IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

CASE NO: 6113/2007
DATE HEARD: 24/4/08
DATE DELIVERED: 5/5/08
REPORTABLE

In the matter between:

BRUCE EHRLICH	**APPLICANT**
and	
MINISTER OF CORRECTIONAL SERVICES	**1ST RESPONDENT**
THE HEAD: MDANTSANE PRISON	**2ND RESPONDENT**

The applicant, a sentenced prisoner, applied to review and set aside a decision taken by the second respondent, the head of the Mdantsane Prison, to deny him access to a gymnasium in the prison at which a karate development program had been run for the previous two years. The second respondent said that he took the decision in order to segregate maximum category offenders housed in A-Section from medium category prisoners housed elsewhere and that the applicant could practice karate on a field in D-Section where he was held.

The Court held that s 41(5) of the Correctional Services Act 111 of 1998 vested a right in sentenced prisoners such as the applicant to participate in development programs like the karate development program. The alternative venue proposed by the second respondent was, in fact, an alternative venue for the applicant to practice karate, rather than an alternative venue for the karate development program. The applicant's assertion that no suitable alternative venue had been made available stood uncontraverted because the second respondent made no attempt to deal with the suitability of the venue.

IN THE HIGH COURT OF SOUTH AFRICA

As the administrative decision that prevented the applicant from participating in the karate development program materially and adversely affected his right in terms of s 41(5) and it was taken without prior notice to the applicant, it had to be set aside for want of procedural fairness. In addition, it was tainted by a material error of law in that the second respondent had misconceived the nature of his powers and as a result had not applied his mind properly. The decision was also unreasonable as contemplated by s 6(2)(h) of the PAJA in that it was a decision that no reasonable decision-maker would have taken and it also was unequal in its operation because the applicant had alleged, and the second respondent had never denied, that other medium category prisoners had been allowed access to A-Section and that it was only those in the karate development program who were denied this access. The decision was set aside and a declarator was issued to the effect that that the medium category prisoners at the prison, including the applicant, were entitled as of right and forthwith to take part in the karate development program and, for this purpose, to be granted supervised access to the gymnasium in A-Section of the prison. It was also ordered that the second respondent file an affidavit within two weeks confirming that he had complied with the order.

JUDGMENT

PLASKET J

[1] The applicant is a sentenced prisoner. He is incarcerated at the Mdantsane Correctional Centre. He has brought an application, purportedly in terms of rule 53 of the Uniform Rules, to review and set aside 'the decision of the second respondent to deny medium category offenders at Mdantsane Prison supervised access to the gymnasium in A-Section of the prison for purposes of development programs' and for alternative relief. He has represented himself throughout in these proceedings. The second respondent is the head of the prison and the official who took the decision that is the subject of this review.

[2] The essence of his case is that he has been denied his right to participate in a development program, as envisaged in s 41 of the Correctional Services

Act 111 of 1998 in circumstances which are unfair, unreasonable and amount to unequal treatment.

[A] GUIDING PRINCIPLES AND STATUTORY SCHEME

[3] There has been much uninformed and often irresponsible talk of late of the law not being tough enough on criminals. For that reason I deem it necessary to preface this 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 principle is one that, in its articulation by the highest court of the land, predates the 1996 Constitution and has a much older but just as august pedigree. The line of cases starts in 1912 in the matter of *Whittaker and Morant v Roos and Bateman*[1] 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.'

[5] Nearly 70 years later, in *Goldberg and others v Minister of Prisons and*

---

1 1912 AD 92, 122-123.

others,[2] Corbett JA said in a dissenting judgment:[3]

> 'It seems to me that fundamentally a convicted and sentenced prisoner retains all the 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 make upon a prisoner's personal rights and liberties (for sake of brevity I shall henceforth speak merely of "rights") are very 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 the 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.'

[6] Even though that dictum was in a dissenting judgment, it relied on the judgment of Innes JA, cited above, in *Whittaker and Morant v Roos and Bateman*.[4] Subsequently, Corbett JA's dictum was held to correctly reflect the law in Hoexter JA's judgment in *Minister of Justice v Hofmeyr*.[5] 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',[6] Hoexter JA had held:[7]

> 'The Innes dictum serves to negate the parsimonious and misconceived notion that upon his admission to a gaol 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

2 1979 (1) SA 14 (A).
3 At 39C-E.
4 Note 1.
5 1993 (3) SA 131 (A), 138E-142C.
6 At 141H.
7 At 141C-E.

> able to assert only those rights 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 rights 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 but also by 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 the 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]

[8] Section 35(2)(e) of the Constitution provides that everyone who is detained, including every sentenced prisoner, has the fundamental right 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 s 33(1) of the Constitution gives everyone the right to 'administrative action that is lawful, reasonable and procedurally fair'.

[9] Section 195(1) of the Constitution binds those who, like the second respondent, are public administrators, to 'the democratic values and principles enshrined in the Constitution' including the provision of services 'impartially,

---

8 See *Minister of Correctional Services and others v Kwakwa and another* 2002 (4) SA 455 (SCA), 469I, in which Navsa JA said that the *Hofmeyr* judgment 'has been given fresh impetus by a number of our constitutional values such as dignity, equality and humanity'.

fairly, equitably and without bias'.[9]

[10] The Correctional Services Act contains a number of provisions that are important for present purposes. It is evident – and not surprising -- that this statute is based on the primacy of the values of the Constitution and in this sense is based on the residuum principle. One of its objects specified in its long title is to provide for 'the custody of all prisoners under conditions of human dignity'. Section 2(b) defines one of the purposes of the Act as being the detention of prisoners 'in safe custody whilst ensuring their human dignity' and s 2(c) speaks of its purpose of 'promoting the social responsibility and human development of all prisoners and persons subject to community corrections'.

[11] Section 4 is headed 'Approach to safe custody'. While s 4(1) places an obligation on prisoners to 'accept the authority and to obey the lawful instructions of the Commissioner and correctional officials of the Department and custody officials', s 4(2)(b) makes provision for something of a *quid pro quo*. It states that the 'duties and restrictions imposed on prisoners to ensure safe custody by maintaining security and good order must be applied in a manner that conforms with their purpose and which does not affect the prisoner to a greater degree or for a longer period than necessary'. (This provision incorporates another constitutional foundation, the principle of proportionality.[10])

[12] Section 7 is headed 'Accommodation'. It provides for the segregation of prisoners on various criteria: sentenced prisoners must be detained separately from unsentenced prisoners;[11] male prisoners must be detained

---

9 Section 195(1)(d).

10 See *Minister of Public Works and others v Kyalami Ridge Environmental Association and others* 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC), para 101. See too Jowell and Lester 'Proportionality: Neither Novel Nor Dangerous' in Jowell and Oliver (eds) *New Directions in Judicial Review* London, Stevens and Sons: 1988, 51, 52; Baxter *Administrative Law* Cape Town, Juta and Co: 1984, 529.

11 Section 7(2)(a).

separately from female prisoners;[12] children must be detained separately from adults and 'in accommodation appropriate to their age'.[13] In addition, the Commissioner is empowered to 'detain prisoners of specific age, health or security risk categories separately.[14]

[13] Section 7(3) allows for departures from the norm. It states:

> 'There may be departures form the provisions of subsection (2)(a) to (c) if such departures are approved by the Head of the Prison and effected under supervision of a correctional official and are undertaken for the purpose of providing development or support services or medical treatment, but under no circumstances may there be departures in respect of sleeping accommodation.'

[14] Chapter IV of the Act deals specifically with sentenced prisoners. Its first section, s 36, says this of the objective of the implementation of a sentence of imprisonment:

> 'With due regard to the fact that the deprivation of liberty serves the purpose of punishment; the implementation of a sentence of imprisonment has the objective of enabling the sentenced prisoner to lead a socially responsible and crime-free life in future.'

[15] Section 37(1) provides that sentenced prisoners must participate in certain processes and programs which have as their aim the achievement of the Act's objectives and the fostering of habits of industry. Section 37(2) goes further, however, by providing that, in addition to processes and programs that meet the minimum requirements of the Act, 'the Department must seek to provide amenities which will create an environment in which sentenced prisoners will be able to live with dignity and develop the ability to lead a socially responsible and crime-free life'. (Section 16(1), which does not apply

12 Section 7(2)(b).
13 Section 7(2)(c).
14 Section 7(2)(d).

to sentenced prisoners only, says that the Department 'may provide development and support services even when not required to do so by this Act'.)

[16] Section 41 is headed 'Treatment, development and support services'. It states:

> '(1) The Department must provide or give access to as full a range of programmes and activities as is practicable to meet the educational and training needs of sentenced prisoners.
>
> (2) Sentenced prisoners who are illiterate or children may be compelled to take part in the educational programmes offered in terms of subsection (1).

(3) The Department must provide social and psychological services in order to develop and support sentenced prisoners by promoting their social functioning and mental health.
(4) The Department must provide as far as practicable other development and support programmes which meet specific needs of sentenced prisoners.
(5) Sentenced prisoners have the right to take part in the programmes and use the services offered in terms of subsections (1), (3) and (4).
(6) Sentenced prisoners may be compelled to participate in programmes and to use services offered in terms of subsections (1), (3) and (4) where in the opinion of the Commissioner their participation is necessary, having regard to the nature of their previous criminal conduct and the risk they pose to the community.
(7) Programmes must be responsive to special needs of women and they must ensure that women are not disadvantaged.'

[17] That then is the legislative scheme, located within its historical and current constitutional framework, within which this matter must be determined.

[B] THE FACTS

[18] As stated above, the applicant is a sentenced prisoner. He is also a qualified karate instructor. Karate, he says, is one of the prescribed development programs for purposes of s 41 of the Act in terms of the Department's Sport, Recreation, Arts and Culture policy. I accept this to be

the case because, if it was not, I am sure that the second respondent would have denied the applicant's averment.

[19] In July 2005, the applicant submitted a proposal for the introduction of karate as a development program at the prison. He received no response to the proposal but the program was eventually implemented in December 2005 after the applicant had obtained an order from this court directing the Department to do so.

[20] In September 2006, the applicant was transferred to the East London prison but he was transferred back to the Mdantsane prison in July 2007. While he was in the East London prison, one of his students ran the karate development program. Of the value of this development program, within the context of the statutory aims and objects of the Department, the applicant says:

> 'I digress briefly to note that the value of this program is immense in relation to one of the core functions of DCS [the Department of Correctional Services], namely to develop offenders. Of the hundreds of offenders who have benefited from this program over the years, a number have gone on to make a living from teaching karate after being released on parole, the most recent being one Abongile Manqola from MCC.'

[21] From its inception in 2005 until 2007 the activities of this development program, which included classes, clinics, gradings and workshops, were conducted in 'the only suitable venue at MCC, namely the 80m² gymnasium, in a part of the prison building known as A-Section'.

[22] Prisoners from other sections of the prison who were part of the karate development program, including the applicant, were brought to A-Section to attend classes and other activities of the program.

[23] In September 2007 maximum category youth offenders were moved into A-Section, having been transferred from the East London prison. From then until 8 October 2007, the karate development program continued as before. On that day, however, the applicant was refused access to the gymnasium to teach a karate class. He took the matter up with the second respondent who informed him that he had decided that no medium category prisoners were to be allowed into A-Section because it was now a maximum category section.

[24] The applicant had numerous meetings with the second respondent and other senior officials at the prison to try to resolve the problem. He stated that no alternative venue has been provided and no indication has been given that the karate development program will continue. On 17 October 2007, the applicant gave notice of his intention to institute these proceedings. In his notice, he described the karate development program as being 'the only market-related skills development program' offered at the prison. (This has not been denied by the respondents.) He stated that the gymnasium in A-Section was the 'only suitable and available facility for this particular program'. He claimed that he was 'being unreasonably denied access to a development program as is my right i.t.o s 41(5) of Act 111 of 1998'. He demanded that he be 'reinstated in this program with access to classes in a safe and suitable facility on or before 22 October 2007' and that if this demand was not met, he would institute proceedings for appropriate relief.

[25] Before turning to the second respondent's answering papers, it is necessary to mention the respondents' first unfortunate line of defence. This was a notice in terms of rule 47 in which it applied for an order to the effect that the applicant – a person who had been incarcerated for seven years – should provide security of R20 000.00 for costs. When the matter was heard on 7 February 2007, Pickering J dismissed the respondents' application.

[26] This application reflected poorly on the respondents' sense of fairness, and on their obligation to 'respect, protect, promote and fulfil' the fundamental rights – in this case, the right of access to court – of people such as the applicant who are detained by them. Courts are entitled to expect better of organs of state. Unfortunately, the respondents did not stop there in their efforts to frustrate the applicant at every turn. The second respondent made certain allegations of improper conduct against the applicant, filing vague affidavits, some containing hearsay evidence, to purportedly support these allegations. On his own version, these allegations had nothing whatsoever to do with his decision to stop the karate development program and the allegations that were made did not, in any event, support the idea behind the allegation, namely that the applicant used the karate development program for 'ulterior motives'. The applicant applied for these affidavits to be struck out and I duly struck them out.

[27] The second respondent filed two affidavits in answer to the applicant's founding affidavit. The first is his answering affidavit. In addition, he was ordered by Pickering J to file a second affidavit by 10 April 2008 in order to provide detail of his allegation that venues other than the gymnasium in A-Section were available for the karate development program. This affidavit was, however, only filed on 18 April 2008 and was never served on the applicant: the first sight he had of it was in court on the day that this matter was heard when Mr Boswell, who appeared for the respondents, made his copy of the affidavit available to the applicant. This serves as a further illustration of the unacceptable manner in which the respondents have conducted themselves in this matter. (I hasten to add that this criticism does not reflect on Mr Boswell. He conducted himself in accordance with the ethical standards of the Bar throughout.) It was agreed that, in order to finalise the matter, and despite the absence of a properly motivated application for condonation, the affidavit would be admitted. The applicant agreed to forego his right to reply to the affidavit. It was obviously unfair of the respondents to

place the applicant in such an invidious position.

[28] Both affidavits filed by the second respondent are cryptic and are perhaps more instructive in what they do not say than in what they do say. In the first affidavit, the second respondent gave a reason for his decision. It is to be found in the following three paragraphs:

> '5. It is correct that the structure within Mdantsane Prison changed and the maximum security youth offenders were moved to A-Section.
> 6. The medium offenders were moved to other places in the prison.
> 7. In terms of Departmental Policy, the maximum and medium offenders should as far as possible be kept separately and not be allowed to mix freely.'

[29] In his further affidavit he added the following:

> 'As previously advised, due to departmental policy consideration[s] and re-classification of the Correctional Services Institution at Mdantsane, a separation had to take place between maximum juvenile offenders and medium adult offenders and medium adult offenders should not have unsupervised access to the juvenile maximum offender section.'

[30] In answer to the applicant's averment that those who took part in the karate development program have not been provided with a suitable alternative to the gymnasium in A-Section, the second respondent initially did no more then answer with a bare denial, stating that where 'the applicant is housed presently an alternative venue is available and the applicant is free to participate in his karate activities at this venue'. He also stated that the applicant 'had been advised of this arrangement' and that he is 'also afforded an opportunity to practice his sports on the sports fields on certain days in the week'.

[31] In his second affidavit, the second respondent identified one alternative venue as an open air exercise area in D-Section where the applicant is detained. It is, he says, about 100 metres by 80 metres, has a gravel pathway

around it and it is grassed. Furthermore, if the applicant agrees to move from D-Section to C-Section, he will be able to use a facility there.

[32] Three issues stand out in the second respondent's affidavits. The first is that he takes the view that the applicant can only practice karate as an individual – as opposed to taking part in the karate development program – in the section in which he is detained. Secondly, although Pickering J required more information on the alleged alternatives to the gymnasium in A-Section, the second respondent attached six photographs of it but not a single photograph of any alleged alternative venue which may have indicated its suitability. Thirdly, and this is related to the second point, the second respondent made no attempt at all to deal with the suitability of the alleged alternative in C-Section and so the applicant's averment in his founding affidavit that the gymnasium in A-Section is the only *suitable* venue stands unchallenged.

[33] The second respondent's focus throughout is on the applicant individually and whether there are facilities in the section in which he is held where he can practice his sport, whereas his proper focus should have been on the karate development program in the prison, which was run to benefit many more people than the applicant and was designed to achieve the aims of a development program envisaged by s 41. His approach to the alleged alternative is thus based on a wrong premise. He has, for this reason, not managed to displace the applicant's assertion that no suitable alternative has been provided for the karate development program.

[34] On the second respondent's own version, the segregation of maximum category juvenile offenders in A-Section is not as absolute as he initially suggested. In his second affidavit he stated that A-Section was used to detain juvenile offenders of up to 21 years of age. (I notice that he does not mention the lower age for this category.) He then proceeded to say that in addition to

these juvenile offenders, 'there is a further category aged between 21 to 25 years, who are also housed in this section'.

[35] More tellingly, however, the second respondent never denied the applicant's detailed averments – in both his founding affidavit and his letter of demand – that from September 2007 onwards 'numerous mediums have been allowed unsupervised daily access to A-Section with the express knowledge and permission of the second respondent'. He referred to a function attended by all of the medium category prisoners and all of the maximum category prisoners in A-Section on 22 November 2007 'at which the second respondent was present', the fact that a prisoner named Xolani Besi 'and a number of assistants' run a prison shop in A-Section and he also referred to two medium category prisoners who attend band practice in A-Section.

[C] THE LAW

[36] As stated at the outset, the applicant has represented himself throughout these proceedings. While the legal basis upon which the relief is sought should ordinarily be identified by the applicant, this rule cannot be applied rigidly and certainly not when a lay litigant represents himself or herself. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others*,[15] O'Regan J articulated the rule as follows in a case in which no mention was made of the Promotion of Administrative Justice Act 3 of 2000 – the PAJA – in a review of an administrative decision:

> 'Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative. I am prepared to assume, in favour of the applicant, for the purposes of this case, that its failure to identify with any precision the provisions of PAJA upon which it relied is

15 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC), para 27.

> not fatal to its cause of action. However, it must be emphasised that it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action.'

[37] In this case the decision taken by the second respondent is an administrative decision. It was the exercise of a public power taken during the course of administering the prison in terms of the Correctional Services Act, it affected the rights of the applicant and others to take part in a development program, as envisaged by s 41(5) of the Act; and, as it put a stop to the karate development program, it had a direct, external legal effect.[16]

[38] While the applicant has not mentioned the PAJA it is clear that it applies. After all, it is intended to 'cover the field' -- to provide the mechanism to review administrative action, the grounds of review and the remedies appropriate to each case.[17] He has, however, identified the source of the right that he seeks to vindicate. That is the right to participate in a development program vested in sentenced prisoners by s 41(5) of the Act. He has also identified some of the grounds of review on which his case rests. They are first that he was denied access to the karate development program without a hearing,[18] in the sense that the first he knew of the decision taken against him was when he was denied access to the gymnasium in A-Section; secondly, that the decision was unreasonable;[19] and thirdly, that the decision was unequal in its operation.[20] The facts also raise further issues namely whether, on the

---

16 See *Grey's Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others* 2005 (6) SA 313 (SCA), paras 21-24. See too *Nakin v MEC, Department of Education, Eastern Cape Province and another* Ck undated judgment (case no. 77/07) unreported, paras 46-48.

17 *Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others (Treatment Action Campaign and another as amici curiae)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC), para 95.

18 The PAJA, s 6(2)(c).

19 The PAJA, s 6(2)(h).

20 This is either an aspect of unreasonableness or a separate ground of review that is covered by the catch-all, s 6(2)(i), namely that the administrative action is 'otherwise unconstitutional or unlawful'. I prefer to deal with it as a manifestation of unreasonableness in

second respondent's own version, he committed a material error of law;[21] and whether it was arbitrary and capricious.[22]

[39] Section 3(1) of the PAJA provides that when administrative action 'materially and adversely affects the rights or legitimate expectations of any person', it must, in order to be valid have been taken in a procedurally fair manner. If it has not been, it may be set aside on the basis of s 6(2)(c) of the PAJA. It is not in dispute that the applicant, like everyone else involved, had a statutory right to participate in the karate development program. That right was materially affected, in the sense that, having been taken away from the applicant, it was affected to a significant degree. He was also, obviously, adversely affected. As he was not given any notice, or afforded any other aspect of a procedurally fair process prior to the decision being taken, it must be set aside. That, in truth, is the end of the matter but I intend to say something of the remaining grounds of review that I have listed above.

[40] In my view, the second respondent's decision falls foul of the fundamental right to lawful administrative action as well because it was based on an error of law: the second respondent erred in interpreting his powers. On his own version, he took the view that prisoners of different categories had to be segregated. That, however, is not what the Correctional Services Act directs. Section 7(3) only requires strict segregation 'in respect of sleeping accommodation' and makes specific provision for mixing 'for the purpose of providing development or support services'. This is precisely what had happened for some two years from when the karate development program commenced and for about two weeks from when the maximum category prisoners moved into A-Section until the second respondent ended the karate development program. The second respondent appears to have taken the view that he had no choice but to enforce segregation soon after maximum

terms of s 6(2)(h). This is yet another example of the overlapping nature of the grounds of review.

21 The PAJA, s 6(2)(d).

22 The PAJA, s 6(2)(e)(vi).

category prisoners were moved into A-Section. He erred materially in believing that he had no discretion when in fact he had a discretion. This error was material in that it resulted in him not applying his mind properly to the matter. On this account, the decision must be set aside.[23]

[41] I turn now to whether the second respondent's decision was unreasonable. Section 6(2)(h) of the PAJA states that administrative action may be set aside if 'the exercise of the power or the performance of the function authorised by the empowering legislation in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function'. In *Bato Star Fisheries (Pty) Ltd v Minister of Environmental Affairs and others*,[24] O'Regan J held that this provision was not to be taken at face value – as it would then set too high a threshold – but was to be interpreted consistently with s 33's fundamental right to reasonable administrative action: s 6(2)(h) should, she held, 'be understood to require a simple test, namely that an administrative decision will be reviewable if … it is one that a reasonable decision-maker could not reach'.[25] She proceeded to state:[26]

> 'What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions

23 See *Hira and another v Booysen and another* 1992 (4) SA 69 (A).
24 Note 15.
25 Para 44.
26 Para 45.

> taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'

[42] Professor Jowell classes unreasonable administrative actions under three broad heads, namely those that suffer from an 'extreme defect in the decision-making process' (such as decisions taken in bad faith or irrational decisions); those that are 'taken in violation of common law principles governing the exercise of official power' (and in South Africa, corresponding constitutional imperatives), such as equality and legal certainty; and those that are oppressive in the sense that they 'have an unnecessarily onerous impact on affected persons or where the means employed (albeit for lawful ends) are excessive or disproportionate in their result'.[27] These grounds of unreasonableness are found in the PAJA, either in specific provisions (such as s 6(2)(e)(v) – bad faith – for instance) or embedded in s 6(2)(h) (such as proportionality or equality).

[43] I am of the view that the second respondent's decision was unreasonable. It is a decision that no reasonable decision-maker could have reached. When consideration is given to the nature of the decision, which was, in effect if not by design, to stop the karate development program, it infringed the statutory right of every participant and affected them in their dignity in the sense that they were denied access to an undertaking that not only had the potential to break the boredom and monotony of incarceration but also to contribute to their personal development and rehabilitation. In this sense, the decision undermined important purposes of the Correctional Services Act. I take into account too that the karate development program had been functioning for some two years and, on the undisputed evidence of the applicant, had been successful. In this sense, the second respondent did not merely affect potential rights, as he would have if he had refused to give

---

27 'Judicial Review of the Substance of Official Decisions' 1993 *Acta Juridica* 117, 120. See too Woolf, Jowell and Le Sueur *De Smith's Judicial Review* (6 ed) London, Sweet and Maxwell: 2007, paras 11-028 to 11-031.

permission to the applicant to start the karate development program, but took away vested rights that had been exercised by those who participated in the program. I have already dealt with the reasons given for the decision and the fact that the second respondent misconceived the nature of his powers. His reasons for stopping the program were therefore misconceived. Finally, his decision is disproportionate in the sense that it has entirely destroyed the karate development program when, by simply ensuring that the program was supervised by his staff, as he was required to do all along, it could have proceeded as before. In this sense, the decision was what Professor Jowell called oppressive in that its impact on the karate development program's participants was unduly and unjustifiably onerous.

[44] The decision is also unreasonable because the second respondent has applied different rules to the applicant and the other participants in the karate development program, on the one hand, and to everyone else, on the other. There is no rational basis that I can gauge, and none has been suggested by the second respondent to justify why medium category prisoners can attend band practice in A-Section, or why medium category prisoners can run a shop there but the karate development program may not be run there. This too points to the unreasonableness of the decision: its unreasonableness lies in its defiance of the constitutional value and fundamental right of equality. Finally, as there is no justification for this differentiation, it is arbitrary -- and unreasonable on that account.

[D] CONCLUSION

[45] For the reasons that I have given above, the application must succeed and the second respondent's decision must be set aside. I intend coupling that order with a declarator. It is also necessary to put in place measures to ensure that this order is served on the respondents and is carried out. This is necessary for two reasons. The first is that the applicant, not being represented and not being free, is hampered by his incarceration in attending to service and the effective supervision of the order. The second is that, given

the history of this matter and the unacceptable manner in which it has been dealt with by the respondents, it is necessary for the court to take steps to ensure that the order is effective.

[45] The order that I make is the following:

(a) The second respondent's decision to deny medium category prisoners at the Mdantsane Prison, including the applicant, supervised access to the gymnasium in A-Section of the prison for purposes of taking part in the karate development program is set aside.

(b) It is declared that medium category prisoners at the Mdantsane Prison, including the applicant, are entitled as of right and forthwith to take part in the karate development program and, for this purpose, to be granted supervised access to the gymnasium in A-Section of the prison.

(c) The Registrar of this court is directed:

(i) to furnish a copy of this judgment and of this order to the applicant; and

(ii) to have a copy of this judgment and of this order served on the respondents' attorneys on behalf of the first respondent and on the second respondent personally.

(d) The second respondent is directed, within two weeks of service on him of this judgment and of this order, to file an affidavit, which shall also be served on the applicant, in which the second respondent confirms that he has acted in accordance with this order and has granted medium category prisoners at the Mdantsdane Prison, including the applicant, supervised access to the gymnasium in A-Section of the prison for purposes of taking part in the karate development program.

_____

C. PLASKET
JUDGE OF THE HIGH COURT

APPEARANCES:

For the applicant: The applicant in person

For the respondents: Mr B Boswell instructed by NN Dullabh and Co,

IN THE HIGH COURT OF SOUTH AFRICA

Grahamstown