

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Application No. : 3905/2005

In the application between:-

<u>ISHMAEL NONGALO</u>	First Applicant
<u>ABEDNIGO MAHUSA</u>	Second Applicant
<u>MOLEME MAKGEBE</u>	Third Applicant

and

<u>THE NATIONAL COMMISSIONER: DEPARTMENT OF CORRECTIONAL SERVICES</u>	First Respondent
<u>THE PROVINCIAL COMMISSIONER: DEPARTMENT OF CORRECTIONAL SERVICES</u>	Second Respondent

CORAM: MALHERBE JP

HEARD ON: 3 MAY 2007

DELIVERED ON: 10 MAY 2007

The applicants are inmates of the Mangaung Correctional Centre (the MCC) in Bloemfontein where they are serving long terms of imprisonment. On 6 September 2005 they issued a notice of motion which they drafted themselves and in which they claim the following relief:

- “(1) Declaring the applicants’ detention and allocation in Mangaung Correctional Centre unlawful and inconsistent.
- (2) Granting an interdict to applicants confirming their reallocation to convenient CENTRES as prayed for in affidavit.
- (3) Directing the respondents to reallocate applicants immediately.”

As could have been expected applicants’ founding affidavit is not a model of clarity. However, it is clear from the following extract from this affidavit that they are dissatisfied with their detention in MCC and wish to be transferred to other prisons:

- “(3) We are residence of Soweto (Gauteng), Mafikeng and Klerksdorp, (Northwest) provinces and our family are based there. Furthermore, it has always been our wish to be reallocated to Gauteng and Northwest provinces in order to enhance communication with our families. In addition, we submitted requests to the Department of Correctional Services Controller in M.C.C. for transfer, simultaneously from 2001 until recently in 2004/5, but to no avail. Therefore, it has come to our attention that all requests for transfer are handled by the controller who

further forwards them to the (DCS) Provincial Commissioner for further handling and consideration.

(4) Granting, in our individual submission we identified and indicated the following Correctional Centres:

- I. I. Nongalo: Leeuwkop. C.C.
- II. A. Mahusa: Rooigrond or Potchefstroom
- III. M. Makgebo: Rooigrond

as convenient and appropriate. Furthermore, we have also consulted the representatives of Judge (Inspecting Judge for Prisons), who are known as I.P.V. (Independent Prisoners Visitors) but also in vain and unsuccessful. Furthermore, among the reason we (applicants) furnished in support of our requests are:

- (A) Our allocation in M.C.C. jeopardizes and has a negative impact on our family relation and communication, more especially on contact visit.
- (B) Moreover, our allocation is expensive and detrimental, because our families can't travel frequently for visit (two of the applicants never have family visit). In fact, we solemnly depend on our parents for financial support, others being pensioners, for funding our studies, and maintaining our livelihood in prison.
- (C) Furthermore, our present predicaments affect our rehabilitation process and academic endeavours,

hence difficult and impossible to concentrate and reach high altitude. However, we firmly believe that our reallocation will help improve family contact and relations.

- (5) In light of the above furnished reasons, we humbly submitted that our allocation and detention in M.C.C. from 2001 is inconsistent with provisions of the Constitution, 108 of 1996 S. 35(2)(f)(i)(ii)(iii) and (iv), which reads 'everyone who is detained, including every sentenced prisoner has the right to communicate with, and be visited by, that person's spouse, next of kin and etc'.
- (6) Furthermore, the Correctional Services Act, 111 of 1998 S. 43(i) read 'Every sentenced prisoner must be housed at the prison closest to the place where he or she is to reside after release'.
- (7) Therefore, it is respectfully submitted that the prisoner subject to which transfer and allocation (centre) next to his or her residence, according to the Correctional Service Act provision."

Since the delivery of the founding affidavit there have been many delays, with the result that the replying affidavit was only delivered on 26 April 2007 whereafter the matter was heard on the first succeeding Motion Court day.

Respondents' opposition to the application appears from the following paragraphs of the answering affidavit:

"3.

I have been informed that applicants seek in paragraph 1 of their notice of motion the review and setting aside of decisions taken as long ago as in 2001 in terms whereof they were transferred to the MCC. Secondly it appears from paragraphs 2 and 3 of the notice of motion as if applicants seek an order in terms whereof respondents be ordered and directed to transfer them to prisons of their choice.

4.

4.1 In so far as applicants seek the review of the 2001 decisions to transfer them to MCC, their application has been filed almost four years after the decisions have been taken. The application has been filed hopelessly out of time without any reasons whatsoever as to why the Honourable Court should condone non-compliance with the provisions of Section 7(1) of the Promotion of Administrative Justice Act, 3 of 2000 ('**PAJA**'). Since the application was issued a further period of two years has lapsed.

4.4 First applicant never complained about his transfer to MCC or the dismissal of any of his applications for transfer from MCC to which I will refer later herein

according to the official Complaints' Register of MCC. Second applicant complained in May 2002 for the first time about his transfer, whilst third applicant never complained about his transfer to MCC or the dismissal of his applications to be transferred from MCC.

- 4.5 No reasons have been advanced to explain the delay and there is no application for condonation.
- 4.6 As advised, argument will be addressed to the Honourable Court that the review application pertaining to the 2001-decisions should be dismissed by the Honourable Court without having to go into the merits thereof.

6.

Before dealing with the allegations made by applicants, I have been advised to give the following background to the Honourable Court:

- 6.1 As stated the MCC is run by a private enterprise in accordance with a contract entered into with the Department of Correctional Services.
- 6.2 In accordance with the terms and conditions of the contract between the Department and MCC, MCC should never be overcrowded, but on the other hand, must also be on 100% capacity at any given time.

- 6.3 In order to facilitate transfers between prisons and particularly from MCC to other prisons, so-called cross-transfers can be arranged.
- 6.4 Although it is not reasonable to transfer a prisoner from MCC to an already overcrowded prison, transfer may be allowed at the request of a prisoner and if all other relevant conditions are satisfied on the basis that a prisoner(s) from the overcrowded prison is/are simultaneously transferred to MCC or if prisoners at such prison are released to effectively reduced the numbers.
- 6.5 Aspects such as security risks must also be taken into consideration. The applicants are maximum-security prisoners and can in any event not be transferred to prisons that do not provide for the detention of maximum-security prisoners.
- 6.6 The MCC was opened in 2001 and has a capacity of 2 928 prisoners.
- 6.9 It has to be emphasised that there was not nearly enough maximum-security classified prisoners within the Free State Province that qualified for transfer to MCC and it was therefore inevitable that prisoners from other provinces such as Northern Cape, North West and Gauteng had to be transferred to MCC to ensure that it was filled to 100% capacity.

6.10 Applicants were transferred to MCC in accordance with the aforesaid plan.

7.

7.1 Applicants did not comply with the provisions of Section 7(2)(c) of PAJA. They did not exhaust their internal remedies and did not set out any exceptional circumstances as to why the Honourable Court should come to their relief. The Honourable Court is respectfully referred to chapters 9 and 10 of the Correctional Services Act, 111 of 1998. Independent Prison Visitors visit the MCC on a regular basis. Applicants are fully entitled to be interviewed in private and to file complaints with these visitors. This option is open to them over and above the Inmate Complaint Register, as well as the Confidential Access System, which facilities allow prisoners to file complaints. One of the powers of Independent Prison Visitors is to discuss complaints with the Head of Prison with a view to resolve issues internally. In the event of an unresolved complaint the matter may be referred to the Inspecting Judge for his further attention.

7.2 It is alleged in paragraph 4 of the founding affidavit that applicants consulted representatives of the Inspecting Judge and Independent Prison Visitors. No information was provided in respect of when these consultations took place, what grievances were made and what feedback

was received. I have thoroughly investigated this matter and could find no proof whatsoever that either the office of the Inspecting Judge or the Independent Prison Visitors reported grievances to either the MCC or the DCS Controllers with instructions to attend to the complaints. I submit therefore that these allegations are without substance.

- 7.3 The application should be dismissed without dealing with the merits on the basis that applicants did not exhaust their internal remedies. There is no proof that they followed above procedures in order to obtain relief.
- 9.2 It is admitted that the relatives of applicants are resident in Soweto, Mafekeng and Klerksdorp respectively. However, save in the case of second applicant, there is no proof that applicants wanted to be transferred to Gauteng or North West prisons immediately or soon after arrival at MCC.
- 9.3 First applicant applied to be transferred to Zonderwater Prison on **12 May 2003**. This application is still pending due to the fact that no feedback has been received from the Zonderwater Prison. However as indicated in annexure 'D' the population percentage of the Zonderwater Medium A Prison is presently 227%, which is more than double the figures it can host. It is just not possible to transfer first applicant to the Zonderwater

Medium A Prison without the consent and co-operation of not only the head of that prison, but also the office of the Regional Commissioner for Gauteng. On **26 May 2005** first applicant applied to be transferred to Leeukop Prison, but this application was disapproved and he was informed accordingly. It appears from annexure 'D' that Leeukop Maximum Prison has at present a population of 220%.

- 9.4 Contrary to the perception of applicants, overcrowdedness in the prisons of their choice is a serious problem. A prisoner cannot be '*dumped*' on a prison of his choice merely because he seeks a transfer to that prison. Such action would be irresponsible and not in line with the Department's statutory duties and obligations.
- 9.5 First applicant also applied on **13 October 2006** to be transferred to Potchefstroom. This prison does not cater for maximum security classified prisoners and although no feedback has been received from the Regional Commissioner for North West and/or the head of the prison yet, I have reason to believe that this application will probably be disapproved in due course for this very reason.
- 9.6 Second applicant applied twice to be transferred to Rooigrond, i.e. on **29 July 2003** and again on **25 October 2004**. Both applications were disapproved and

second applicant informed accordingly. He applied on **13 October 2006** (on the same date as first applicant) to be transferred to Potchefstroom. I refer the Honourable Court to my comments made in the previous subparagraph. This application is also still pending.

9.7 Third applicant also applied twice to be transferred to Rooigrond, i.e. on **4 January 2005** and again on **14 July 2006**. Both applications were dismissed and third applicant advised accordingly.

9.8 The reasons for the disapproval of the aforesaid applications appear from annexures '**E**' and '**F**' hereto. The Honourable Court will note that over-crowdedness was stipulated as the reason for disapproval.

9.9 I reiterate that applicants are serving lengthy services after having been found guilty of serious crimes. They are maximum-security classified prisoners and there are pertinent security risks in detaining them.”

The replying affidavit does not raise anything worthy of note.

I have considered the evidence and the arguments addressed to me. Even if respondents' reliance on Act 3 of 2000 and Act 111 of 1998 as set out in paragraphs 4.1 and 7.1 quoted above, is not considered at all, there is no way that the application can succeed

on the merits. This is clearly a case where inmates of a high security prison want to dictate to the prison authorities where and under what conditions they prefer to serve their sentences. That cannot be allowed.

For what it is worth, costs must follow the result.

The application is dismissed with costs.

The Registrar is requested to make a copy of this judgment available to each applicant.

J.P. MALHERBE, JP

On behalf of applicants: In person

On behalf of respondents: Adv. J.P. Daffue
Instructed by:
State Attorney
BLOEMFONTEIN

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