

SOUTH AFRICA / JUDGMENT

WP v Minister of Justice and Correctional Services and Others (66090/18) [2021] ZAGPPHC 88; [2021] 2 All SA 626 (GP); 2021 (2) SACR 76 (GP) (4 March 2021) [2021] ZAGPPHC 88

COURT

North Gauteng High Court, Pretoria

BEFORE

Kollapen

CASE / FILE NUMBER

66090/18

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 66090/18

In

the matter between:

W

P APPLICANT

And

THE

MINISTER OF JUSTICE AND

CORRECTIONAL

SERVICES FIRST RESPONDENT

THE

NATIONAL COMMISSIONER OF

CORRECTIONAL

SERVICES SECOND

RESPONDENT

THE

HEAD OF THE ZONDERWATER

CORRECTIONAL

CENTRE

THIRD RESPONDENT

JUDGMENT

KOLLAPEN, J

Introduction

[1] The applicant brings these proceedings in person to seek relief against the respondents relating to the conditions of his incarceration and in particular to matters relating to contact and non-contact visits, including conjugal visits with his spouse. In addition, he seeks to have the use of a mobile telephone to enable him to communicate with his spouse and relatives. The relief sought is opposed by all of the respondents .

[2] The precise terms of the relief sought as set out in the Notice of Motion *inter alia* reads as follow:

"1. ...

2. ...

3. That the court order the respondents to allow the following:

3. 1 That the applicants' wife be allowed to visit him in the Correctional Centre for private marriage visits;

3.1.1 That the mentioned marriage visits be allowed one per month for three hours per visit;

3.1.2 That the mentioned marriage visits be dealt with by the Correctional Services on such a basis as to ensure the maximum protection of the human dignity of both the applicant and his wife.

3.2 The applicant be allowed to receive contact visits every weekend and Public Holiday.

3.2. 1 That the mentioned visits be allowed to take place between 08:00 and 13:30;

3.2.2 That the visits be unlimited within the allowed visiting hours, in terms of the following guidelines:

3.2.2.1 That it should be a minimum of an hour;

3.2.2.2 That the only limitation on the maximum time of the visit be the cut-off time of the general visiting hours, namely 13:30 or in case space is required by other visitors that haven't yet received an hour of visitation.

3.2.2.3 That during these visitation, three adults and three minors be allowed to visit;

3.2.2.4 That the chairs of the visitor be spaced so that maximum privacy be achieved;

3.2.2.5 That the chairs between the applicant and his visitors be at such a distance that they are at least able to sit hand in hand and easily hear each other.

3.3. That the applicant, during weekdays, Public Holidays excluded, be allowed to have non-contact visits.

3.3.1.1 That the duration of the visits be at least an hour;

3.3.1.2 That the non-contact visits be between 08:00 and 13:00;

3.3.1.3 That it be unlimited and that it will only end after a minimum time of an hour, in case there are other visitors or inmates who also need to use the space.

3.4 That all visitors in the course of visiting, be treated with respect and dignity.

3.5 That the applicant be allowed to use a cellphone, under the following terms, or alternative terms that the court allow:

3.5.1 The cellphone is without a camera and not connected to the internet but only enabled to take phone calls and receive sms's.

3.5.2 The applicant accepts all responsibility for the content contained on the cellphone as well as persons that came into contact with the cellphone as well as the costs involved with having the phone.

3.5.3 Correctional Services is exempted of any liability of costs in regard to the cellphone.

3.5.4 The cellphone and sim-card, with necessary proof of RICA registration, must be registered with Correctional Services with

regard to serial numbers and other identifying numbers.

3.5.5 Only the cellphone and sim card are allowed to be used.

3.5.6 The phone may be inspected at any time by correctional officers to verify that it is the registered phone and sim-card.

3.5.7 The applicant must provide consent to the correctional officers to obtain at any time the register of phone calls from the service provider.

3.5.8 Despite the facilitating competence which is given to the correctional officers, the applicant's privacy should always remain protected.

The factual background

[3] The applicant who is 41 years old is currently being held at the Zonderwater Correctional facility where he has been imprisoned since the 9 July 2014.

[4] The applicant was part of a group of persons who stood trial in this Division of the High Court and was subsequently convicted of high treason and other related crimes. He was sentenced to 25 years' imprisonment on 29 October 2013.

- [5] The applicant became engaged in February 2017 and thereafter sought and was granted permission to marry. On the 21 July 2017, he married Mrs. RP. Prior to entering into marriage, the applicant and his then fiancé expressed the desire to have children and engaged with the respondents with a view to securing the necessary permission to have access to the technology of artificial insemination to enable them to attempt to have a child.
- [6] The request was initially refused in January 2018 and the respondents say that the refusal was based on their incorrect reliance on a policy document[1] that said it did not allow for such a process. They say that it was a genuine and bona fide error on their part. Shortly thereafter on the 5 March 2018, the decision was reversed and the applicant was advised that the necessary permission was granted subject to certain terms and conditions.
- [7] The applicant bemoans the long period of some 14 months it took for the National Commissioner to grant permission and says that this constituted a violation
- [8] While the applicant seeks no relief in this regard, it is important to point out that the applicant got married in July 2017 and that the application for permission to have access to the process of artificial insemination could only properly have been considered after the marriage was concluded. The respondents in addition say it was an unusual application which they initially refused, relying on the incorrect policy document which refusal was reversed two months later. I am not sure if the applicant is justified in taking the stance that what occurred, constituted a violation of his constitutional rights.
- [9] It appears that there were some logistical, biological and other difficulties with the process but that ultimately success was

achieved, Mrs. RP fell pregnant and thereafter gave birth to a child.

The basis upon which the relief is sought

- [10] All of the relief sought says the applicant, is based on his right to establish and maintain healthy family relations, including with his wife as well as other members of his family. He relies on the right to marry and found a family located in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the right to bodily and psychological integrity and the right to have access to reproductive health services and the right to access health care services .
- [11] The application is brought under Section 38 of the Constitution[2] which provides that a person can approach a Court with an allegation or complaint that his/her human rights have been violated or that a violation is pending. The applicant noted that he is aware of the limitation of Section 36 of the Constitution and that he understands that part of detention entails a limitation of his Constitutional Rights.[3] The applicant, however, contends that the limitations imposed by the respondents other than that imposed on his freedom of movement and certain limitations required to maintain law and order in the correctional facility does not pass the Section 36 test and is therefore unconstitutional.

[12] The applicant further contends that contact with family and other member of society together with the building of family relationships, is central to the objective of the Department of Correctional Services in order to fulfill its Constitutional mandate of rehabilitation and upholding human rights.[4]

The claim to have conjugal visits

[13] The applicant seeks relief that will allow him to have a conjugal visit with his wife, once per month for three hours in duration .

[14] The applicant relies on various national and international human rights instruments[5] which proclaim the importance of family life and in addition relies on the marriage policy of the Department of Correctional Services which provides the following:

"No prisoner shall be excluded from the benefit of this policy but shall not be allowed to exercise their conjugal rights.

Every prisoner has the right to make decisions concerning reproduction in exercising the right to family life but only limited to adoption and artificial insemination at own cost.

No offender will be excluded from the benefit of the marriage policy; however, conjugal rights and the right to reproduction may not be exercised whilst in correctional centres."

[15] From this it would appear that while prisoners have the right to make decisions regarding reproduction as part of family life, such a right is limited to adoption and artificial insemination. The applicant takes issue with the policy and contends that when he was granted permission to marry it was implied that with the giving of the consent, the policy or rule that prohibited conjugal visits was abandoned. It is not clear how the granting of permission to marry automatically entailed the lifting of the prohibition on conjugal visits .

[16] In this regard the respondents point out, that when permission to marry was granted the applicant and his then fiancé had a pre-marital session with the Social Worker of the Department during which the policy of the Department was fully explained to them, including the limitations on conjugal visits and that both the applicant and his fiancé accepted that when they decided to get married, those would be the circumstances the marriage relationship would be subjected to.

[17] The applicant submits that the marriage policy of the Department is unreasonably and unjustifiably limits the right to make decisions concerning reproduction in exercising the right to family life by not making provision for conjugal visits in prison facilities.

The claim to further contact and other visits

[18] There is no dispute that the right to communicate with, and be visited by a spouse, partner or next of kin is both constitutionally

recognized but also an important part of the policy and legal framework of the respondents in order to advance rehabilitation and

to promote the building of healthy familial relations. It is the scope and extent of such visitation rights that is in dispute.

- [19] The applicant seeks relief that would allow him to have a contact visit every weekend and Public Holiday for a minimum of one hour but subject to a maximum of five and a half hours if the space used for such visits is not required for visitors of other prisoners.
- [20] In addition the applicant seeks to have non-contact visits during weekdays (excluding Public Holidays) which should last for a minimum of one hour and a maximum of five and a half hours, if the visiting space is not required for other visitors.
- [21] The applicant also seeks relief to the effect that the location and spacing of the chairs in the visiting hall during contact visits be spaced in such a manner that allows for privacy in communication with his visitors as well as for the applicant and his family to be able to be close enough to each other to hold each other and each other's hands.
- [22] In summary what the applicant seeks is to have contact visits for each of the 52 weekends per year as well as the approximately twelve Public Holidays per year. He also seeks non-contact visits for every other weekday of the year excluding Public Holidays as well as twelve conjugal visits per year.

Access to a cellphone

- [23] The applicant further seeks permission to have a mobile phone which he undertakes to use subject to a various terms and conditions which he has proposed including that the phone may not have internet access or a camera, that it be procured at the applicant's own costs, be registered with the respondents and be subject to monitoring.
- [24] The applicant relies in this regard on Section 25(2) of the Constitution which provides for the right of every sentenced prisoner

to communicate with and be visited by that prisoners' spouse, or partner or next of kin.

- [25] Again there is no dispute with regard to how the parties understand the right to communicate, it is rather the mode of that communication that is in dispute, the respondents contending that the policy, rules and regulations of the Department does not provide for any prisoner, sentenced or un-sentenced to have a cell phone.
- [26] The applicant submits in this regard that B-Order is the only authority for the explicit ban on the use of a cell phone in

correctional facilities and the applicant in this regard submits that 8-Order is in violation and contradictory to Section 8(4) of the Correctional Regulations which makes provision of electronic communication which the respondents say is limited to use during

visits.

The Legal framework in South Africa

- [27] All of the relief sought by the applicant relates to the interaction, engagement and the type of contact the applicant says he is entitled to have with his family and other relatives. The idea of imprisonment as a species of punishment has always been the subject of much debate and contestation and some societies use it sparingly and in exceptional circumstances while for others it has become a routine part of the punishment regime open to the criminal justice system. This is invariably a matter of the policy choice for different jurisdictions and shaped and informed by the particular circumstances the prevail at any given time. In South Africa where there is a high level of imprisonment, the Constitution and the Correctional Services Act[6] (the Act) forms the constitutional and legal framework against which the relief that is sought is to be adjudicated.
- [28] In all of that however, what has not been in dispute is the idea that imprisonment does not strip the individual of all the rights and entitlements he/she would ordinarily have albeit that the context of imprisonment means that those rights are given effect to differently where it is possible to do so, while others necessarily inconsistent with imprisonment do not enjoy recognition.
- [29] In *Eirich v Minister of Correctional Services and Another*[7] Plasket, J found it necessary to preface his

judgment

with a short discussion of the central principle that applies to the treatment of prisoners before turning to the provisions of the Act that are applicable:

"[4] That the principle is one that, in its articulation by the highest court of land, predated the 1996 Constitution and has a much older but just as august pedigree. The line of cases start in 1912 in the matter of *Whittaker and Morant v Roos and Bateman* in which Innes JA held:

'The action of the Governor [of the prison] was a wrongful and intentional interference with those absolute natural rights relating to personality, to which every man is entitled. 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 legally curtailed could afford no excuse for a further illegal encroachment upon it. Mr Esselen contended that the plaintiffs, once in prison, could claim only such rights as the Ordinance and the regulations conferred. But the directly opposite view is surely the correct one. They were entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed. "

- [30] In *Goldberg and Other v Minister of Prisons and Others*, Corbett, JA said in a dissenting judgment:

'It seems to me that fundamentally a convicted and sentenced prisoner retains all basic rights and liberties (using the word in its Hohfeldian sense) of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed. Of course, the inroads which incarceration necessarily makes upon a prisoner's personal rights and liberties (for sake of brevity I shall henceforth speak merely of 'rights) are considerable. He no longer has freedom of movement and has no choice in the place of his imprisonment. His contact with the outside world is limited and regulated. He must submit to discipline of prison life and to the rules and regulations which prescribe how he must conduct himself and how he is to be treated while in prison. 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.'

but also by

[6] Even though that dictum was in a dissenting judgment, it relied on the judgment of Innes AJ, cited above, in *Whittaker and Morant v Roos and Bateman*, Subsequently, Corbett JA 's dictum was held to correctly reflect the law in Hoexter JA's judgment in *Minister of Justice v Hofmeyr*. In this matter, prior to expressing his agreement 'with the general approach reflected in the residuum principle enunciated by Corbett JA in the *Goldberg* case, Hoexter JA held:

'The Innes dictum serves to negate the parsimonious and misconceived notion that upon his admission to a goal a prisoner is stripped, as it were, of all his personal rights; and that thereafter, and for so long as his detention lasts, he is able to assert only those right for which specific provision may be found in the legislation relating to prisons, whether in the form of statutes or regulations. The Innes dictum is a salutary reminder that in truth the prisoner retains all his personal right save those abridged or proscribed by law. The root meaning of the Innes dictum is that the extent and content of a prisoner's rights are to be determined by reference not only to the relevant legislation reference to his inviolable common-law rights.'

[7] The common law may not be as prominent now as it was in 1912, 1979 or 1993 for the protection of fundamental rights and it was, of course, subject to legislative override, as a result of parliamentary sovereignty being a central tenet of the constitutional order at the time. Now, in a era of democratic constitutionalism, in which fundamental rights are justiciable and in which they may only be limited by laws of general application 'that are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom ', the residuum principle has stronger protection than before. There can be no doubt that it is in harmony with the Constitution's values.

[8] Section 35(2)(e) of the Constitution provides that everyone who is detained, including every sentence prisoner, had the fundamental rights 'to conditions of detention that are consistent with human dignity'. In addition, s 9(1) provides that every person 'is equal before the law and has the right to equal protection and benefit of the law'; s 10 entrenches a fundamental right to human dignity; and section 33(1) of the Constitution gives everyone the right to 'administrative actions that is lawful, reasonable and procedurally fair'.^[8]

[31] The Constitution of the Republic of South Africa in Section 35 thereof, in dealing with the rights of arrested, detained and accused persons provide in part as follows :

"(e) to conditions of detentions that are consistent with human dignity, including at least exercise and the provisions at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) to communicate with, and be visited by, that person 's-

(i) spouse or partner;

(ii) next of kin;

(iii) chosen religious counsellor; and

(iv) chosen medical practitioner. "

[32] In this regard the constitutional right to communicate and be visited is also captured in Section 13 of the Correctional Services Act in the following terms:

"(1) The Department must encourage inmates to maintain contact with the community and enable them to stay abreast of current affairs.

(2) The Department must give inmates the opportunity, under such supervision as may be necessary, of communicating with and being

visited by at least their spouses or partners, next of kin, chosen religious counsellors and chosen medical practitioners.

(3) In all circumstances, a minimum of one hour must be allowed for visits each month."

[33] What emerges is that a prisoner even on entry into the prison system retains a residuum of rights and in particular those rights that are not necessarily inconsistent with the institution of imprisonment. In addition, Section 35(2) guarantees a host of rights that are intended to provide for and create the conditions of detention consistent with human dignity. The question that will arise for determination is whether the kind of contact rights the applicant seeks are necessarily inconsistent with his incarceration as well as whether the rights that the applicant is entitled to assert in terms of Section 35(2) have been infringed.

[34] In one of the few cases that the Courts have interacted with the Section, the Courts have inferred that competing interests may at times result in the right to contact being limited for just cause. In *Masileta and Others v Bouwers And Others*,^[9] the Court had to consider

applications to transfer the applicants - who were prisoners incarcerated in a maximum-security facility - from the maximum-security centre far from their homes to a lesser security centres closer to their homes so that they could be closer to their families. The Court found that the applicants had failed to establish grounds for the relief sought. As such, the applications were dismissed. Masileta seemingly demonstrates that whilst the right to outside contact as mandated by the Constitution and the Correctional Services Act does apply to prisoners as a basic human right, competing interests may at times limit the right.

International Framework

[35] An important premise in dealing with the rights of detainees and prisoners to maintain contact with the world outside the institutions where they are held is that, like free persons, those deprived of their liberty enjoy all the human rights guaranteed by the international law, however subject to those restrictions that are an unavoidable consequence of the confinement. [10] This means, *inter alia*, that no detainee or prisoner "shall ... be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence"[11]

[36] The primary source of authority for the promulgation of human rights standards by United Nations bodies may be found in the Charter itself. The second paragraph of the Preamble states that one of the principles aims of the United Nations is:

"to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ..."[12]

[37] Furthermore, article 1, paragraph 3, of the Charter states that one of the purposes of the United Nations is to achieve international

cooperation in:

"promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion ..."

[38] The international instruments that inform the rights of inmates include Article 12 of the United Nations Universal Declaration of Human Rights of December 1984 which provides that:

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence." [13]

[39] In a similar vein, Article 17 of the International Covenant on Civil and Political Rights states that:

"

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence ...
2. Everyone has the right to the protection of the law against such interference and attacks."

[40] Principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that:

"a detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations."

[41] The Standard Minimum Rules for the Treatment of Prisoners, 1958 provides that:

"Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits." [14]

[42] In a manual drafted by the Office of the United Nations High Commissioner for Human Rights on Human Rights and Prisons, the

objective of the Commissioner in respect of the rights of an inmate to outside contact reads as follows:

"The objective of this section is to emphasize that, despite being deprived of liberty, prisoners retain a right to have contact with their family and friends and the outside world."

[43] The manual goes on to further emphasize that the essential principles underscoring the right to outside contact are underlined by the fact that:

"No one shall be subjected to arbitrary interference with his or her privacy, family, home or correspondence.

All prisoners shall have the right to communicate with the outside world, especially with their families.

Foreign prisoners shall be allowed to communicate with their diplomatic representatives .

A prisoner request to be held in a prison near his or her home shall be granted in as far as possible.

Prisoners shall be kept informed of important items of news."

[44] Article 8(1) of the European Convention provides that "everyone has the right to respect for his private and family life, his home and his correspondence", paragraph 2 allows for the following restrictions on the exercise of this right:

"2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[45] The United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules) of 17 December 2015 stipulates

as follows :

"Rule 58

1. Prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals:
 - (a) By corresponding in writing and using, where available, telecommunication, electronic, digital and other means; and
 - (b) By receiving visits.
2. Where conjugal visits are allowed, this right shall be applied without discrimination, and women prisoners shall be able to exercise

this right on an equal basis with men. Procedures shall be in place and premises shall be made available to ensure fair and equal access with due regard to safety and dignity. "

[46] The African Charter on Human and Peoples' Rights (Africa Charter) has no provision that explicitly relates to prisoners' rights or the rights of people in detention, but these rights are implied in other rights such as the right to human dignity and the right not be subjected to any form of torture cruel, inhuman and degrading treatment or punishment.[15] The African Commission on Human and Peoples' Rights (African Commission) was established under the Article 30 of the African Charter to promote and protect human rights in Africa . The African Commission interprets the provisions of the Charter and is empowered to receive complaints of human rights violations from States, individuals and groups.[16] The African Commission encourages governments to hold detainees and prisoners in humane conditions. During detention detainees and prisoners should be allowed to have access to lawyers during trial to prepare their defense, also have access to their lawyers after convictions to discuss the prospects of appeal and for lawyers to ensure that their clients are detained in conditions that are in line with international standards. Prisoners should also be granted access to their family members, doctors and should also be allowed sufficient light in their cells and enough food.[17]

[47] In *Civil Liberties Organisation v Nigeria*[18], in which the Federal Military government of Nigeria imprisoned civilians and military officers in military camps who allegedly wanted to overthrow it, the African Commission held that:

"While being held in a military detention camp is not necessarily inhuman, there is the obvious danger that normal safeguards on the treatment of prisoners will be lacking. Being deprived of access to one's lawyer, even after trial and conviction, is a violation of article 7(1)(c) of the African Charter[19] being deprived of the right to see one's family is psychological trauma that is difficult to justify, and may constitute inhuman treatment. Deprivation of light, insufficient food and lack of access to medicine or medical care also constitute violations of Article 5.[20]"

[48] The Kampala Declaration on Prison Conditions in Africa arose out of an international seminar on prison conditions in Africa held in September 1996 in Kampala[21]. The Kampala Declaration took prison conditions into account and considered that in many African countries "the level of overcrowding in prisons is inhuman, that there is a lack of hygiene, insufficient or poor food, difficult access to medical care, a lack of physical activities or education, as well as an inability to maintain family ties." The Kampala Declaration recommends action be taken by states and non-governmental organizations on four fronts, prison conditions, remand prisoners, prison staff and alternative sentencing. The Kampala Declaration recommends:

" That the human rights of prisoners should be safeguarded at all times...; that prisoners should retain all rights which are not expressly taken away by the fact of their detention; that conditions in which prisoners are held and the prison regulations should not aggravate the suffering already caused by the loss of liberty; that the detrimental effects of imprisonment should be minimized so that prisoners do not lose their self-respect and sense of personal responsibility ..."

[49] The Ouagadougou Declaration and Plan of action under one of the main areas which relates to promoting the reintegration into society of alleged and convicted offenders recommends, *inter alia*:

"Promote contact with the family and community by: encouraging civil society groups to visit the prison and work with offenders; improve the environment for visitors so that physical contact is permissible; provide facilities for conjugal visits; setting up a privilege system including day, week-end and holiday leave subject to satisfying appropriate criteria." [22]

The international position with regard to conjugal visits

[50] In *Dickson v. the United Kingdom*[23], the Court referred to the fact that more than half of the Contracting States allow for conjugal visits for prisoners, subject to a variety of different restrictions. However, while the Court has expressed its approval for the evolution in several European countries towards conjugal visits, it has not yet interpreted the European Convention as requiring Contracting States to make provision for such visits (*Aliev v. Ukraine*, [24]). Accordingly, Contracting States could enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the European Convention with due regard to the needs and resources of the community and of individuals.

- [51] In *Vamas v Lithuania*[25], the European Court for Human Rights found that a difference in treatment of remand prisoners compared to convicted prisoners as regards conjugal visits was not justified within the meaning of Article 14[26] in conjunction with Article 8 (Right to respect of private and family life). The Court further noted that security considerations relating to any criminal family links were absent in the case at issue as regards the visits by the applicant's wife. The Court also did not accept the argument that a lack of appropriate facilities justified lack of access to conjugal visits. In sum, the Court found that the authorities had failed to provide reasonable and objective justification for the difference in treatment of remand prisoners compared to convicted prisoners and had thus acted in a discriminatory manner.[27]
- [52] Rule 24 of the European Prison Rules can be read as setting out the duties, as stipulated in Article 8 of the European Convention, the duties of prison authorities need to have to ensure these rights are upheld in the inherently restrictive conditions of the prison. This is inclusive of visits to the outside world of a prisoner. Rule 24.4 is significant of visits not only to prisoners but also for their families. It is important that where possible intimate family visits should extend over a longer period, for example, 72 hours, as is the case in many eastern European countries. Such long visits enable inmates to have intimate relations with their partners. Shorter "conjugal visits" for this purpose can be demeaning to both partners . [28] In a number of eastern European countries sentenced prisoners may receive private visits from their spouse, partners and families at regular intervals for up to three days. These visits take place in small flats within the security of the prison. The family visitors provide for their own meals for duration of their stay. During these days, prisoners can lead a relatively normal life with family members. However, although widely available in practice, many families are prohibited due to distances and expense from making these visits.[29]

The applicant's classification as a prisoner and his entitlement to visits and communication

- [53] The Zonderwater Correctional Centre is classified as a maximum facility and caters for offenders who are serving lengthy periods of imprisonment as well as those convicted of very serious crimes. Section 2 of the Act describes the purpose of the Correctional system in the following terms :-

"The purpose of the correctional system is to contribute to maintaining and protecting a just , peaceful and safe society by-

- (a) enforcing sentences of the courts in the manner prescribed by this Act;
- (b) detaining all inmates in safe custody whilst ensuring their human dignity; and
- (c) promoting the social responsibility and human development of all sentenced offender."

- [54] Section 13 of the Act purports to give effect to the rights of contact and while it is styled contact with the community, its

provisions relate to both the community at large as well as family, a spouse, partner or next of kin.

It provides as follows:

- (2) The Department must give inmates the opportunity, under such supervision as may be necessary, of communicating with and being visited by at least their spouses or partners, next of kin, chosen religious counsellors and chosen medical practitioners.
 - (3) In all circumstances, a minimum of one hour must be allowed for visits each month."
- [55] Finally the Act also provides for the security classification of prisoners based on the security risk posed by the prisoner. This determination informs the physical location within the system where such prisoner would be detained as well as the nature of the rights and entitlements that may accrue to such a prisoner.

The position of the applicant

- [56] The applicant is currently classified as a Group A offender and is entitled to a maximum of three contact visits per month. On such visits he may be visited by two adults and any number of children under the age of 16. Such visits take place during weekends and Public Holidays. Group B and C offenders are not allowed contact visits but are only entitled to non-contact visits.
- [57] The respondents say that all contact visits take place in an open hall where there are loose chairs and that the applicant is free to make his own seating arrangements with his contact visitors . The applicant denies that this is the case and while he admits that there are loose chairs in the hall, he says that they are placed in designated positions and may not be moved and that officials of the respondent indicate where offenders and visitors may sit during visiting times. The result of this, the applicant says, is to prevent such visits from happening within the bounds of privacy given the close proximity of visitors to each other. The applicant says he is not even able to touch his spouse or other relatives due to the spacing of the chairs.
- [58] On this score there appears to be no dispute that the applicant is able to enjoy three contact visits per month with his family

including his wife as well as other contact visits with his doctor, religious counselor and legal representatives. The issue in dispute relates to his request to have more extensive contact visits as well as non- contact visits. In an ideal world maximizing visits may well be desirable both in contributing to establishing strong community and family contact as well as the rehabilitation of the offender. At the same time however, regard must be had to the large number of prisoners housed in South Africa's penal system, the practical and logistical arrangements that go into the process as well as the need for the Department to take care of the other

business of the penal system as well as maintaining safety inside the facility .

[59] The constitutional guarantee of contact which is mirrored in the provisions of the Act is given effect to by the system that is in place and my view is that the current visitation regime does not constitute a limitation on the right to contact as it could not be contended that the scope and extent of contact that the applicant seeks is consistent with the conditions of his incarceration. Even if it did constitute a limitation then such limitation is reasonable and justifiable. The respondents say that the Zonderwater Facility houses some 1500 offenders of different categories and that the classification system enables them to make proper and suitable arrangements for visitation times and arrangements for all offenders .

[60] The relief sought in respect of extended contact visits as well as non-contact visits must accordingly fail. The matter of the arrangements in the visiting hall has given rise to a dispute which should be capable of easy resolution. If the respondents say that prisoners are entitled to make their own seating arrangements in the hall then this should not pose a problem, regard being had to the number of visitors in the hall at any given time, I would be reluctant to make any order in this regard given the largely unknown

factors of the size of the hall, the number of visitors that may occupy it at any given time and the spacing that should be put in place. It is an operational issue that requires a measure of flexibility and adjustment. Having said that I would expect the

respondents to then implement, within reason, the practice of allowing prisoners to make their own seating arrangements at visiting

times.

Access to a cell phone

[61] The applicant says that while there are public telephone facilities within the prison, these break down from time to time resulting in difficulties in making telephonic contact with the outside world. The respondents take the view that there are sufficient facilities

available and when they do break down, the service providers are contacted, and they attend to the repairs thereof .

[62] In addition they say that the policy that prohibits the possession of cell phones is also related to the increased security risk posed by such devices. They point to an escape attempt that was planned from the Zonderwater prison where a cell phone that had been illegally smuggled into the prison was used to make arrangements to facilitate the planned escape.

[63] The right to communicate is important in the rehabilitation of a prisoner and the system in place gives effect to that right in number of ways including visits (both contact and non-contact visits) in the case of the applicant this is limited to contact visits which lend themselves to create a greater level of interaction between the prisoner and his/her visitors and telephonic contact as well as contact with a doctor, religious counselor and legal representatives. All of this in my view provides sufficient opportunity for contact and the demand for a cell phone cannot be sustained both in terms of any entitlement to a cell

phone that a prisoner may have but also regard being had to the security risk posed by cell phones in general in a penal context. The monitoring of cell phone usage by prisoners would in any event be a full-time duty further stretching the human resources at correctional facilities.

The right to marry and the right to found a family

- [64] The right to marry and to found a family located in the Universal Declaration of Human Rights is a central pillar in the recognition of the family as a central and fundamental group unit of society. In the context of South Africa's penal system provides the policy and legal framework for the realization of this important right.
- [65] Prisoners may marry upon the consent of the Commissioner of Correctional Services being sought and granted. In addition, those who desire to start a family may seek permission to have access to the artificial insemination technology. While these processes are not the subject of any challenge in these proceedings, my understanding is that when the Commissioner's consent is sought, the decision taken must accord with the principle of legality and be consistent with the Constitution. Failure to do so may well trigger a legal challenge. [30]
- [66] That being said the applicant, while a prisoner, sought and obtained the permission of the Commissioner to marry and then entered into a marriage with the now Mrs. RP. Subsequent to that he sought and obtained the permission of the Commissioner to have access to the artificial insemination technology so that he and his wife could start a family. They were successful in doing so.
- [67] Accordingly, it cannot be said that the applicant's right to marry or his right to found family has been limited in any manner. On the contrary the evidence compellingly displays that those rights have been honored and the fact that the applicant is today a married man and a father is in part due to the enabling policy and legislative framework that made it possible for him to attain such a status while being a prisoner. In saying this I do not do so to suggest that the applicant owes some debt of gratitude to the Department - he does not
- but rather to simply point out that the enabling legal framework gives effect in the most substantial manner to the right to marry and the right to found a family.

The entitlement to conjugal visits

- [68] While both international human rights law as well as South Africa's own human rights framework and commitment provides for the right of prisoners to have contact with a spouse partner or next of kin, there appears to be no express self-standing right of prisoners to conjugal visits. Of course, the question may arise whether the right to have contact with one's spouse or partner may well entail the right to a conjugal visit.

- [69] In the context in which it is used, the idea of and the language used to give effect to the right to contact in the Constitution, contact is used in the generic sense with little distinction drawn between the various categories of persons mentioned in Section
35. The detained person is entitled to have contact with a partner, spouse, doctor, priest etc. and they all relate to the same enterprise - the idea of human interaction with another and even though they may seek to advance different objectives, they all take the same form - the right and the ability of the prisoner to see, meet and engage another.
- [70] On the other hand, sexual relations between two people may well, at the physical level constitute contact, but it can hardly be said to be contact in the context described in the Constitution which is not about physical contact but rather the process by which two or more people interact with each other - in many instances the absence of any physical contact does not render or undermine the right to contact that is given effect to.
- [71] Therefore to suggest that contact with a spouse or a partner entails sexual relations is to give to Section 35 a meaning that is not consistent with the ordinary meaning of the word or the context within which it is used. It would have clearly been open to the drafters of the Constitution, if they so intended, to include under contact the right to a conjugal visit. That they elected not to do so is instructive.
- [72] On this issue I therefore conclude that the right to contact or indeed the right to marry or to found a family in the context of the penal system does not entail the right to conjugal visits. As explained and indeed in the case of the applicant those rights have been fully given effect to without the need for a concomitant right to a conjugal visit that the applicant contends exists.
- [73] In conclusion, I find that the right to conjugal visits is not part of the rights that the Constitution guarantees to prisoners and that the current policy of the Department that prohibits conjugal visits does not constitute a limitation of the right to contact but that even if it did it is a limitation that is consistent with the limitation on the freedom that imprisonment necessarily entails.
- [74] This may not necessarily be the last word on the matter. The matter of conjugal visits however remains an important issue and has complex policy and legal implications. Ordinarily many personal and intimate human relationships are characterized by a physical closeness and sexual intimacy is often, though not always a vital part of those relationships. It is said that such intimacy and the physical connection between people often adds value and quality to such relationships. On the other hand, there are many personal and intimate relationships that exist and thrive without the need for any physical intimacy or sexual connection. The complexity of the human condition and the diverse range of human relationships and interaction simply mean that there is not a single model that fits all.
- [75] I am however willing to accept that for many a normal relationship may well encompass a measure a physical closeness expressed through physical intimacy and sexual interaction.

[76] Much has been written and said on the matter whether prisoners should enjoy conjugal visits and there are many who argue with great force and persuasion that if the object of imprisonment is not to punish but to create the conditions under which rehabilitation can meaningfully take place conjugal visits should be permitted. They argue that conjugal visits contribute to healthy relationships

between individuals and the strengthening of such bonds contributes to the rehabilitation of offenders and ensures that the important

component of their private lives, including that of physical intimacy is maintained.

[77] On the other hand it is argued that the deprivation of liberty that imprisonment necessarily entails. has as its consequence that for those whose freedom is curtailed. they of necessity give up much of what is associated with that freedom. Included in that is what may be regarded as a normal family life and a normal relationship with their spouse or partner. They point out that under these circumstances the ability to enjoy conjugal visits are incidental to the loss of freedom and liberty that imprisonment entails.

[78] At other levels the debate around conjugal visits in prisons implicates a host of other related and relevant issues and they

include the commitment to equality for all within the penal system, the recognition of human dignity and the physical, logistical and other challenges such a shift in policy would create. The recognition of gender equality and given that the large majority of prisoners are male and heterosexual, how their partners may feel about such a change in policy may also be relevant. Coupled with that the issues of consent, patriarchy and the significant imbalance in power relations between men and women which still characterize our society all become relevant considerations in the debate about conjugal visits.

[79] These issues all become relevant in how society is to approach such a matter and make a determination thereof if it is called upon to do so. It does appear that it is in nature a matter that is largely a policy choice that would ultimately require a consideration of a number of factors and the views from a number of stakeholders. It is hardly a matter that Courts are necessarily well suited or well equipped to determine given the nature of and the wide ranging interests and stakeholders who are relevant in such a process.

Conclusion

[80] In conclusion and for the reasons given, I find that our law does not expressly recognize a right to a conjugal visit nor can the Constitution be interpreted to provide support for the existence of such a right which is inconsistent with the notion of incarceration . To that extent the relief sought by the applicant must fail. I have already dealt with the relief sought in respect of contact and non- contact visits as well as that relating to the applicant's claim to the use of a cellphone.

[81] On the other hand, the question of whether conjugal visits should be a feature of our correctional system is a question that will require debate and the weighing of diverse, complex and contested issues. Whether such a debate and a process are triggered in the body politic of our country remains to be seen but it is not a debate whose outcome this Court is called upon to determine.

Order

In the circumstances I make the following order :-

1. The application is dismissed.
2. No order is made as to costs.

NJ. KOLLAPEN

JUDGE OF THE HIGH COURT,

PRETORIA

APPEARANCES

APPLICANT

:DR

W PRETORIUS

(in person)

COUNSEL FOR THE 1st RESPONDENT: Adv S.S MAAKANE SC

INSTRUCTED BY

STATE ATTORNEY

DATE OF HEARING

Matter was decided on paper.

DATE OF JUDGMENT

4 MARCH 2021

- [1] Correctional Services 8-Order. of the applicant's right to just administrative action in terms of Section 33 of the Constitution.
- [2] The Constitution of the Republic of South Africa, 1996.
- [3] Page 6 of the Applicant's Heads of Argument at 3.1.
- [4] Page 7 of the Applicant's Heads of Argument at 3.3.

- [5] Sections 12(2)(a) and 27(1)(a) and (2) of the Constitution, Section 23(2) of the International Covenant on Civil and Political Rights, Sections 12 and 16(1) of the Universal Declaration of Human Rights and Section 18(1) and (2) of the African Charter.
- [6] Act 111 of 1998.
- [7] 2009 (1) SACR 588 (E).
- [8] The Constitution of the Republic of South Africa, 1996
- [9] 2013 (2) SACR 350 (GNP). See also *Mohammed v Minister of Correctional Services and Others* 2003 (6) SA 169 (SE).
- [10] Cf. in particular statement by the Human Rights Committee in its General Comment No.21 on article 10, in United Nations Compilation of General Comments, para.3 at p. 142.
- [11] Article 17 of the International Covenant on Civil and Political rights, 1966.
- [12] Human Rights and Prisons: Manual on Human Rights Training for Prison officials. https://www.ohchr.org/documents/publications/trainingq11_en.pdf Office of the United nations High Commission for Human Rights at page 8.
- [12] Human Rights and Prisons: Manual on Human Rights Training for Prison officials. https://www.ohchr.org/documents/publications/trainingq11_en.pdf Office of the United nations High Commission for Human Rights at page 8.
- [13] See fn. 9 at page 115.
- [14] Rule 37.
- [15] Protecting Prisoners' Rights before the African Commission on Human and Peoples' Rights: The Role of Civil Society By Jamil Ddamulira Mujuzi, Doctoral Research Intern, CSPRI newsletter No 22 June 2007 [https://acjr.org.za/resource-centre/22 %20-%20June%202007.pdf](https://acjr.org.za/resource-centre/22%20-%20June%202007.pdf).
- [15] Protecting Prisoners' Rights before the African Commission on Human and Peoples' Rights: The Role of Civil Society By Jamil Ddamulira Mujuzi, Doctoral Research Intern, CSPRI newsletter No 22 June 2007 [https://acjr.org.za/resource-centre/22 %20-%20June%202007.pdf](https://acjr.org.za/resource-centre/22%20-%20June%202007.pdf).
- [16] See fn. 9 at page 9.
- [17] See fn. 14.
- [18] Communication 151/96, 13th Annual Activity Report of the African Commission on Human and Peoples' Rights (1999-2000) Annex V.
- [19] See fn. 17 at para 26.

- [20] See fn. 17 at para 27.
- [21] Kampala Declaration on Prison Conditions in Africa accessed at <https://cdn.penalreform.org/wp-content/uploads/2013/06/rep-1996-kampala-declaration-en.pdf>.
- [22][22] Africa's recommendation for Penal reform accessed at <https://cdn.penalreform.org/wp-content/uploads/2013/05/rep-2008AfricasRecommendations-en-1.pdf> at page 45.
- [23] GC 2007 81
- [24] 2003 188.
- [25] 2013, 116-122.
- [26] Article 14 of the European Convention for Human Rights states "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."
- [27] See also Costel Gaciu v. Romania, 2015, 56-62.
- [28] European Prison Rules accessed at <https://rm.coe.in/european-prison-rules-978-92-871-5982-3/16806ab9ae> at page 53-54.
- [29] See fn. 18 at page 118.
- [30] In this regard see Constitutional Law of South Africa by Chaskalson, Kentridge et al the learned authors state the following at 28-24: "A key requirement of the principle of legality is that even those of prisoners which are restricted as a necessary consequence of incarceration may only be limited if this is done by legislation, either expressly or by necessary implication. The laws regulating prisons in South Africa must therefore be scrutinised to see whether they provide the necessary authority for the restriction of prisoners' rights. The restrictions must, in addition, be formulated sufficiently narrowly to ensure that prisoners are not exposed to overbroad discretionary powers which deny them protection of the law."

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/unknown-plaintiff-v-unknown-defendant-prisoners-rights-agpphc-2021-66090-18>

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