the following: the use of the personal computer must take place without the use of a modem; the prisoner must remain a registered student; the use of a personal computer is subject to inspection; and the withdrawal of use rights from a prisoner may take place upon breach of the rules of use. The publication of these orders within the prison system is also ordered.

[37] In the result, the following order is made:

- 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.

D N UNTERHALTER
ACTING JUDGE OF APPEAL

Appearances

For the appellants

F Nalane SC and K Motla

Instructed by:

The State Attorney, Johannesburg

The State Attorney, Bloemfontein

For the respondent:

J Brickhill and I Kentridge

Instructed by:

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Symington de Kock, Bloemfontein

For *amicus curiae*:

N Ferreira and M Salukazana

Instructed by:

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