REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2019/41462

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED. YES

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SIGNATURE **DATE:** 28 October 2020

In the matter between:

GARY PATRICK PORRITT	Applicant
and	
HEAD OF JHB MEDIUM A CORRECTIONAL FACILITY	First Respondent
AREA COMMISSIONER, JOHANNESBURG AREA, DEPARTMENT OF CORRECTIONAL SREVICES	Second Respondent
NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	Third Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fourth Respondent

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG LOCAL DIVISION Fifth Respondent

SUSAN HILARY BENNETT Sixth Respondent

In re: **Criminal Case No. SS 40/06**

THE STATE

and

GARY PATRICK PORRITT Accused No 1

SUSAN HILARY BENNETT Accused No 2

JUDGMENT

SIWENDU J

[1] This urgent application served before me on 10 December 2019. The applicant is incarcerated at the Johannesburg Medium A Correctional Facility while awaiting the continuation of the trial. The substance of the relief he sought against the first, second, third and fourth respondent was in the following terms:

[1.1] The first, alternatively the second, alternatively the third, alternatively the fourth respondent or any of them jointly with another, permit the sixth respondent (Ms Susan Bennett), to consult with the applicant at the Medium A Facility in the same manner, and under the same conditions, and in the same physical area as is allowed for legal visits by legal representatives in respect of criminal case number SS 40/06.

[1.2] Alternatively, the above prayer operates as an interim interdict pending the finalisation of the procedure prescribed in Section 21 of the Correctional Services Act 112 of 1998.

[1.3] If at the end of the section 21 process, the matter is not resolved in the applicant's favour, the applicant shall be entitled to amplify its papers in support of the relief sought.

[2] On 13 December 2019, I granted the applicant the order below with reasons to follow:

"[1.1] that the matter be heard as one of urgency and granted condonation for any non-compliance with the rules pertaining to service and the periods prescribed in Rule 6(12).

[1.2] that the first, alternatively the second, alternatively third alternatively the fourth respondent jointly with another make reasonable accommodation within the available resources to permit the consultation between the Applicant and the Sixth Respondent at the Johannesburg Medium A Correctional Centre/ Facility.

[1.3] the first, second, third and fourth respondents are ordered to pay the costs of two counsel as well as the wasted costs of one junior counsel for 13 December 2019."

[3] The order in paragraph [1.2] above varies the relief sought in the Notice of Motion. I undertook and provide herein the reasons for the order.

[4] The applicant and the sixth respondent ('Bennett') are co-accused charged on approximately 3 000 counts of investor fraud and tax evasion, amongst others. The case which commenced in 2016 is ongoing and pending before Spilg J. They are not legally represented, therefore conduct their own defence.

[5] The applicant asserts he relies entirely on Bennett to fairly represent and conduct his defence. Bennett keeps some of the documents pertaining to the conduct of the trial and has hands on knowledge of the order of the information, some of which is stored on her computer. According to the applicant, approximately 150 arch lever files comprising evidence of two state witnesses in the criminal case before Spilg J necessitate that he consults with Bennett. The criminal trial which commenced in 2016 was adjourned for two months and is due to resume at the end of January 2020.

[6] From the papers, it appears the trial has been mired by interlocutory applications and appeals, including an application for Spilg J's recusal. In view of the length of the trial and to obviate further delays, on 29 October 2019, Spilg J attempted to gain agreement from Correctional Services to ensure that the applicant consults with the sixth respondent at the facility, without success. On 31 October 2019, Spilg J directed that the applicant and Bennett consult with one another to go through trial documents, and if necessary, bring an application to enable the consultation. That direction gave rise to this application.

[7] The applicant previously claimed that the officers permitted consultation with Bennett in the area set aside for legal representatives on three occasions in 2018. She consulted with him as if she were his 'legal representative'. It seems in most of these instances, the visits were in respect of certain pending appeals but not the trial. Bennett was accompanied by her legal representatives. It appears certain inconsistent statements about the applicant's ability to consult with Bennett were made, to wit that she can and has permission to consult with the applicant. He was refused permission notwithstanding.

[8] The applicant claims his rights to a fair trial, accorded to him in terms of s 35 of the Constitution, will be negatively affected if meaningful consultation with the sixth respondent is not permitted. His ability to cross examine certain expert witnesses will be impaired. He claims that consulting with Bennett during the hours allocated for visitors is not conducive or adequate for meaningful consultation. Consultations during court adjournments or at the facility within the confines of visiting hours is insufficient for the purpose of the trial. It is not disputed there are voluminous documents to go through.

[9] The thrust of the legal opposition by the first to fourth respondents is premised on the novel legal question the case raises – that neither the Correctional Services Act, the Regulations, nor the Policy of the Department of Correctional Services permits a co-accused to step in the shoes of a legal practitioner and assume that role. The sixth respondent is a co-accused, a civilian, and not a legal practitioner within the prescripts of the legislation. It has not been

contended that the applicant engineered this situation for ulterior motive or gain – it emanates from a direction by the court.

[10] On the facts, the respondents claim constraints in capacity. The relief cannot be implemented because there is limited space, and the area designated for legal visits at the facility is small. There are approximately 5 140 inmates awaiting trial whose needs must be taken account of. The applicant cannot be singled out for preferential treatment. Visit duration is between 30 to 45 minutes per visit. Ordinary visitation rules must apply. The respondents are obliged to treat all the prisoners equally. The applicant's case is not unique as made out in the papers.

[11] The respondents claim the applicant has been accommodated. After lodging a complaint about room for the voluminous files, he was allocated a single cell which he refused. His files have been placed in the communal cell he occupies, and he is given the opportunities to peruse the documents. Storage space has been allocated to house the other documents. Granting the relief would set a precedent where privileges accruing to a legal practitioner would be transferred to a civilian or a co-accused.

[12] The case centres on the interpretation and application of s 17(4) of the Correctional Services Act, Regulation 12 and s 35 of the Constitution. The contention is that the sixth respondent is not a legal practitioner but a co-accused and civilian. She cannot be afforded rights accruing to legal practitioners. Section 17 of the Correctional Services Act provides:

(1) Every inmate is entitled to consult on any legal matter with a legal practitioner of his or her choice at his or her own expense.

(2) The Minister may, by regulation, impose restrictions on the manner in which such consultations are conducted if such restrictions are necessary for the safe custody of inmates, but legal confidentiality must be respected.

(3) The Head of the Correctional Centre must take reasonable steps to enable inmates to exercise the substantive rights referred to in section 6 (3).

(4) Remand detainees must be provided with the opportunities and facilities to prepare their defence.

[13] Section 46(1) of the Correctional Services Act states that:

(1) Remand detainees may be subjected only to those restrictions necessary for the maintenance of security and good order in the remand detention facility and must, where practicable, be allowed all the amenities to which they could have access outside the remand detention facility.

[14] Correctional Service Regulation 12, promulgated under s 17(2) of the Correctional Services Act, deals with access to legal advice as follows:

(1) An inmate may consult with his or her legal practitioner in connection with legal matters subject to the conditions determined by the National Commissioner.

(2) A consultation contemplated in subregulation (1) is subject to the following:

(a) A legal practitioner must lodge proof of his or her identity and status as legal practitioner at the request of the Head of the Correctional Centre;

(b) Such a consultation must take place only between 08h00 and 15h30 unless the Head of the Correctional Centre, due to the existence of urgent or exceptional circumstances has given his or her prior permission;

(c) The consultation must take place in sight but out of earshot of a correctional official;

(d) The legal practitioner may be allowed to utilise his or her own interpreter, secretary or typist; and

(e) If a particular legal practitioner is refused access to the inmate the inmate may request to consult with another legal practitioner.

[15] It is common cause that the sixth respondent does not meet the classification or qualifications in the Act. In my view, the argument that the sixth respondent is not a 'legal practitioner' and therefore has no rights in terms of the legislation misses the mark. Even though in the relief, the applicant seeks is to have the sixth respondent dealt with as if she was a legal representative – the application is not founded on the rights accruing to the sixth respondent. The application is not premised on the qualification or identity of the sixth respondent. It is founded on the need to facilitate the applicant's right to a fair trial under s 35 of the Constitution. Section 17(4) of the Correctional Services Act affords the applicant the right contended in the broad sense.

[16] The respondents do not dispute Spilg J's direction or present facts to argue that it is incorrect misdirected and/or erroneous. Therefore, I depart from the premise that the consultation is essential and necessary to bring the trial to finality. Other than the argument that the applicant must be treated equally with other prisoners, there is no indication from the papers that the respondents have considered or sought to balance the requirements of the applicant with any of the conflicting rights and/or interests claimed. In my view, the right to a fair trial which the applicant asserts simultaneously evokes the realisation of another interconnected right, namely, the right to a speedy trial.

[17] The argument about limited resources at the facility, while not disputed, is not explained. The argument fails to account for the positive steps the state is enjoined under s 7 of the Constitution to promote, protect and fulfil, thereby facilitating the realisation of the constitutionally protected rights. To arrive at the conclusion that the applicant must fail, the respondents must, at the minimum, set out the facts considered to accommodate the applicant within the available resources as well as relevant facts which render it impossible to do so.

[18] In granting the order, I have carefully considered the parameters for judicial intervention in the context of the doctrine of separation of powers. In *Glenister v President of the Republic of SA,* Langa CJ held that:

'*In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their powers*.'[1]

[1] *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC) para 33.

[19] I am further minded that in *De Lange v Smuts NO and Others*, Ackermann J repeated that there is no universal model of separation of powers. He continued with the following remarks:

> *'I have no doubt that over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest*.'[2]

[20] Given that the Constitution reigns supreme, and there is no other effective remedy, I deemed the order granted appropriate.

T SIWENDU
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	10-12 December 2019
Date of order:	13 December 2019
Date of reasons:	30 January 2020

Appearances:

Counsel for the Applicant:	Adv. Johan Du Toit SC
	Adv. Jeremy Raizon
Instructing Attorneys:	FJ Cohen Attorneys

[2] *De Lange v Smuts NO and Others* 1998 (3) SA 785 para 60.

Counsel for the 1st - 4th Respondents:	Adv. Naseera Ali
Instructing Attorneys:	State Attorney