



OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION, MBOMBELA
(MAIN SEAT)**

- | | |
|-----|----------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: /NO |
| (3) | REVISED: YES |

.....	23 JULY 2021
SIGNATURE	DATE

Case No: 1674/2021

In the matter between:

IRVAN BROWN NKOSI

Applicant

versus

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

First Respondent

**THE NATIONAL COMMISSIONER OF CORRECTIONAL
SERVICES**

Second Respondent

**THE AREA COMMISSIONER OF CORRECTIONAL
SERVICES**

Third Respondent

JUDGMENT

BRAUCKMANN AJ

- [1] This is an application launched by the Applicant, which is not opposed, in terms whereof the Applicant seeks, ostensibly on an urgent basis, an interdict compelling the Respondents to transfer him to Barberton Correctional Services, which is within the jurisdiction of this Court.
- [2] He applies to this Court to transfer him in terms of Section 43 of the *Correctional Services Act, Act 111 of 1998* ("the Act") within seven days from date of this order, together with costs.
- [3] The Applicant provides reasons why this Court should grant him an "interdict" and order the Respondents to transfer him to Barberton Correctional Services.
- [4] Applicant is currently incarcerated in the Katama Sinthumule Prison in Louis Trichard, Limpopo Province. I am of the view that this court does not have jurisdiction over his person, but in the event that I am wrong,

the application stands to be dismissed in any way, for the reasons herein.

[5] It will appear from this judgment, none of the reasons proffered by applicant for his transfer are good enough and that the Applicant have followed the incorrect procedures.

[6] The reasons for requesting a transfer are as follows:

[6.1] His family resides in Belfast Siyathuthuka in Mpumalanga. He want to be closer to his family as he want them to visit him and appoint a legal representative to be able to consult with him to file an appeal against his incarceration;

[6.2] One of his co-accused in the trial that lead to his conviction and incarceration is constantly “troubling” him, and

[6.3] He is under “parental support” of his grandmother who cannot visit him as she only receives a social grant.

[7] His case is based on Section 43 of the Act. Section 43(1) reads as follows:

“43(1) A sentenced offender must be housed at the correctional centre closest to the place where he or she is to reside after release, with due regard to the availability of accommodation and facilities to meet his or her security requirements and with reference to availability of programs.”

[8] The Applicant has certain rights as set out in Section 35(2) of the *Constitution of the Republic of South Africa, Act 108 of 1996* (“the Constitution”).

[9] In terms of Section 21(1) of the Act the following is stated:

“21(1) Every inmate must on admission and on a daily basis, be given the opportunity of making complaints or requests to the head of the correctional centre or a correctional official authorized to represent such head of the correctional centre.

(2) The official referred to in subsection (1) must –

- (b) deal with the complaints and requests promptly and inform the inmate of the outcome; and
 - (c) if the complaint concerns an alleged assault, ensure that the inmate undergoes an immediate medical examination and receives the treatment prescribed by the correctional medical practitioner;
- (3) If an inmate is not satisfied with the response to his or her complaint or request, the inmate may indicate this together for the reasons for the dissatisfaction to the head of the correctional centre, who must refer the matter to the National Commissioner.
- (4) The response of the National Commissioner must be conveyed to the inmate.
- (5) If not satisfied with the response of the National Commissioner, the inmate may refer the matter to the Independent Correctional Centre Visitor, who must deal with it in terms of the processes laid down in section 93."

[10] In terms of Section 93 of the Act the following is relevant:

“93(1) An Independent Prison Visitor shall deal with the complaints of prisoners by –

(a) regular visits;

(b) interviewing prisoners in private;

(c) recording complaints in an official diary and monitoring the manner in which they have been dealt with; and

(d) discussing complaints with the Head of Prison or the relevant subordinate correctional official, with a view to resolving the issues internally.

(2) An Independent Prison Visitor, in the exercise and performance of such powers, functions and duties, must be given access to any part of the prison and to any document or record.

- (3) *The Head of Prison must assist an Independent Prison Visitor in the performance of the assigned powers, functions and duties.*
- (4) *should the Head of Prison refuse any request from an Independent Prison Visitor relating to the functions and duties of such a Visitor, the dispute must be referred to the Inspecting Judge, whose decision will be final.*
- (5) *An Independent Prison Visitor must report any unresolved complaint to the Visitors' Committee and may, in cases of urgency or in the absence of such a Committee, refer such complaint to the Inspecting Judge.*
- (6) *The Inspecting Judge may make Rules concerning, or on the appointment of an Independent Prison Visitor, specify, the number of visits to be made to the prison over a stated period of time and the minimum duration of a visit, or any other aspect of the work of an Independent Prison Visitor.*

(7) Each Independent Prison Visitor must submit a quarterly report to the Inspecting Judge, which shall include the duration of visits, the number and nature of complaints dealt with, and the number and nature of the complaints referred to the relevant Visitors' Committee.

(8) The Minister may, on the recommendation of the Department of Public Service and Administration and with the concurrence of the Minister of Finance, determine remuneration and allowances to be paid to the Independent Prison Visitors who are not in the full-time service of the State."

[11] What is also important is Regulation 25 in terms of the Act. In terms of Regulation 25 an inmate must be allowed an opportunity to make a representation as well as an opportunity to notify his spouse, partner, next of kin in a manner prescribed by the order to transfer him. The inmate is also entitled to be informed of his proposed transfer as well as the reasons therefor.

[12] I am of the view that the Applicant was supposed to bring a review application dealing with his transfer to the current location where he is held.

[13] If he was not satisfied with the transfer, he could have objected thereto. In terms of Section 21 and Section 93 of the Act certain measures are at the disposal of the Applicant. He can apply for a transfer which is a request, and if it is declined, reasons for the dissatisfaction should be referred to the Head of the Correctional Centre, who in turn must convey it to the National Commissioner. This Section also caters for the complaints of an alleged "troubling", as alleged by the Applicant. The Applicant may also lodge his complaints with the Independent Correctional Centre Visitor.

[14] In a judgment by Kollapen J. in **WP v. Minister of Justice and Correctional Services** delivered on 4 March 2021, the Judge found that the rights relating to conditions of incarceration and more particular contact and non-contact visits which the Applicant submitted he is entitled to, are not part of the rights that the Constitution guarantees to prisoners and subsequently dismissed the application.

[15] The Applicant do not have a right to be transferred to a facility of his choice. The refusal to transfer him to a facility of his choice, although in this application it does not appear that he applied for such transfer, does not amount to a violation of his rights in terms of the Constitution.

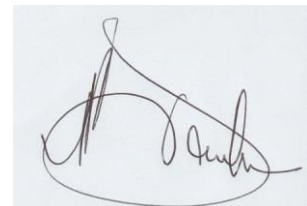
- [16] Section 35(2) of the Constitution, which contains the rights afforded to a sentenced offender, does not go that far. The rights enshrined in the Constitution are also not absolute and is limited to the extent that the limitation is reasonable and justifiable in an open and democratic society.
- [17] From the Applicant's application it is clear that the Respondents never prevented the Applicant's family to visit him or prevented the Applicant to consult with attorneys. An attorney can consult with the Applicant via telephone in order to proceed with his appeal and he does not need to consult him or to be close to his family to proceed with the appeal. There are also Legal Aid offices all over the country with whom he can make contact to proceed and process his appeal.
- [18] The contact that he does not have with his family is not prevented by the Respondents, but rather the family cannot visit him as they are apparently too far away from him. His rights in this regard is therefore not infringed upon by the respondents.
- [19] I am therefore of the view that the Applicant failed to make out a proper case for the relief sought and the application is not the correct way to approach this Court. The Applicant should have applied for a transfer to Barberton Correctional Facility and in the event it was refused, the Applicant could take the Respondents decision on review.

[20] As the Applicant is incarcerated and any cost award in this matter might be of an academic value, I do not intend making a cost award.

[21] The following order is therefore made:

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

DATED AT MIDDELBURG, MPUMALANGA ON THIS 23rd DAY OF JULY 2021.

A handwritten signature in black ink, appearing to read 'H.F. Brauckmann', is written over a light blue rectangular background.

H.F. BRAUCKMANN
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 23 JULY 2021

JUDGMENT HANDED DOWN: 23 JULY 2021

(DUE TO COVID – 19 JUDGMENT HANDED DOWN BY EMAIL)

APPLICANT APPEARED IN PERSON – jphilleman@sacm.co