

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION)**

Case number: 2019/083

**NOT REPORTABLE
OF NO INTEREST TO OTHER JUDGES
REVISED**

In the matter between:

NTULI MS

Applicant

and

**THE MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

1st Respondent

**THE NATIONAL COMMISSIONER
DEPARTMENT OF CORRECTIONAL SERVICES**

2nd Respondent

**THE HEAD OF CENTRE PRISON,
JOHANNESBURG MEDIUM "C" CORRECTIONAL CENTRE**

3rd Respondent

JUDGEMENT

1. Initially, this was an application in which the Applicant sought the following orders:

1.1 That paragraphs 3.5 and 3.6 of the Policy Procedures on formal education programmes approved by the Acting Commissioner of the Correctional Services Department on 8 February 2007, which policy is applicable to all Correctional Centres within South Africa be declared inconsistent with the Constitution of South Africa, Act 108 of 1996 ("the Constitution"), insofar as the use of personal

computers in cells for study and education purposes is concerned;

1.2 That it be declared that the prohibition on the use of laptop computers in cells as contained in the policy approved by the Acting Commissioner: Correctional Services on 8 February 2007 constitutes unfair discrimination in accordance with provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000 ("the PEPUD Act"), as against the Applicant;

1.2.1 That Applicant be entitled to use his personal computer without a modem in his single cell for as long as he remains registered student with any recognized tertiary institution of South Africa;

1.2.2 That Applicant be entitled to have supervised and restricted internet access at reasonable times by using his own personal modem, to any websites which Applicant may from time to time be required to access by his tertiary institution for study purposes.

1.2.3 That personal computer of applicant shall be made available for inspection at any given time to any representative of any of the respondents;

1.3 That first and second respondents be ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved;

1.4 Further and/or alternative relief.

2. A second notice of motion was filed which amends the relief sought on aspect. The amended notice of motion clarifies that Applicant seek an order that he may use his computer in his cell, without the use of a modem.

BACKGROUND

3. The Applicant, is a prisoner currently serving a 20 year sentence in the Johannesburg Medium "C" Correctional Centre.

4. First Respondent is cited as the minister responsible for the Department of Correctional Services. Second Respondent is the Commissioner of Correctional Services, who is appointed as such in terms of the Public Service Act, 1994, read with the provisions of The Correctional Services Act, Act 111 of 1998 ("the Act"). Third Respondent is the head of Prison, Johannesburg Correctional Centre, and he is directly responsible for the implementation of the Act, and the policy provisions applicable to prisons, in the prison.

5. Applicant was convicted of robbery. Johannesburg Medium "C" is a maximum security facility, and is intended to house some of the most dangerous offenders.

6. Applicant is a registered student at Oxbridge Academy pursuing a course in data processing. There is no dispute regarding their need for a computer to further his studies, and in fact, Applicant had previously had the use of his computer in his cell at Medium "B" Correctional Centre for two years.

7. The Applicant was transferred to the Medium "C" Correctional Centre (Medium C) from Medium "B" on the 20 July 2018 for reasons not disclosed. While in Medium "B" he was authorized to have and to use personal desktop computer in his single cell for the purpose of furthering his tertiary education. Upon his arrival at Medium "C" the desktop was removed from him and was told to use the computers in the computer centre.

8. The computer centre is opened from 9H00 to 12H00. Reopens 13H00 to 15H00 Mondays to Fridays. Occasionally opens on weekends but never on public holidays.

9. He is permitted to be outside the cell for 6 hours per day. During the time he is permitted to be outside the cell, he had to take a shower, consume breakfast and lunch, clean his cell and clean his laundry.

10. Since every cell in the entire centre is opened at the same time, the centre is exceptionally noisy and studying with many distractions is extremely challenging.

THE CONSTITUTIONAL MATRIX

11. The Constitution is aimed at creating a society that is based upon equality, dignity and freedom. Section 7 (1) requires the state to respect the individual's basic rights, and not to interfere in the individual's enjoyment of such rights, unless there are objectively justifiable reasons for interfering. The exercise of state power should also not be arbitrary, which entails that decisions should be rationally related to the purpose for which the power is given. See **Pharmaceutical Manufacturers Association of SA: In Ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC)** At par .85

12. The exercise of state power should also not unfairly discriminate against any person or group of persons. Sections 9 (3) and 9 (5) of the Constitution provides:

(1)-(2)....

"(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4).....

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

13. Section 16 (1) (d) of the Constitution provides:

"(1) Everyone has the right to freedom of expression, which includes:

(a) - (c).....

(d) academic freedom and freedom of scientific research."

14. Section 29 (1) (b) of the Constitution provides:

"(1) Everyone has the right-

(a)

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

15. The Constitution recognizes that rights are not absolute, and may be limited. Section 36 of the Constitution reads as follows:

"36. Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justified in an open and democratic society based upon human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the limitation;

(c) the nature and extent of the limitation;

- (d) *the relation between the limitation and its purpose; and*
- (e) *less restrictive means to achieve the purpose.*

(2) *Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."*

16. In order to promote equality between persons, and to give effect to section 9 of the Constitution, the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000 ("the PEPUD Act") was enacted. Its object is, *inter alia*, to prevent unfair discrimination and to protect human dignity as contemplated by sections 9 and 10 of the Constitution.¹

17. Section 6 of PEPUD prohibits the state from unfairly discriminating against any person. Discrimination is defined as follows:

" discrimination means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-

- (a) imposes burdens, obligations or disadvantages on; or*
- (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds."*

18. Prohibited grounds, as referred to in section 6, are defined² 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 upon 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);"*

¹ Section 2 (b) (iv) of the PEPUD Act

² Section 1 of the PEPUD Act

THE POLICY

19. It is against the above constitutional background that I now turn to the correctional services mandate, and the policy under attack.

20. Section 4 of the Correctional Services Act, Act 111 of 1998 reads as follows:

"Approach to safe custody.- (1) Every inmate is required to accept the authority and to obey the lawful instructions of the National Commissioner and correctional officials of the Department and custody officials.

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

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

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

21. Section 18 of the Correctional Services Act provides that every inmate must be allowed access to available reading material of his or her choice, unless such material constitutes a security risk or is not conducive to his or her rehabilitation.

22. The Department is under the control of the 2nd respondent who must perform³ the functions of the department in accordance with the policy determined in accordance with the policy determined by 1st respondent.

23. It is common cause what the framework of the current policy is. In respect of the use of desk top computers, laptops (personal computers), and notebooks by

³ Section 3 (5) and (6) of the Correctional Services Act ,Act 111 of 1998

inmates in prisons, the policy is as follows:

" Only registered students (offenders) who have a need for a computer as supportive of his/her studies, and/or offenders who have registered for a study field/course that requires a computer as compulsory part of the course are allowed to have a personal computer within the Correctional Facility.

All applications relating to the utilization of personal computers received from offenders must be approved by the Head of the Correctional Centre.

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)"

24. I must point out that the previous policy allowed computers in single cells where there was no computer centre, whereas the current policy contains an outright ban on the use of computers in single cells.

ISSUES

25. Applicant complains that he is often deprived of sufficient time to study due to delays in having breakfast and lunch, exercise do laundry, clean his cell and also due to other obligations that they have to attend to. This has to be done within 6 hours.

26. Respondent's objection to applicant being allowed use of his computer in their cells is largely based on the contention that it would create a security threat. Respondent is concerned that inmates may smuggle modems into their cells, or use illegal cell phones to create hotpots. The actual risk that respondents fear is not specified, but presumably they are concerned that inmates' use of computers may either pose a flight risk, or that they may become involved in illegal activities over the internet. Respondent allege that in Medium "B" inmates have smuggled cell phones and use them to communicate with gang members, give instructions to execute and incite crimes.

EVALUATION OF THE FACTS

27. Respondents have not provided any evidence that, where computers have been allowed in cells, even with modems, there has been any security breach as a result thereof.

28. Respondents do not deny that applicants have a right to further education. That education is the core of a successful society has long been recognized. In the cells of this court building, the Freedom Charter was inscribed on the walls by the Rivonia Trialists during their trial in 1964. One of the principles outlined therein is that the doors of learning shall be opened to all. The right to further education has also been enshrined in section 29 (1) (b) of the Constitution. A reading of the section shows that not only is the individual's right to further education protected, a positive obligation is placed upon the state to make such education progressively "available and accessible". It is a right that, in an ever-advancing world, should be jealously guarded.

29. More particularly, prisoners should be encouraged to obtain further education, rather than being impeded from so-doing. Whereas previously the purpose of sentencing had been predominantly aimed at punishment, the importance of rehabilitation is now at the forefront. It is, after all, in the interests of society that ex-inmates are able to function fully in society.

30. A press release on 5 September 2013 by First Respondent's predecessor, Minister Sibusiso Ndebele was quoted in **Ambrose Hennie and others v Minister of Correctional Services and others (729/2015) [2015] ZAGPPHC 311** as having stated:

"Research shows there is an inverse relation between knowledge, culture and crime. The greater the knowledge, culture and access to education, the less the crime."

31. Another principle to bear in mind is that the fact that applicant is a prisoner, does not in itself justify a limitation of their rights. In **Goldberg and others v**

Minister of Prisons and others 1979 (1) SA 14 (A) at 39 C-F Corbett JA held as follows:

It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and libertiesof an ordinary citizen except those taken away from him by law, expressly , or those necessarily inconsistent with the circumstances in which he as a prisoner , is placed. Off course, the inroads which incarceration necessarily make upon a prisoner's personal rights and liberties are very considerable....Nevertheless, there is a substantial residuum of basic rights which he cannot be denied; and if he is denied them, then he is entitled, in my view, to legal redress."

33. It was argued that Applicant should make the best out of the situation. It is my view that Applicant has the right to study as much as he please, within the legitimate limitations that prison life inevitably presents. That right is being limited by the policy. The fact that Applicant has should make the best of the situation does not detract from the fact that his right to study has been infringed.

34. The question is whether the limitation is justified. In **The Bill of Rights Handbook**⁴ the learned authors describe the limitation test as follows: *"Put at its simplest, this part of the limitation test requires a law that restricts a fundamental right to do so for reasons that are acceptable to an open and democratic society based on human dignity, equality and freedom. In addition, the law must be reasonable in the sense that it should not invade rights any further than it needs to in order to achieve its purpose. To satisfy the limitation test then, it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purpose of the law)."*

35. The process of analyzing the grounds justifying a limitation entails

⁴ Ian Currie and Johan DeWaal 6th Edition at 162

considering both the relevant policy and factual considerations underpinning the law or policy under attack. In this instance respondents do not allege any policy reasons for limiting the applicant's study time. In fact, the policy is that inmates should be encouraged to study further and to improve themselves. Respondents raise only one factual issue, which is that the use of computers in cells is a security risk, and that it is impossible to monitor.

36. The process of considering whether the limitation is justified, requires a weighing up of competing values. In **S v Makwanyane 1995 (3) SA 391 (CC)** at **C-F** it was held:

"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33 (1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for an 'open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

37. The party that wishes to impose a limitation on a basic right, has the burden to justify such limitation. In **Minister of Home Affairs v Nicro and others 2005 (3) SA 280 (CC)** at **page 294 D-F**, Chaskalson CJ held:

"Where justification depends on factual material, the party relying on justification must establish the facts on which the justification depends .

....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."

39. In this matter, respondents have raised the concern that the use of computers in cells would constitute a security risk. The argument is that inmates could smuggle modems into their cells, and that computers could then be used to contact outside criminal elements in order to perpetuate criminality. Inmates could also become involved in illicit organizations and could facilitate prison outbreaks. There is no evidence at all that either of these instances led to a breach of security.

40. There is no substance to the argument that inmates might initiate contact with the outside world, and cause a security risk. Computers can be screened to ensure that they do not contain modems. Respondent can also prevent the use of external modems by simply enforcing proper security protocols in its facilities.

41. Significantly, Respondents have not raised one incident where the use of a computer in a cell, with or without a modem has led to a security risk. It seems that there are a large number of inmates who have access to computers in Medium "A", some with modems. Had there been any security breaches as a result thereof, Respondents would surely have placed those facts before court. The fact that they failed to do so leads to the inevitable conclusion that there have not been such incidents.

42. Regard must also be had to the provisions of Chapter IV of the Correctional Services Act. In terms of section 36, the objective of incarceration is to enable the sentenced offender to lead a socially responsible and crime-free life in future. Section 37 (1A) imposes an obligation on the department to apply a management regime which consists (*inter alia*) of:

- 39.1 Good communication between officials and inmates;
- 39.2 Assessment of sentenced offenders;
- 39.3 Needs-driven programmes for sentenced offenders in a structured day and correctional sentence plan;

39.4 A restorative, developmental and human rights approach to sentenced offenders.

43. Section 38 (1) (a) of the Correctional Services Act requires that each sentenced prisoner should be assessed to establish his or her security classification while section 38 (1) (c) requires that the individual prisoner's needs in regard to education should be established. The import of sections 37 and 38 are that each sentenced prisoner should be treated as an individual. Where a prisoner has a spotless security record, as is evidently the case with applicants, that fact should have been considered when their requests for the use of computers was considered. It is not proper simply to determine that all sentenced prisoners are subject to the same policy as regards the use of computers, immaterial of the needs and security record of the individual prisoner. Such a blanket approach is contrary to the purpose of the Correctional Services Act.

44. Respondents have instituted a policy that limits applicant's basic rights, and it has the burden to justify the limitation by placing facts before court to justify the policy. Respondents have not done so.

45. I am of the view that the policy likely constitutes an unjustified limitation of the right to further education of all inmates and therefore inconsistent with the Constitution.

46. To the extent that the policy prohibits computers in cells for study purposes, it unfairly discriminates against Applicant on the basis that it imposes disadvantages on him. It withholds benefits, opportunities and advantages, on the grounds that he is a prisoner, thereby adversely affecting the equal enjoyment of his right to further education. The policy not only discriminates between prisoners and the general public, the department, in the manner in which it implements the policy, but also discriminates between inmates in Johannesburg Medium "C" Correctional Centre, as opposed to inmates in other prisons.

47. I accordingly find that the policy constitutes unfair discrimination in

accordance with the provisions of the PEPUD Act.

POINT IN LIMINE

48. One aspect remains. Initially respondents took the point that applicants were not entitled to approach this court, on the basis that they had not exhausted their internal remedies that are provided for in section 21 of the Correctional Services Act.

49. Applicant allege in the founding affidavit that he had addressed letters to the Head of the Correctional Centre, and he responded on the 16 August 2018 as follows;

“Not approved. Educational policy clear. No personal computers in cells.”

50. The same complaint and request was also escalated to the Regional Commissioner, Ms Grace Molatedi to which she responded

“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 the computer room for study purposes”

51. Adv Kutlano Motla, on behalf of respondents, did not pursue this argument before court, with good reason. Applicant has shown that on several occasions he made written and verbal to the authorities this matter. To most of his verbal request he did not receive a reply. When he received a reply to his written request, it was to deny his requests.

52. The letters filed by applicants as a separate bundle, which I understand respondents do not dispute, reveal an appalling pattern of refusal to engage with applicants. Not only did the Department not pay attention to their complaints, respondents have deliberately tried to mislead the court by alleging that applicants did not exercise their internal remedies. Blatantly misleading allegations have no place in papers placed before courts.

1. In the result I make the following order:

1. The Policy Procedures on Formal Education Programmes, as approved by the


second respondent, 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 Applicant.

2. Paragraphs 3.5 and 3.6 of The Policy Procedures on Formal Education Programmes, as approved by the second Respondent constitute an unjustified limitation of the right to further education of all inmates and therefore inconsistent with the Constitution.

3. The Applicant shall be entitled to use his personal computer without the use of a modem in his cell, for as long as he remains registered student with any recognized tertiary institution in South Africa;

4. The Applicants' computer shall be made available for inspection at any given time by any representative of the respondents;

3. First and second respondents shall pay the costs of the application jointly and severally, the one paying the other to be absolved.



M MATSEMELA
Acting Judge of the High Court,
Gauteng Local Division

DATE OF HEARING:

26TH AUGUST 2019

DATE OF JUDGMENT:

27TH SEPTEMBER 2019

FOR APPLCANTS:

IN PERSON

ATTORNEY FOR RESPONDENTS:

THE STATE ATTORNEY

ADVOCATES FOR RESPONDENT:

ADV KUTLWANO MOTLA