

SOUTH AFRICA / JUDGMENT

Pretorius and Others v Minister of Justice and Correctional Services and Others (2016/83909) [2018] ZAGPPHC 347; 2018 (2) SACR 501 (GP) (14 May 2018)

[2018] ZAGPPHC 347

COURT

North Gauteng High Court, Pretoria

BEFORE

Swanepoel

CASE / FILE NUMBER

2016/83909

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

number: 2016/83909

Date:

25 April 2018

NOT

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

WILHELM
PRETORIUS 1ST
Applicant
DR.
JOHAN
PRETORIUS 2nd
Applicant
DR.
JOHAN (LETS)
PRETORIUS 3rd
Applicant
and
THE
MINISTER OF JUSTICE AND
CORRECTIONAL
SERVICES 1st
Respondent
THE
NATIONAL COMMISSIONER
DEPARTMENT
OF CORRECTIONAL SERVICES 2nd
Respondent
THE
HEAD OF PRISON,ZONDERWATER
PRISON 3rd
Respondent

JUDGEMENT

1. Applicants, all members of the same family, are incarcerated as sentenced prisoners in the Zonderwater Prison at Cullinan. They have all been sentenced to long periods of imprisonment of between 20 and 30 years.
2. 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, Zonderwater, and he is directly responsible for the implementation of the Act, and the policy provisions applicable to prisons, in the prison.

RELIEF SOUGHT

3. Applicants initially sought an order:

3.1 That 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 Centers 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;

3.2 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 applicants;

3.3 That applicants be entitled to use their personal computers in their single cells for as long as they remain registered students with any recognized tertiary institution of South Africa;

3.4 That all personal computers of applicants shall be made available for inspection at any given time to any representative of any of the respondents;

3.5 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 ;

3.6 Further and/or alternative relief.

4. A second notice of motion was filed which amends the relief sought in two aspects:

4.1 Instead of seeking an order that the education policy related to the use of personal computers in cells be declared inconsistent with the Constitution, as outlined in paragraph 3.1 above, applicants now only seek an order that the policy be declared to constitute unfair discrimination in accordance with the PEPUD Act.

4.2 The amended notice of motion clarifies that applicants seek an order that they may use their computers in their cells, without the use of a modem.

5. During argument applicants underscored that they were seeking an order in respect of the manner in which the policy is being applied to them as individuals, and that they were not seeking an order that the policy in itself, as it relates to the use of computers in single cells in general, is inconsistent with the Constitution.

THE CONSTITUTIONAL MATRIX

6. The Constitution is aimed at creating a society that is based upon equality, dignity and freedom. The state is required 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.[1] 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.[2]

7. 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."

8. 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."

9. 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."

10. 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."
11. 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 .[3]
12. 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."

13. Prohibited grounds, as referred to in section 6, are defined[4] 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);"

THE POLICY

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

15. 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."

16. 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.

17. The Department is under the control of the 2nd respondent who must perform[5] the functions of the department in accordance with the policy determined in accordance with the policy determined by 1st respondent.

18. Although respondents initially took the point that the policy document that was being attacked was a repealed policy, both parties

were, however, in agreement what the framework of the current policy is. In respect of the use of desk top computers, laptops (personal

computers), and notebooks by 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)"

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

FACTUAL

BACKGROUND

20. Applicants were convicted of serious charges ranging from high treason to conspiracy to commit murder. Zonderwater is a maximum

security facility, and is intended to house some of the most dangerous offenders.

21. Applicants are all registered students at either UNISA, or at the University of Pretoria. 1st applicant is studying theology, second respondent is studying Biblical and Ancient Studies, and third respondent is an honours student of political sciences. There is no dispute regarding their need for computers to further their studies, and in fact, first and second applicants have previously had the use of computers in their cells for a period of eleven years. Of those eleven years, they had access to modems for some two years.
22. Apparently the policy has now been enforced in full in the Zonderwater Correctional Centre. The result is that from 07h00 until 14h00. They may download information and study-related material under the control of a correctional-Services official. They may also print documents that they may take to their cells for reading. They may not have their computers in their cells.
23. Applicants complain that they are often deprived of sufficient time to study due to unforeseen events in the prison, such as riots that cause shut-downs, or due to delays in having breakfast, and also due to other obligations that they have to attend to. They have calculated that in a two-month period between December 2016 and February 2017 they lost approximately 52 hours of study time. Respondent has made the point that, despite the limitations placed on them, applicants are excellent students who have passed various modules, mostly with distinction.
24. Respondent's objection to applicants being allowed use of their computers 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. Respondents allege that during one routine check at Zonderwater, six computers were found to have violated policy. One contained a hacking manual and inscription software on its hard drive, four had access to the internet, and one contained pornography.
25. Respondent has 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.
26. 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.

27. More particularly, prisoners should be encouraged to obtain further education, rather than being impeded from so-doing. Studies in the United States of America[6] reveal that the one determining factor in reducing recidivism, is education. 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.
28. 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*[7] 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."

29. Another principle to bear in mind is that the fact that applicants are prisoners, does not in itself justify a limitation of their rights. In *Goldberg and others v Minister of Prisons and others*[8] 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."

30. Respondents argue that although applicants' study time has been limited, their rights have not been infringed. The argument is that although applicants cannot use all of their spare time to study, the time allocated is sufficient. They have all done exceptionally well in their studies, and therefore, respondent argues, their right to further education has not been infringed.
31. In my view this argument is fallacious. Applicants have the right to study as much as they please, within the legitimate limitations that prison life inevitably presents. That right is being limited by the policy. The fact that applicants have made the best of the situation does not detract from the fact that their right to study has been infringed.

32.The question is whether the limitation is justified. In *The Bill of Rights Handbook*[9] 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)."

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

34. The process of considering whether the limitation is justified, requires a weighing up of competing values. In *S v Makwanyane*[10] 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."

35. 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*[11], 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."

36. 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. Respondent points to two confiscated computers in

Zonderwater to bolster its argument. The one contained hacking software, and the other pornography. There is no evidence at all that either of these instances led to a breach of security.

37. 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.

38. Significantly, respondent has 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 their cells, some with modems. Had there been any security breaches as a result thereof, respondent 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.

39. Regard must also be had to the provisions of Chapter IV of the Correctional Services Act. The objective of incarceration is to enable the sentenced offender to lead a socially responsible and crime-free life in future.[12] 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.

40. 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.

41. 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.

42. I am of the view that the policy likely constitutes an unjustified limitation of the right to further education of all inmates. Had I been asked to declare the policy inconsistent with the Constitution, I may well have done so. However, I am not called upon to make that determination. I am only asked to find that the application of the policy unfairly discriminates against Applicants.

43. To the extent that the policy prohibits computers in cells for study purposes, it unfairly discriminates against applicants on the basis that it imposes disadvantages on them, it withholds benefits, opportunities and advantages, on the grounds that they are prisoners, thereby adversely affecting the equal enjoyment of their 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, discriminates between inmates in Zonderwater, as opposed to inmates in other prisons.

44. I consequently find that the policy constitutes unfair discrimination in accordance with the provisions of the PEPUD Act.

POINT IN LIMINE

45. 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.

46. Applicants allege in the founding affidavit that they had addressed letters to the Head of the Correctional Centre, and to the National Commissioner, that, after a month had remained unanswered. Respondents allege that applicants have not pursued the matter

properly through the prescribed internal remedies that were available to them.

47. Mr. Moerane, on behalf of respondents, did not pursue this argument before court, with good reason.

48. Applicants have shown that on at least 15 occasions they addressed letters to the authorities, or requested meetings with the Head of Centre. The letters spanned two years, from October 2014 to July

2016. Three of those letters were addressed to the deponent to the answering affidavit, Deputy Director I.C. Shabangu. Applicants have also had meetings with Shabangu regarding this matter. To most of their letters applicants did not receive a reply. Where they did receive a reply, it was to deny their requests.

49. 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. Had the court been

asked to express its displeasure with the respondent's conduct by granting a punitive costs order, I would have done so. Blatantly misleading allegations have no place in papers placed before courts.

50. In the result I make the following order:

50.1 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 applicants;

50.2 First, second and third applicants shall be entitled to use their personal computers without the use of a modem in their cells, for as long as they remain registered students with any recognized tertiary institution in South Africa;

50.3 All of applicants' computers shall be made available for inspection at any given time by any representative of the respondents;

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

Swanepoel J

Acting Judge of the High Court,

Gauteng Division

DATE OF HEARING: 25 APRIL 2018

DATE OF JUDGMENT: 14 MAY 2018

ATTORNEY FOR APPLCANTS: JULIAN KNIGHT AND ASS

ADVOCATE FOR APPLICANTS: ADV L KELLERMAN (SC)

ADV A D THEART

ATTORNEY FOR RESPONDENTS: THE STATE ATTORNEY

ADVOCATES FOR RESPONDENT: ADV M MOERANI (SC)

ADV B NDEBELE

[1] Section 7(1)

[2] Pharmaceutical Manufacturers Association of SA :In Ex parte President of the Republic of South Africa [2000] ZACC 1; 2000 (2) SA 674 (CC) AT PAR .85

[3] Section 2 (b) (iv) of the PEPUD Act

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- [4] Section 1 of the PEPUD Act
- [5] Section 3 (5) and (6) of the Correctional Services Act ,Act 111 of 1998
- [6] The Effect of Prison Education Programs on Recidivism,by John Esperian, JOURNAL OF Correctional Education 61 (4) published on
December 2010
- [7] Case no.729/2015 ,Gauteng Division,Pretoria.heard on 7 May 2015
- [8] 1979 (1) SA 14 (A) at 39 C-F
- [9] Ian Currie and Johan DeWaal 6th Edition at 162
- [10]
- [1995] ZACC 3; 1995
- (3) SA 391 (cc) at C-F
- [11]
- [2004] ZACC 10; 2005
- (3) SA 280 (CC) at page 294 D-F
- [12] Section 36
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