

## REPUBLIC OF SOUTH AFRICA



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

CASE NO: 00028/2018

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
5/1/18	<i>[Signature]</i>
Date:	WHG VAN DER LINDE

## In the matter between:

Nkosi, Elvis Nkosinathi

Applicant

and

The Minister of Justice  
and Correctional Services

First Respondent

The National Commissioner  
(Department of Correctional Services)

Second Respondent

The Area Commissioner, Modderbee Area  
(Modderbee Correctional Centre)

Third Respondent

The Head Correctional Centre  
(Modderbee Correctional Centre)

Fourth Respondent

The Chairperson  
(Parole Board: Modderbee Correctional Centre)

Fifth Respondent

The Chairperson, (Case Management Committee:  
Modderbee Correctional Centre)

Sixth Respondent

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Judgment

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Van der Linde, J:

- [1] The applicant is a convicted prisoner who was sentenced to life imprisonment for amongst others murder and robbery with aggravating circumstances. He will be considered for parole next year on 10 April.
- [2] He applies urgently to review the decision of the Assistant Head of the prison at Modderbee Management Area, currently the acting head of that prison, Mr Aucamp, to refuse temporary leave under s.44(1)(a) of the Correctional Services Act 111 of 1998 to attend the funeral of his mother tomorrow morning at 08h00. She died on 28 December 2017.
- [3] The respondents filed an answering affidavit by Mr Aucamp and despite the absence of a replying affidavit the matter as is ripe for urgent hearing as the circumstances permit.
- [4] The applicant is ethnically a Zulu, but speaks Sotho. He appeared in person and was brought to court by officials of the Modderbee Prison. He asked for an interpreter and one was arranged for him. I asked him to state his case, which briefly did, through the interpreter. I was then addressed by Ms Cingo, an attorney from the State Attorney's office, and her address was interpreted to the applicant.
- [5] Some way into her address I permitted her a brief adjournment to take instructions from Mr Aucamp by telephone, to explain an ostensible discrepancy in his affidavit. It was that he says that the applicant is regarded as a high risk even though he is classified as medium risk, because in 1996 he tried to escape from custody, and in 2017 he was found guilty of three disciplinary offences. The deponent annexed the applicant's admission profile to prove this,

but that document reflects only two convictions. One entry is left blank, and it was in that respect that Ms Cingo would take instructions.

- [6] When I returned to court Ms Cingo commenced by informing me that the interpreter had left because the State Attorney was not prepared to pay him for his services. Ms Cingo said that for "administrative reasons" it could not be arranged that he be paid by the State Attorney, and that she has not been able to arrange a substitute interpreter. I asked what counsel's submission was as to the further conduct of the matter in those circumstances, and counsel responded that she left the matter in the court's hands.
- [7] It seemed to me under those circumstances that I could not proceed to hear submissions from one party that were not understood by the other party, and that I should proceed to consider the application on the papers alone, without further oral argument. I accordingly adjourned the matter at around 12h30, intimating that I would give judgment at 14h00, given the urgency. I would have preferred more time to formulate my reasons, but in the circumstances that is not available.
- [8] The answering affidavit discloses that the decision that was taken, ultimately by Mr Aucamp, but along the way by four individuals who first considered the application, was that the applicant was not granted permission to attend the funeral of his mother, but that instead he would be allowed to visit her body in the morgue, there to pay his last respects.
- [9] The reasons given in the answering affidavit are that the applicant is a flight risk, he is not trustworthy, and he was sentenced to life imprisonment for shooting a person in cold blood after robbing the victim.
- [10] Of the four persons that considered the application as well, the applicant's unit manager recommended that he be granted permission to attend the funeral, whereas the social worker, the chairperson of the Case Management Committee, and a representative of CC Corrections recommended that the applicant be permitted only to visit his mother's body at the morgue.

[11]I approach the application on the basis that the Promotion of Administrative Justice Act, 3 of 2000, applies to it. In terms of s.6 (2)(e)(iii) a decision may be reviewed if the administrator took irrelevant considerations into account in arriving at the decision. I should remark that deference to administrators who are engaged on a regular basis with individuals must of course weigh heavily in favour of the decision sought to be reviewed.

[12]Having said that, it seems to me to unavoidable to conclude that Mr Aucamp took irrelevant considerations into account in arriving at his decision, that accordingly his decision should be reviewed and set aside, and that given the short time-frame before the funeral, this court should substitute its own decision for that of Mr Aucamp and not refer it back to him. I state pertinently that this is not intended to reflect adversely in any way on him.

[13]I refer then in particular to the following considerations that to my mind were irrelevant, but that were taken into account. The first is the fact that on 10 December 2001 the applicant committed a heinous crime. There is no doubt at all that the crime is heinous; that is why the legislature has prescribed minimum sentences for those. But I fail to see how that conviction can be relevant in considering whether the applicant should be allowed to bury his mother over a period of say four hours.

[14]If it were a relevant consideration, then no prisoner convicted for such a crime will be permitted to bury his mother. Add to this the fact that the applicant was sentenced on 25 March 2003, nearly 15 years ago. Moreover, according to the social worker's report which formed part of the decision being reviewed, the applicant has been involved in the rehabilitation programmes such as the aggressive behaviour management programme, where he learnt to deal with issues that contribute to his anger. The social worker concluded: "He was empowered with knowledge and skills to handle violence and conflict."

[15]The next irrelevant consideration is the classification of the applicant, according to Mr Aucamp, as "high risk." There are two problems with that classification. The first is that it is

not borne out by the applicant's profile document. That reflects his classification as "medium".

[16]The second problem with that classification is that, according to Mr Aucamp, it is based amongst others on his having been found guilty of three disciplinary offences. The record speaks only of two. Of these, he was found guilty on his own plea on one, and the other related to him being found in possession of private cash. I do not suggest that any of these two is unimportant, but the problem is that a third disciplinary offence, of which there is no record, was taken into account.

[17]I am mindful of the statement by Mr Aucamp that the applicant had tried to escape from lawful custody in 1996. That is a serious consideration, but it would appear that despite this fact, the applicant was classified "medium". At the end of the day, during the last nearly 15 years (possibly more, taking awaiting trial periods into account) in prison, there is no record of him having attempted escape.

[18]In the result I make the following order:

- (a) The decision to refuse the applicant permission under s.44(1)(a) compassionate leave to attend the funeral of his mother tomorrow, 6<sup>th</sup> January 2018 at 08h00 at Daveyton (Phumlani Cemetery) is reviewed and set aside;
- (b) The applicant is granted permission to attend the funeral of his mother at the above time and place between the hours 07h00 and 12h00;
- (c) The current Acting Head of the Modderbee Correction Facility is directed to put in place appropriate security measures to ensure the applicant's custody during the funeral, including ~~refusing~~ <sup>ensuring</sup> the applicant to maintaining an appropriate distance from other attendees.

WAG



WHG van der Linde  
Judge, High Court  
Johannesburg

For the applicant: In person  
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For the respondents: Ms. N. Cingo  
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Date argued: 5 January, 2018.  
Date of judgment: 5 January, 2018.