

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 729/2015

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
<i>6/5/2015</i>	
SIGNATURE	DATE

7/5/2015

IN THE MATTER BETWEEN:

AMBROSE HENNIE (207291150)

First Applicant

JADE JACOBS (205040940)

Second Applicant

SABELO BUTHELEZI (207045259)

Third Applicant

and

MINISTER OF CORRECTIONAL SERVICES

First Respondent

THE HEAD OF PRISON, KGOSI MAMPURU II PRISON

Second Respondent

**THE MANAGER OF THE COMPUTER TRAINING CENTRE,
KGOSI MAMPURU II**

Third Respondent

JUDGMENT

KOLLAPEN, J

Introduction and background

[1] This application was brought as one of urgency by the Applicants who sought relief that would enable them to use their personal laptop computers (without the use of a modem) in their cells for study purposes.

[2] During the hearing of the matter on 2 March 2015 the Respondents counsel requested that the Respondents be afforded the opportunity to reconsider their policy with regard to formal education programmes in so far as it related to access to personal computers by offenders in communal and / or single cells. The matter was accordingly postponed for that purpose.

[3] At the resumed hearing of the matter on the 23rd April 2015, a written report prepared by the Respondents served before the Court which report in broad terms took the stance that the existing policy which prohibited the use of personal laptop computers in cells would be retained.

Background facts

[4] The Applicants are all registered students at recognised tertiary institutions in South Africa and are currently incarcerated at the Kgosi Mampuru II prison in Pretoria. The Applicants are seeking an order to compel the Respondents to allow them to have their personal laptop computers as well as their personal printers /

scanners with them in their cells for studying purposes. They are all held in single cells at the prison.

[5] The Applicants were previously held in single cells in medium B at the Johannesburg prison where they were allowed to have their personal computers (laptops) with them in their single cells. All three Applicants have since been transferred to the Kgosi Mampuru II prison in Pretoria where they have access to their personal laptops only in the secured study facility of the prison. The secured study facility is open five days a week, excluding public holidays and weekends, from 08:00 to 15:00 daily. The Applicants also have access to a printer and supervised access to the internet in the secured study facility.

[6] The Applicants contend that their inability to use their laptop computers in their cells undermines and compromises their ability to pursue their studies effectively. Most of the assignments and other tasks they are required to submit are completed on computers and often the time available in the study centre is not sufficient. Without the availability of a laptop in their cell they are unable to study after hours or over weekends, public holidays and other periods when the study facility is closed. All of the personal computers they own do not have modems and therefore are unable to access the internet.

[7] The Respondents, in opposing the relief sought, argued that the reason for allowing laptops in single cells in the Johannesburg prison facility is due to the lack of infrastructure, as the Johannesburg prison does not have a secured study centre, unlike the one at the Kgosi Mampuru II prison. The Applicants, however, disputed

this and persisted in their stance that such a secured facility did exist in the medium B section of the Johannesburg prison where they were held and that they were nevertheless allowed to use their personal laptops in their single cells.

[8] The Respondents further sought to justify the prohibition on the use of personal computers in cells on the grounds that it compromised the security arrangements in the prison facility. As I understand it this submission was based largely on the assumption that a personal laptop enabled access to the internet and that would constitute a possible security threat. Counsel for the Respondent accepted that where access to the internet was not possible or was disabled on a laptop, it largely eliminated any security risk.

The current policy framework and its application

[9] The Respondents policy procedures on formal education programmes was approved by the Acting Commissioner of the Correctional Services Department on 8 February 2007 and this policy is presently applicable to all correctional centres across the country. The applicable sections of the above policy which is part of the Formal Education Programme reads as follow:

“3.5. Utilization of Desk Top Computers / Note books / Lap Tops (Personal Computers):

3.5.1 Only registered students (offenders) who have a need for a computer as supportive to his / her studies, and / or offenders who have registered for a study field / course that requires a computer as compulsory part of the course are allowed to have a personal computer within the Correctional Facility.

3.5.2 *In relation to Computer Studies registration is subject to the following conditions:*

- *Prior to registration, the Tertiary Institution must be contacted to determine the requirement for the Hardware and Software.*
- *the minimum requirement of the institution should be in line with the specified requirement within this procedure in term of: No access to the internet, CD writer, Modem, TV/Radio card and or any other hardware devise that may impact negatively in the good order and administration of the Correction Centre.*
- *All Software should be originals and not copies.*

All applications relating to the utilization of personal computers received from offenders must be approved by the Head of the Correctional Centre (HCC).

A secured room within the Correctional Centre or at the School must be made available specifically for the placement of the personal computers of students. In cases where there is no secured room for the personal computers, the offenders may be allowed with a personal computer in a single cell where such cells are available.

...

3.5.5 *Ensure that a structured time table is available to students to have access to their personal computers.*

3.6 *Management of Personal Computers:*

3.6.1 *Ensure that an educationist / custodial official is appointed in writing to supervise and control access to the computer room.*

3.6.2 *Ensure that offenders have no access to the internet, DCS Local Area Network, communication service provider or remote computing service.*

3.6.3 *Ensure that personal computers of offenders does not include CD writers, Modem, TV/Radio cards and or any other hardware devise that may negatively impact on the good order and security of the Correctional Centre.*

3.6.4 *Violation of this procedure may result in disciplinary actions.*

- *Ensure that a structured time table is available to students to have access to their personal computers.*
- *No computer shall be allowed in any cell (communal and / or single).*

Management of Personal Computers:

- *Ensure that an educationist / custodial official is appointed in writing to supervise and control access to the computer room.*
- *Ensure that offenders have **no** access to the internet through the use of a computer, computer system, network, communication service providers or remote computing service. Violation of this procedure may result in disciplinary actions.*
- *Ensure that all applications in relation to obtaining information from internet, must be approved by the SH Formal Education. Authorization should be kept in a register.”*

[10] The Respondents state in their report to the Court that security of the prison officials and other offenders are the main concern in respect of disallowing inmates to have access to personal computers (including laptops) outside the secured study facility where strict supervision cannot be exercised. According to the Respondents, personal laptops or notebooks in single cells in the prison could compromise security due to laptops having accessories like built-in modems, built-in hard drives and cameras.

[11] The First Applicant in his letter of complaint, dated 3 November 2014, addressed to the Head of the Correctional Centre (hereinafter referred to as “HCC”), provided the following motivation in support of his request to have access to his personal laptop in his cell:

“The school will be closed from December to February and this means that I won’t have access to my computer. During this time I need to study in preparation for the next semester since I have the material already on my computer. I am a Unisa student in my final year BA Communications Science degree, so studying during holidays are important to me. I therefore need constant and more frequent access to my computer.”

[12] The First Applicant's letter of complaint was answered by the HCC informing him that his request was denied and that only desktop computers are allowed in single cells.

[13] The Second Applicant also addressed a letter of complaint to the HCC, dated 4 November 2014 and stated as motivation in support of his request to have his personal laptop in his single cell:

"Please take note that it does not have a build-in modem. My family told me that they can't afford to purchase another computer (Desktop) hence they bought me this laptop last year (2013)."

[14] The Second Applicants request to have his personal laptop in his single cell was also denied by the HCC, on the same ground as that of the First Applicant, that only desktop computers where allowed in single cells.

[15] If regard is had to the policy of the Respondents on its formal education programmes, it is clear from the facts in this matter that the policy has not been applied consistently and that deviation from the policy has taken place. Simply by way of example, the policy states that no computers (desktop computers, notebooks and laptops) shall be allowed in any cell (communal and / or single), while it was clear from the stance of the HCC in response to the letters of complaint by the Applicants, that desktop computers are allowed in single cells at Kgosi Mampuru II. No explanation was offered by the Respondents for the departure from policy in this regard.

[16] Similarly, the policy on the one hand purports to provide for a total prohibition on all computers from all cells but in the same breath makes provision for allowing computers in single and / or communal cells in prisons where there is not a secured study facility available which the Respondents argue is the reason for allowing personal laptops in single cells at the Johannesburg prison. It is certainly not clear how security becomes compromised in these instances where the policy allows for the use of laptop computers in cells.

The failure to exhaust internal remedies

[17] The First Respondents, in its answering affidavit, raised the fact that the Applicants did not exhaust internal procedures to resolve their complaints, and that the Applicants did not comply with s 21 of the Correctional Service Act, Act 111 of 1998 as amended by s 11 of Act 32 of 2001. The Applicants lodged a complaint with the HCC and it was argued that if the Applicants were not satisfied with the response by the HCC, the next step would have been for them to refer the matter to the National Commissioner and from there, and if it became necessary, to the Independent Correctional Centre Visitor .

[18] Having regard to the response the Applicants received from the HCC in response to their request to have their personal laptops in their single cells as well as the thirty day period that the court granted the Respondents to reconsider their policy on its formal education programmes and the current stance of the Respondent , it is unlikely that the Applicants would have received a different outcome in regard to

their request even if they did escalate their complaint in terms of the s 21 of the Correctional Service Act 111 of 1998 as amended by s 11 of Act 32 of 2001.

[19] The Respondent further indicated that it does not have any intention to revise the provision which deals with the prohibition of access to computers being it personal computers or desktops in a communal and / or single cell due to security considerations. There is accordingly no merit in my view on this leg of the defence in opposition to the relief sought.

The security consideration argument

[20] From the factual background it is clear that the policy with regard to access to computers in cells is applied inconsistently. It appears to be acceptable at the Kgosi Mampuru II prison to have a desktop computer in a single cell even though the policy expressly prohibits it. In addition laptops and desktop computers are allowed in prisons where there is no secured study facility. This must in itself raise concerns about the cogency of the security argument advanced by the Respondents.

[21] When one has further regard to the submissions around security concerns raised by the Respondents, no argument or evidence was presented to court that a laptop without internet access (i.e. without a modem) would compromise security, nor was there any evidence presented that allowing student offenders in other prisons to have access to their personal computers in their cells, as is the case at the Johannesburg prison, have led to any security breaches. On the contrary the

Respondents were unable to point out how a laptop without internet access would compromise security.

[22] In *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others*¹ the Constitutional Court held that in order for government to justify a limitation of the rights of a section of the population, it was obliged to provide the court with sufficient information to enable the court to properly examine the purpose of the exclusion and by so doing assess the justification for the limitation.

[23] The Constitutional Court articulated its stance in the following terms:-

“In a case such as this where the government seeks to disenfranchise a group of its citizens and the purpose is not self-evident, there is a need for it to place sufficient information before the Court to enable it to know exactly what purpose the disenfranchisement was intended to serve. In so far as the government relies upon policy considerations, there should be sufficient information to enable the Court to assess and evaluate the policy that is being pursued.”

[24] The Applicants are willing to have their personal laptops searched and inspected on a regular basis and it appears not in dispute that none of the Applicants laptops have access to the internet. In any event any inspection of the computers will be able to establish this but the Applicants have informed the Respondents that their personal laptops does not have built-in modems, subsequently all security risks relating to the laptops can be eliminated and it can be accepted that the laptops will

¹ 2005 (3) SA 280 (CC) at paragraph [65].

then be operating in the same manner in which the already allowed desktop computers in single cells operate.

[25] In paragraph 6.6 of the written report submitted by the Respondents, the Respondent are of the opinion that: *"...should the above Honourable Court allow the Applicants to use their personal computers in their single cells, then the order will open flood gates for numerous applications whereby other offenders will seek permission to use personal computers in single cells. This will cause immense prejudice to the Department and the safety and security of correctional officials and other offenders will be at risk;"*

[26] The Respondents again mention the possible security risks involved in allowing the Applicants' use of their personal laptops without substantiating or providing examples of security breaches that had occurred by the use of personal laptops in cells by inmates or setting out the security risk that is likely to ensue.

[27] Having regard to the Respondents concern that granting an order in favour of the Applicants in this matter, will open flood gates for numerous applications similar to the current one, it needs to be taken into account that prior to this application, only two similar applications were brought in this division, one of which was settled between the parties², allowing the Applicant in the matter access to her personal computer in her cell and the other an order of court, which granted the applicant

² Regina Kgafela v The Minister of Correctional Services and Others, Case number 40329/2013.

access to his personal computer in his cell³. Those orders have hardly resulted in the 'opening of the floodgates' as it were.

[28] The court takes into consideration that study methods and accessibility of study material has changed considerably since the approval of the formal education programme in 2007 and that personal computers are certainly going to continue to play an increasingly important role as a means to access information which was in the past confined to textbooks. Personal computers have in many ways replaced conventional textbooks and therefore access to a personal computer by students has become a necessity and not a privilege.

[29] Further, taking into consideration that tertiary institutions provide guidelines to students in regard to the amount of hours required per registered subject, there is a potential of student offenders being prejudiced into taking only a limited amount of subjects, due to their limited access to the secured study centres.

[30] In terms of s 29 (1) (b) of the Constitution⁴ everyone has the right to further education, which the state, through reasonable measures must make progressively available and accessible. The Department of Correctional Services in line with s 29 (1) (b) of the Constitution makes provision for further education of offenders through its formal education programme. S 35 (2) (e) of the Constitution provides that every detained person, including a sentenced prisoner, has the right to reading material.

³ Tshepiso Williams v The Minister of Correctional Services and Others, case number 38906/2013.

⁴ The Constitution of the Republic of South Africa, 1996.

[31] Section 18 of the Correctional Services Act, 111 of 1998 provides for the following, in respect of the use of reading material, by offenders:

“18. Reading material. –

(1) Every inmate must be allowed access to available reading material of his or her choice, unless such material constitutes a security risk or is not conducive to his or her rehabilitation.

(2) Such reading material may be drawn from a library in the correctional centre or may be sent to the inmate from outside the correctional centre in a manner prescribed by regulation.”

[32] The range of Section 18(1) is cast wide and as mentioned earlier in the judgment the security concerns of the Respondents can be eliminated as the Applicants will not have internet access in their cells. The other factor taken into account by Section 18 (1), being that the reading material must be conducive to the rehabilitation of the Applicants, was never addressed by the Respondents.

[33] Section 18(2) contemplates that the offender, upon obtaining the reading material, whether from the library or from outside the correctional centre, will proceed to using the reading material in his or her cell and there should exist no differential regime between the reading material being in book form or electronic form.

[34] Regulation 13(4)⁵, reads as follow:

“13. Reading Material. –

(4) The Head of the Correctional Centre or a correctional official designated by him or her may prohibit:

⁵ GNR.914 of 30 July 2004: Correctional Services Regulation.

(a) the entry into the correctional centre or the circulation within the correctional centre of any publication, video or audio material, film or computer program that he or she believes on reasonable grounds would jeopardise the security of the correctional centre or the safety of any person; and

(b) the use by an inmate, including the display of, any publication, video or audio material, film or computer program that he or she believes on reasonable grounds –

would likely be viewed by other persons; and

would undermine a person's sense of personal dignity by demeaning the person or causing personal humiliation or embarrassment to a person, on the basis of race, gender, sex, pregnancy, marital status, ethical or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.”⁶

[35] In light of Section 18 as well as Regulation 13(4) above, the term reading material, refers to any publication, video, audio material and/or film or computer program and should therefore be interpreted, to include reading material available in electronic form.

[36] The grounds on which reading material for offenders which is brought into the correctional facility may be disallowed are set out in Regulation 13(4) and electronic study material does not fall within these prohibited grounds of reading material.

[37] The study material that the Applicants use, are downloaded, under supervision, with prior authorization from the sectional head of formal education, within the secured study centre. It is therefore accepted that the electronic study material does not pose a security risk and that it is instrumental to the rehabilitation of the Applicants providing them with the knowledge to assist them with their reintegration into society upon their release.

⁶ Sub-r. (4) amended by GN 143 of 27 February 2012.

[38] The vision of the Department in respect of its formal education programmes is stated as follow, on their webpage⁷:

“To be one of the best in the world in delivering formal education programmes with integrity and commitment to excellence on excellent education service that will provide diverse educational needs to persons entrusted to our care.”

[39] The mission of the Department in regard to the formal education programmes is stated as:

“To offer, in partnership with relevant stakeholders a variety of learning fields that are, aimed at contributing towards the developments of essential skills and knowledge that will form the foundation for life long learning.

To offer career orientated needs-driven, adaptable and market related education programmes and services to persons entrusted to our care in a stable and humane teaching environment.”

[40] The former Minister of Correctional Services, Minister Sibusiso Ndebele, issued a media statement on 5 September 2013 announcing the Department of Correctional Services’ Reading for Redemption Programme in promoting reading and writing in correctional centres⁸:

“Research shows there is an inverse relation between knowledge, culture and crime. The greater the knowledge, culture and access to education, the less the crime. It is for such reason that we have made education, skilling and training of offenders compulsory at DCS. According to the Freedom Charter, ‘Imprisonment shall be only for serious crimes against the people, and shall aim at re-education, not vengeance.’

⁷ <http://www.dcs.gov.za/Services/Formal%20Education.aspx> – visited 30 April 2015.

⁸ Issued by the Ministry of Correctional Services to all media on 5 September 2013.

Ex-offenders must be fully integrated into society. They must be able to meaningfully participate in the knowledge economies of the 21st century.”

[41] In the matter of *August and another v Electoral Commission and others*⁹ the following is said in regard to the rights of prisoners to vote which can also be applied in regard to the prisoners right to further education in terms of Section 29 of the Constitution:

“They must submit to the discipline of prison life and to the rules and regulations which prescribe how they must conduct themselves and how they are to be treated while in prison. Nevertheless, there is a substantial residue of basic rights which they may not be denied; and if they are denied them, then they are entitled to legal redress.”

[42] In order for the Department to ensure that it gives effect to the rights of the offender students to have access to formal education as stated in the Constitution and to ensure that the Department gives effect to its vision and mission in respect of its formal education programme and considering the precautionary measures that can be put in place to ensure that security within the prison is not compromised by the use of personal laptops in single cells by the Applicants, as well as the inconsistent application of its policy on formal education, the disallowing of the use of personal laptops by the Applicants in this instance is without merit.

[43] The Respondents have in my view and on the facts of this case not advanced a justification for the prohibition which they seek to apply. While security considerations will always remain an important feature of how a correctional facility is managed, on what is before me, there is no evidence that personal laptops without

⁹ 1999 (3) SA 1 (CC) at paragraph [18].

modems compromise security. On the other hand to refusal to allow the Applicants access to their laptop computers in their cells has the real risk of compromising their ability to study and infringes on their right to further education.

[44] I am satisfied that the Applicants have made out a case for the relief they seek and subsequently the following order is made:

1. The Applicants are allowed to use their personal laptops in their single cells without the use of a modem;
2. The laptops will be made available for inspection at any given time;
3. The Applicants will have use of their laptops in their single cells for as long as they remain registered students with a recognised tertiary institution in South Africa;
4. No order is made as to costs.



N KOLLAPEN
JUDGE OF THE HIGH COURT

APPEARANCE

HEARD ON THE	: 2 MARCH 2015
DATE OF JUDGMENT	: 7 MAY 2015
APPLICANTS COUNSEL	: APPEARED IN PERSON
RESPONDANTS' COUNSEL	: ADV H.O.R MODISA