THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 60/2000

In the matter between:

THE MINISTER OF CORRECTIONAL SERVICES	**First Appellant**
COMMISSIONER OF CORRECTIONAL SERVICES	**Second Appellant**
THE AREA MANAGER OF PRETORIA PRISON	**Third Appellant**
HEAD OF PRETORIA FEMALE PRISON	**Fourth Appellant**
and	
IGNATIUS VISHINSKY KWAKWA	**First Respondent**
GODFREY ABEL MOTSHWANE	**Second Respondent**

Coram: ***Smalberger ADP, Olivier, Zulman, Navsa and Mthiyane JJA***

Date of hearing: **15 February 2002**

Date of delivery: **27 March 2002**

Summary: **Legality of prison privilege system in respect of unsentenced prisoners – Commissioner of prisons acting beyond his statutory powers and in violation of respondents' constitutional rights.**

JUDGMENT

NAVSA JA:

[1] This appeal concerns the rights of prisoners who in terms of a new privilege system determined by the second appellant are classified as "unsentenced prisoners". This category is made up of prisoners awaiting the commencement or finalisation of their trials (in every day language they would be described as awaiting-trial prisoners – the respondents fall in this group) and includes prisoners who have been granted bail but have been unable to raise the funds to secure their release. A further part of the prison population who fall into this category are prisoners who have been convicted of an offence but who have not yet been sentenced. Serving prisoners who have been convicted and sentenced on a previous occasion and who are awaiting the commencement or finalisation of subsequent trials or sentencing proceedings are not regarded as unsentenced prisoners.

[2] The Department of Correctional Services ("the department") established in terms of section 2 of the Correctional Services Act 8 of 1959 ("the Act") is responsible for the administration, management and maintenance of prisons in South Africa. In terms of the Act the department is under the control of the second appellant, subject to the policy determinations and directions of the first appellant. The third and fourth appellants are officials of the department whose titles are descriptive of their functions and responsibilities. On 1 November 1998 the second appellant, purportedly acting in

terms of section 22 of the Act, determined a new privilege system ("the new system") in terms of which privileges were granted on a differential basis to prisoners in specified categories. A consequence of the introduction of the new system is that several privileges previously enjoyed by unsentenced prisoners were restricted or withdrawn. During December 1998 five unsentenced prisoners ("the applicants"), including the two respondents, held at different sections of the Pretoria Prison, who were aggrieved at the introduction of the new system, brought an urgent application in the Transvaal Provincial Division of the High Court for an interdict prohibiting the introduction and application of the new system and an order reinstating the privileges previously enjoyed by them, pending an application for an order reviewing and setting aside the determination by the second appellant and restoring the privileges hitherto enjoyed by them. They failed to obtain an interim order. The review application was set down in the same division of the High Court and heard by Maritz AJ. On 2 November 1999 the learned judge held that the application should succeed in part, restoring a number of privileges, which were previously enjoyed by unsentenced prisoners, and ordering that certain privileges be extended to them. Maritz AJ used the terms awaiting-trial prisoners and unsentenced prisoners interchangeably. He made the following order in favour of the applicants before him:

> "That it is hereby stressed that these orders relate only to awaiting-trial prisoners:
>
> 1. The decision not to allow visits over weekends is set aside.

2. The embargo placed on receiving delicacies from visitors is set aside. Applicants are to be allowed the same rights as those afforded to A-group prisoners.
3. The embargo relating to private musical instruments is set aside.
4. The embargo relating to the practice of hobbies is set aside. The applicants are to be accorded the same rights as those of A-group prisoners.
5. The regulation in respect of radios is amended to include cassette players and compact disc players.
6. The embargo in respect of access to library facilities is set aside.
7. The embargo in respect of the applicants' participation in a choir or choirs, is set aside.
8. The respondents are ordered to pay the applicants' costs."

[3] The present appeal is with the leave of this Court. The respondents case in the Court below was based, first, on the second appellant's failure to observe procedural fairness, it being asserted that there was no, or insufficient, consultation with interested parties, rendering the determination invalid. Secondly, the respondents contended that the determination is invalid because it is *ultra vires* the powers of the second appellant, in that it violates the Constitutional rights of unsentenced prisoners and is unreasonable. It is the respondents' case that the new system violates a prisoners rights in terms of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") to have reading material supplied at State expense; it discriminates against unsentenced prisoners unfairly in that they are treated less favourably than sentenced prisoners; and it offends against their right to dignity and the presumption of

innocence. Maritz AJ rejected the first ground of challenge. Before us, the procedure adopted by the second appellant in determining the new system was no longer an issue. The legality of the determination of the new system in so far as it applies to unsentenced prisoners is the only issue in this appeal.

[4] Maritz AJ recognised that unsentenced prisoners have rights, which ought not to be invaded to a greater extent than is necessary for regulating life in prison. He considered each of the applicants objections against the new system and struck down such parts of the new system as in his view infringed their rights. He was disinclined to set aside the new system in its entirety. I will in due course deal with this line of reasoning.

[5] The appellants contended before us, as they did in the Court below, that the determination by the second appellant was good in law and that it must be seen in the light of security needs and within the constraints of available resources. It was submitted on their behalf that the Court below erred in adopting a subjective approach to the new system, refashioning it in the light of its own wishes.

[6] It is necessary at the outset to consider the structure of the new system: For the purpose of determining an entitlement to specific privileges, sentenced prisoners are grouped together, *inter alia*, on the basis of behavioural patterns. The designated groups are: **A**, **B** and **C**. Mr Rufus Ntotho ("Ntotho"), a deputy director within the

prison services, who deposed to the main affidavit in support of the appellants' case, describes this classification of prisoners as a security classification, explaining that prisoners in group **A** pose the least security risk. The security risk escalates from group **A** downwards. Group **A** prisoners are granted a greater number of privileges than prisoners in groups **B** and **C**. Prisoners in group **B** are in turn granted a greater number of privileges than those in group **C**. In terms of the new system there is a fourth group of prisoners, namely, unsentenced prisoners constituted as described earlier in this judgment. Groups **A**, **B**, **C** and unsentenced prisoners, as categories of prisoners within the new system, constitute the entire spectrum of the South African prison population. The standardised privilege system which was in force before the introduction of the new system ("the old system") applied only to groups **A**, **B** and **C**. Such privileges as were granted to unsentenced prisoners, before the introduction of the new system, were at the discretion of the head of each prison, acting in the Commissioner□s stead, in terms of sections 22, 82 and 93 of the Act, read with the provisions of regulation 132 of the Consolidated Correctional Services Regulations (as amended) promulgated in terms of section 94 of the Act ("the Regulations"). Ntotho states that the motivation for the introduction of the new system is "standardisation in the light of security needs". He also states that the purpose of the new system is to "primarily encourage prisoners towards good behaviour; to engender a sense of

responsibility in them and to ensure their interests and co-operation in the integration into detention and treatment programmes". The standardised new system does not allow for a residual discretion to deal with prisoners whose circumstances may require measures or treatment not catered for by it.

[7] In the period between the judgment in the Court below and the hearing of this appeal the three awaiting trial prisoners who are not party to this appeal but who were the first, fourth and fifth applicants in the review application before Maritz AJ, were acquitted and freed at the end of their respective trials on the charges referred to later in this judgment. For them this appeal is academic. However, their stated individual complaints and the answers they elicited from the appellants are relevant to the determination of this appeal. It is therefore necessary to allude in detail to their circumstances, the grounds on which they and the respondents relied for the attack on the validity of the new system and the appellants answer to their case. The other erstwhile prisoners who were applicants in the Court below were Ms Masefako Julia Mashele, Mr Mafika Philemon Mahlangu and Mr Patrick Hlongwane. Where it is necessary to refer to them distinctively I will refer to them as they were in the Court below: first, fourth and fifth applicants respectively. The first and second respondents in this appeal were the second and third applicants respectively in the Court below. I will in the main continue to refer to them as they are in this Court; the first and second

respondents.

[8] I do not intend to allude to every detail of the old and new systems. I will refer to such provisions as are relevant to a determination of the present appeal. I interpose to state that the case of the applicants before Maritz AJ, as set out in the supporting affidavits, was short on detail and fact. It was inadequately presented and poorly answered by the appellants. The applicants whilst stating that the withdrawal or restriction of privileges cannot be justified for lack of facilities, or on the basis of security risks or for other reasons, did not supply sufficient detail of the practical implementation of the old system and the problems encountered in giving effect to it. No reliable statistical information was supplied. The number of unsentenced prisoners at the Pretoria Prison was not provided. The Court was not informed about the average time for finalisation of trials. The extent of the Pretoria Prison□s resources was not set out by any of the parties.

[9] The second appellant did not himself furnish an affidavit on the motivation for the determination of the new privilege system. Ntotho deposed to his affidavit based on his experience of prison policies. His answers to the case presented by the applicants, as will become apparent, are scanty and generally unhelpful.

[10] The first respondent has been in detention as an awaiting trial prisoner since 3 February 1998 facing charges of armed robbery. He was initially held at Pretoria

Local Prison. On 20 November 1998, when he was 52 years old, he was transferred to Pretoria Maximum Prison where he was held at the time that the review application was heard in the Court below. He is presently back at the Pretoria Local Prison, pending the finalisation of his trial. At the time of the urgent application the first respondent's trial had not yet commenced. At the time of the hearing of this appeal the first respondent had been awaiting trial for longer than four years.

[11] The second respondent, a Botswana citizen who faces charges related to the possession of and the dealing in mandrax tablets, was sixty years old when he was first taken into custody. He too was held at the Pretoria Maximum Prison at the time that the matter was heard in the Court below. He is presently held at the Pretoria Local Prison. At the time of the urgent application the second respondent had been awaiting trial for approximately twenty-four months. At the time of the hearing of this appeal he had been in custody for approximately five years.

[12] The first applicant was taken into police custody on 14 May 1993. Together with a number of co-accused she faced prosecution on approximately 100 charges, mostly of fraud and theft. On 23 December 1993, the first applicant, who was then 41 years old, was transferred to the Pretoria Female Prison. At the time that judgment was delivered in the Court below her trial had started but had not been finalised. At the time of the urgent application in 1998 she had been awaiting trial for longer that 5

years.

[13] The fourth and fifth applicants were co-accused charged with armed robbery. At the time of the urgent application they were in their early thirties and had been awaiting trial for periods longer than eight and thirteen months respectively.

[14] The respondents and the first and fourth applicants were assigned to single cells whilst the fifth applicant shared a cell with six other prisoners.

[15] All the periods of detention referred too are deplorable. This aspect will be dealt with later in this judgment.

[16] I turn to describe the privileges previously enjoyed by the respondents and the other applicants in the Court below and their specific and general complaints about the new system. It is necessary to deal with the first applicant's affidavit in some detail, as it was the principal affidavit on which the applicants relied in the Court below. Before the introduction of the new system the first applicant had the use in her cell of a television set, a compact disc player and a radio/tape hi-fi combination all of which were owned by her. Prison authorities took the television set away and her compact disc player was removed from the hi-fi combination set. The new privilege system allows **A** group prisoners to have the use of cassette players. Unsentenced prisoners are denied the use of cassette players. The removal of the first applicant□s compact disc player and television set should be seen against the fact that the new system denies

all unsentenced prisoners access to the prison library. The new system allows all sentenced prisoners access to the prison library. The first applicant complained that although the new privilege system does not provide for study and developmental programmes, the practice at the Pretoria Prison is that study programmes for sentenced prisoners are conducted and they are permitted to enrol, at own cost, with outside distance education institutions. No such courses are conducted for unsentenced prisoners. They may, however, enrol at own cost with outside distance education institutions. The first applicant who, before the introduction of the new system, did not practice a hobby, complained that in terms of the new system she would be unable to pursue a hobby to make up for the loss of her appliances and denial of access to the library. The new system denies unsentenced prisoners the practice of any hobby whilst Group **A** prisoners are allowed the practice of a hobby that does not include the use of tools which pose a security threat. Before the introduction of the new system the first applicant was allowed to sing in the prison choir. The new system allows only **A** group prisoners to sing in the prison choir. The first applicant claimed that prior to the introduction of the new system she was allowed contact visits. The appellants denied this. The new system prohibits unsentenced prisoners from having contact visits and allows them only two visits per week for a limited duration of 30 minutes at a time, restricted to two adults at a time. Previously, visits were allowed every day for an hour

without a limitation on the number of visits. The first applicant complained about not being able to have contact with her three minor foster daughters. Group **A** prisoners are entitled to contact visits, facilities permitting. The first applicant complained about the prohibition on weekend visits, stating that it made it impossible for her foster children to visit her during school terms. Another complaint raised by the first applicant was that the new system placed an unwarranted restriction on the receipt by unsentenced prisoners of foodstuff and delicacies from visitors and next of kin. She submitted that the restrictions on the receipt of foodstuffs and delicacies are in contravention of section 82 of the Act. This complaint appears to be based on a misreading of the relevant part of the new privilege system. In this one respect unsentenced prisoners appear to be better off than sentenced prisoners. They are able to receive foodstuff from family and friends for consumption at the next meal whilst sentenced prisoners are prohibited from doing so. The first applicant used her own frying pan to prepare food in accordance with a diet prescribed by her doctor. The new system prohibits the preparation of food by all prisoners. The respondents and the other applicants all of whom previously had access to a television set made common cause with the first applicant's complaints about the introduction of the new system. In their affidavits they complained about the prohibition on the use of appliances. The respondents are both directly affected by the restrictions on visits. The second respondent is

particularly hard hit by the restrictions on visits as he is a Botswana citizen whose wife and four children have to make trips from that country to visit him. In his affidavit the fifth applicant raised a complaint about telephone access. He has two daughters with whom he kept regular telephonic contact whilst imprisoned. The new system places restrictions on the making of telephone calls by allowing only one telephone call per day for a maximum of ten minutes. Prior to the introduction of the new system the fifth respondent had greater access to the telephone. The respondents are physically locked in their cells from 15h00 until 7h00. They contend that against that background the withdrawal of privileges hitherto enjoyed is oppressive and unlawful.

[16] Although no applicant in the Court below complained about the prohibition on the use by unsentenced prisoners of private musical instruments, Maritz AJ saw fit to lift this prohibition. In terms of the new system A group prisoners are allowed the use of private musical instruments.

[17] Counsel for the appellant submitted before us that the attack on the new system by the applicants in the Court below was specific and limited to their personal circumstances and that Maritz AJ erred in not confining his order to their specific complaints. It was submitted that in the event of this Court holding that the respondents' specific complaints were warranted it would be inappropriate to strike out the new system in its entirety. It is consequently necessary to consider the basis of the

applicants attack on the validity of the new privilege system. In paragraph 24 of her founding affidavit the first applicant states:

> "The conditions under the new privilege system are not necessary or reasonable limitations of our rights of access to amenities."

In paragraph 45 the following appears:

> "I also respectfully submit that it is unreasonable to allow certain privileges to sentenced prisoners, more particularly the A group, and not to allow it to unsentenced prisoners."

In paragraph 46 she states:

> "The above situation was obviously designed under circumstances where trial awaiting periods are very short and are mainly taken up by trial days. This is obviously no longer the case and the Respondents [Appellants] have completely failed to consider the extended periods endured by trial awaiting prisoners these days."

In paragraph 53 of the first applicants affidavit she states:

> "Apart from the procedural unfairness of the Respondents' actions and decisions, I respectfully submit, for the reasons stated above, that there is ample reason for a review on substantive grounds as well. None of the measures are justifiable in respect of trial awaiting prisoners."

Paragraph 55 is also relevant:

> "I also respectfully submit that the balance of convenience favours me. Firstly, I respectfully submit that there are clear violations of rights of trial awaiting prisoners

> in terms of the new privilege system. Furthermore, I respectfully submit that the new privilege system violates the basic principle that prisoners, and more particularly trial awaiting prisoners, retain all the rights they had as free citizens."

Maritz AJ recorded in his judgment that the applicants before him urged him to strike down the new system in its entirety. Given the limited recreational facilities available to them, all of the applicants had an interest in the amenities which were withdrawn, and to which group A prisoners have access. In their notice of motion the applicants in the Court below *inter alia* sought the following relief:

> "1. That the introduction of a new 'Privilege System' as annexed hereto as Annexure 'A' as decided upon by Second Respondent in respect of trial awaiting prisoners be reviewed and set aside."

To sum up, the applicants in the Court below sought nothing short of the setting aside of the new system in its entirety. The respondents (and the other applicants in the Court below) were directly affected by the introduction of the new regime for unsentenced prisoners. The new system in so far as it applied to unsentenced prisoners impacted on their lives in prison. The respondents continue to be affected by the implementation of the new system.

[18] The appellants answer to the respondents case is as described in this and the following three paragraphs. The new system is applied nationally and has been implemented without problems. If the new system were to be reversed at the Pretoria

Prison it would result in chaos and a number of unsentenced prisoners who submitted to the new system would be prejudiced. No details are supplied of the kind of prejudice and chaos that would ensue. In justifying the new system Ntotho refers in general terms to the budgetary constraints faced by the department asserting that this makes it difficult to structure a privilege plan for unsentenced prisoners. No details of the Pretoria Prison's available facilities are supplied. Ntotho does not describe the shortcomings of the old system nor are we supplied with any details of how security was compromised by that system. He states that unsentenced prisoners present particular policy problems. Whenever they leave prison to attend court they are entrusted to the custody of police services. When they are handed over it is uncertain whether they will be returning. Consequently their names are removed from the prison's computer records for the time they are away. In the event that they return to prison they are readmitted on the strength of a new warrant of detention and reintroduced into the prison's records. An unsentenced prisoner may be held at a prison in terms of a number of warrants of detention. Of particular significance is the fact that prison authorities are unaware of the unsentenced trial prisoner's history – he or she is presumed innocent and there is no conviction or findings by a court on which a grading can be based. He may be innocent or may be a hardened and violent criminal who presently may be facing a minor charge. He may also be a first offender. One of

the problems with unsentenced prisoners is that they are often granted bail and spend short periods in prison making it difficult for prison officials to place them in a designated group according to behavioural patterns. This last statement should be seen against an admission by Ntotho that the trial awaiting periods are no longer short. Ntotho also states that prison authorities regard awaiting trial prisoners as a high security risk. It is not uncommon for them to escape from custody. Elsewhere in his affidavit he states, somewhat contradictorily, that an unsentenced prisoner's "inherent tendency" to escape is not known to prison authorities. The appellants do not supply any statistical information concerning escapes by sentenced prisoners compared to escapes by unsentenced prisoners. According to the appellants the fluidity of the position of unsentenced prisoners and the attendant security risks create a problem in extending privileges to them. We are not told what those problems are. Ntotho, in attempting to explain the reason for denying unsentenced prisoners access to the prison library, states that they may be released on bail or be released without returning a library book. He states that it is difficult to extend the same privileges to them as are enjoyed by sentenced prisoners. Details of the difficulties are not supplied. The appellants state that many prison programmes are rehabilitative in nature and it is absurd to speak about rehabilitating an unsentenced prisoner. Contact visits are denied to them because they may escape by exchanging clothes with visitors and because

investigating officers are against such visits. Ntotho states further that unsentenced prisoners are not well-known to prison officials and that this makes it easier for them to escape by changing clothes with visitors. He does not explain why a sentenced prisoner in the **A** group of prisoners in the early stages of his imprisonment does not present the same problem nor does he explain why prisoners such as the applicants in the Court below would not because of the length of their stay become familiar to prison officials. If visits were to be conducted under supervision the security problem would diminish.

[19] The appellants assert that prisoners are allowed access to television in designated general areas at prescribed times and that a denial of television is not consonant with a denial of human dignity. The appellants adopt the position that the respondents are entitled to receive books from their next of kin. They also state that those prisoners wishing to study and who wish to enrol with outside educational institutions, at own cost, may consult a prison educationist for assistance. Since unsentenced prisoners are prohibited from mixing with sentenced prisoners, prison authorities cannot allow them to attend lessons given to the latter category. The uncertainty of the future of the unsentenced prisoner makes it difficult to arrange formal lessons for them. The prohibition on limiting food intake or preparation is justified by the security consideration that a prisoner may be exposed to the risk of burning or may burn others.

[20] The appellants denied that any of the respondents were previously allowed contact visits other than consultation visits. They contended that the first applicant was free to apply for her children and mother to visit her during weekends. Her response, as set out in her replying affidavit, was that she applied and was refused permission.

[21] Mrs Dorah Maako, the head of the female section of the Pretoria Prison, in an affidavit in support of the appellants case, states that 80 unsentenced prisoners and 70 sentenced prisoners constitute the prison population in her section. As can be seen the questions raised in this appeal affect a significant number of inmates in one section of one prison. The number of people affected nationally by the introduction of the new system must be fairly high.

[22] I turn to consider relevant provisions of the Act and the regulations promulgated thereunder. Section 22 of the Act reads as follows:

> "**22. Security measures, privileges and indulgences.** - (1) The Commissioner shall determine –
>
> (*a*) the security measures applicable at prisons, and may determine different security measures applicable at prisons, and may determine different security measures in respect of different prisons;
>
> (*b*) the groups into which prisoners are to be classified.
>
> (2) The Commissioner may –
>
> (*a*) grant such privileges and indulgences as he may determine to any prisoner;
>
> (*b*) withdraw or amend any privilege or indulgence granted in terms of paragraph (*a*) to any prisoner if it is in the interests of the

administration of prisons."

(By definition – see section 1 of the Act – a "prisoner" means "any person, whether convicted or not".) In terms of this section prisoners may be grouped together and classified for security purposes. The Commissioner is expressly authorised to determine different security measures in respect of different prisons. This may be compelled by the difference in physical conditions of prisons or by differing resources or by the nature of the particular prison population. In terms of section 22 (2) privileges and indulgences may be determined and granted to "any prisoner". This enables prison authorities to deal with the needs of prisoners whose personal circumstances are such that they may require specialised treatment. The second appellant also has the power to withdraw such privileges if it is in the interests of the administration of prisons. Section 82 of the Act provides, *inter alia,* that unconvicted prisoners awaiting trial for an alleged offence, may, subject to such limitations and restrictions as may be prescribed by the second respondent be allowed:

> "(i) to write and receive letters;
>
> (ii) to receive visits; and
>
> (iii) to procure for themselves from outside the prison and to receive at prescribed hours therein such food, unfermented drink, bedding clothing, literature and other articles as may be approved by the Commissioner, subject to a strict examination thereof."

Section 94 of the Act authorises the Minister to make regulations not inconsistent with the Act, which regulate the management and administration of prisons in a generalised or specific manner. Regulation 132 of the Regulations deals with unsentenced prisoners and provides, *inter alia*, that subject to the necessary controls an unsentenced prisoner may receive stationary and reading matter from outside sources or may purchase them. Regulation 132 (8) of the Regulations reads as follows:

> "A prisoner who has been unable to comply with the conditions of bail, shall be granted visits at reasonable times during any day and also the opportunity and facilities to write and receive letters in order to comply with such conditions."

Section 93 (2) of the Act provides:

> "The Commissioner may delegate any of the powers vested in him by this Act to any correctional official or other person employed in the Department."

This provision facilitates prison administration and allows for the head of each prison to deal with prisoners relative to the conditions and resources at each prison.

[23] In addressing the merits of this appeal it is useful to bear in mind what was said by Gubbay CJ in ***Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Others*** **1992 (2) SA 56 (ZS)** at **60 G - 61 A**:

> "Traditionally, Courts in many jurisdictions have adopted a broad 'hands off' attitude towards matters of prison administration. This stems from a healthy sense of realism that prison administrators are responsible for securing their institutions against escape or unauthorised entry, for the preservation of internal order and discipline, and for

> rehabilitating, as far as is humanly possible, the inmates placed in their custody. The proper discharge of these duties is often beset with obstacles. It requires expertise, comprehensive planning and a commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Courts recognise that they are ill-equipped to deal with such problems. But a policy of judicial restraint cannot encompass any failure to take cognisance of a valid claim that a prison regulation or practice offends a fundamental constitutional protection. Fortunately the view no longer obtains that in consequence of his crime a prisoner forfeits not only his liberty but all his personal rights, except those which the law in its humanity grants him. For while prison officials must be accorded latitude and understanding in the administration of prison affairs, and prisoners are necessarily subject to appropriate rules and regulations, it remains the continuing responsibility of Courts to enforce the constitutional rights of all persons, prisoners included."

The learned Chief Justice went on to refer to two decisions of the Supreme Court of India and the decision of the Supreme Court of the United States of America in ***Rhodes v Chapman*** **(1981) 452 US 337** in which this approach is followed. It is an approach that I endorse and intend to follow.

[24] In the ***Conjwayo*** case (at **62 C – D**) Gubbay CJ referred with approval to the dissenting judgment of Corbett JA in ***Goldberg and Others v Minister of Prisons and Others*** **1979 (1) SA 14 (A)** which was decided at a time when the legislature was supreme and where the transgression of human rights was not susceptible to constitutional challenge. In the ***Goldberg*** case (at **39 C – D**) the following appears:

> "It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties … 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."

This *dictum* has become known as the *residuum* principle and has been endorsed in subsequent decisions of this and other courts.

[25] The case of ***Charles Sobhraj v Superintendent, Central Jail, Tihar, New Delhi* (1979) 1 SCR 512 (Sup Ct India)** is one of the cases cited by Gubbay CJ in the ***Conjwayo*** case, *supra*. In the ***Sobhraj*** case, although it is asserted that courts cannot take over the running of prisons, the following appears at 518 – 519:

> "Whatever fundamental rights are flouted or legislative protection ignored, to any prisoner's prejudice, this Court's writ will run, breaking through stone walls and iron bars, to right the wrong and restore the rule of law."

[26] In ***Constitutional Law of South Africa*** by Chaskalson, Kentridge *et al* the learned authors state the following at **28 - 24**:

> "A key requirement of the principle of legality is that even those rights of prisoners which are restricted as a necessary consequence of incarceration may only be limited if this is done by legislation, either expressly or by necessary implication. The laws regulating prisons in South Africa must therefore be scrutinized to see whether they provide the necessary authority for the restriction of prisoners' rights. The restrictions must, in addition, be formulated sufficiently narrowly to ensure that prisoners are not exposed to overbroad discretionary powers which deny them protection of the law."

They are referring specifically to the Act and the regulations made thereunder (see

footnote **4**). The cases referred to in the preceding paragraphs deal with the rights of convicted prisoners. Unconvicted and unsentenced prisoners cannot have fewer rights.

[27] The comment of Maritz AJ that the word privilege as used in the new system is a misnomer is wholly justified. Curtailed as their rights may be unsentenced prisoners retain certain personal rights. As early as 1912 this Court, in the case of ***Whittaker v Roos and Bateman, Morant v Roos and Bateman*** **1912 AD 92,** dealing with the rights of awaiting trial prisoners said the following, (*per* Innes CJ at **122 - 123**):

> "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. They could claim immunity from punishment in the shape of illegal treatment, or in the guise of infringement of their liberty not warranted by the regulations or necessitated for purposes of gaol discipline and administration."

This has become known as the Innes *dictum*. In ***Minister of Justice v Hofmeyr*** **1993 (3) SA 131 (A)** Hoexter JA referred with approval to ***Cassiem and Another v Commanding Officer, Victor Verster Prison, and Others*** **1982 (2) SA 547 (C)** where Grosskopf J said the following concerning the Innes *dictum* (at **551 G**):

> "In respect of awaiting-trial prisoners, the correctness of the approach stated by

> INNES J as far back as 1912 has to my knowledge never been questioned."

With reference to section 82 of the Act Grosskopf J went on to state the following (at **552 B – D**):

> "When this section states that awaiting-trial prisoners 'may be allowed' certain amenities, it does not in terms purport to grant any rights. If, however, one approaches the position of awaiting-trial prisoners along the lines laid down by INNES J in *Whittaker's* case *supra*, it is more significant that s 82 does not in terms take away rights which awaiting-trial prisoners may have to the amenities mentioned in the section, but merely subjects them to various forms of control."

In ***South African Prison Law and Practice*** by Van Zyl Smit (1992) at **263** the learned author states with reference to the ***Cassiem*** case, *supra*:

> "The implications of this decision do not appear to have been recognized fully by the prison authorities who label as 'privileges' of prisoners awaiting trial, the amenities referred to by Grosskopf J. This terminological imprecision would not matter if all that the authorities in fact do is to regulate access to these amenities to the extent that they are empowered to do so…"

At **141 C - D** of the ***Hofmeyr*** judgment Hoexter JA said the following:

> "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 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."

Hoexter JA stated (at **141 H**), that he was in agreement with the *residuum* principle as enunciated by Corbett JA in the ***Goldberg*** case, *supra*. The approach followed by this Court in the ***Hofmeyr*** case, *supra*, has been given fresh impetus by a number of our Constitutional values such as dignity, equality and humanity. In the ***Conjwayo*** case Gubbay CJ, in referring to these values in the Constitution of Zimbabwe, stated the following (at **63 E**):

> "Punishment or treatment incompatible with the evolving standards of decency that mark the progress of a maturing society, or which involves the infliction of unnecessary suffering, is repulsive. What might not have been regarded as inhuman decades ago may be revolting to the new sensitivities which emerge as civilisation advances."

[28] At a time in our history when crime is rampant and prisons overflowing, the public might feel particularly unsympathetic towards prisoners and even against those who are yet to be tried on criminal charges, thereby undervaluing the presumption of innocence and the judicial process. We cannot dispense with the essential values that make us a civilised society. We are bound to the values entrenched in our Constitution. It is accepted that prison is a bleak place and that prisoners are not entitled to be imprisoned with all the comforts that they enjoyed before their incarceration. The essential question is whether the rights of the respondents have

been violated. In the present case we are dealing with persons who have not yet been convicted and whose incarceration at this point is to secure their attendance at trial. They have spent an inordinately long time in prison awaiting the finalisation of their trial as was the case with those applicants before Maritz AJ who have since been acquitted.

[29] The applicants in claiming access to the prison library relied on section 35 (2) (e) of the Constitution, which reads as follows:

> "Everyone who is detained, including every sentenced prisoner, has the right –
> to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment."

Ntotho's response to the respondents' reliance on the Constitution is that only sentenced prisoners are allowed access to library facilities and that unsentenced prisoners may receive books from their next of kin. This ignores the clear wording of section 35 (2) (e) of the Constitution. His other response, recorded earlier in this judgment, namely, that prison authorities fear that a prisoner may be released without returning a library book, cannot be taken seriously. Appellant□s counsel rightly accepted that Ntotho□s response in respect of this issue was no response at all. The second respondent should know better than to ignore Constitutional guarantees.

[30] It is abundantly clear that in fashioning the new system the second appellant did

not take into account that there is a substantial part of the prison population that spends a lengthy period of time waiting for their trials to commence or be finalised. It is accepted that the long delays in the commencement or finalisation of trials cannot be laid at the appellants door. The fault lies with our system of the administration of justice. The periods that all the applicants before Maritz AJ spent awaiting trail are unacceptable in a democratic society that subscribes to the values enshrined in the Constitution. The two respondents continue to be incarcerated pending the finalisation of their trials. That their trials have not yet been concluded is scandalous and calls for an immediate and urgent investigation by the Minister of Justice. Faced with the reality of a substantial awaiting trail prison population there has been a fundamental failing by the second appellant to consider the needs and rights of persons such as the respondent and to fashion a system catering for their circumstances and which does not violate any of their rights. Proper effect must be given to the *residuum* principle. The new system cannot be justified by a vague and generalised reference to security needs and resource limitations.

[31] Whilst there appears to be no statutory or other prohibition on some form of standardisation and whilst it is arguable that a measure of standardisation is desirable, particularly when one is dealing with a large national prison population, the rigidity of the new system does not allow for cases where the circumstances are such that

applying the norm would be oppressive. The First United Nations Congress on the Prevention of Crime and the Treatment of Offenders recommended standard minimum rules for the treatment of prisoners. These are recommended minimum standards to ensure that discipline and order are maintained without over-restriction and without an infringement of the rights of prisoners. An examination of these standard minimum rules shows that the purpose is to ensure that the rights of prisoners are respected and not infringed. Standardisation *per se* cannot be justification for an infringement of prisoners rights. The new system does not cater for the needs of those prisoners waiting for an inordinately long time for their trials to commence or be finalised. The new system treats all unsentenced prisoners as if they are in prison for a short time. In addition the second appellant discriminates against unsentenced prisoners in a manner, which is unjustified in logic and law. There is no explanation for allowing **A** group prisoners the use of cassette players whilst denying them to unsentenced prisoners. There is no explanation for denying unsentenced prisoners the use of private musical instruments whilst group **A** prisoners are entitled to use their own musical instruments. The bar on hobbies is not justified. The rights of unsentenced prisoners who have been granted bail to have daily visits as provided for in regulation 132 (7) are being transgressed by the restrictions that the new system places on visits. Denying unsentenced prisoners contact visits may well be justified by reference to conditions in

prison and because of security considerations, but simply to state that contact visits may lead to escapes without explaining why the same rationale does not apply to group **A** prisoners is insufficient justification. The structure of the Act and the regulations is such that it does not countenance such rigidity and discrimination as flows from the new system. The provisions of the Act referred to earlier in this judgment, establish a system which takes into account the conditions in different prisons, allowing the second appellant to make determinations relative to local conditions. In so far as the appellants experience problems in predicting the length of detention of unsentenced prisoners, it appears to me that it will not require much effort to establish, by liaising with prosecution authorities and defence counsel, which trials will be conducted over a lengthy period and to then deal with the prisoners concerned accordingly.

[32] In section 35 of the Bill of Rights the rights of all detained persons are spelt out in detail. The manner in which we treat our prisoners should not be out of line with the values on which the Constitution is based. Human dignity and the advancement of human rights and freedoms and respect for the rule of law are not just hollow phrases. They must be made real.

[33] The learned judge in the Court below considered that the introduction of the new system was a matter of policy and was more akin to a legislative rather than an administrative act. However, with reference to ***Fedsure Life Assurance Limited and***

Others v Greater Johannesburg Transitional Metropolitan Council and Others **1999 (1) SA 374 (CC)** he concluded that since the determination cannot be said to be an original legislative act, in law it amounts to an administrative act and that section 33 of the Constitution, which requires that administrative action should be fair and just, applies. Counsel for the respondents submitted before us that the act was administrative in nature.

[34] For the reasons that follow it is in my view, for present purposes, not necessary to define more precisely the nature of the act of the second appellant in determining the new system. This is because, whatever its nature, the second appellant's conduct was subject to constitutional scrutiny and review. In the ***Fedsure*** case, *supra*, the Constitutional Court held that the doctrine of legality, an incident of the rule of law, was an implied provision of the interim Constitution (at **400 D – E** paragraph **[58]**):

> "It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."

See also: ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others*** **2000 (1) SA 1 (CC) (**at **70 G - H** paragraph **[148]**). Like the President of the country, like members of the Executive and like the Legislature and other repositories of power, the appellants, in exercising public power, must comply with the Constitution and must act within the parameters of their statutory

powers. In ***Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*** **2000 (2) SA 674 (CC)** Chaskalson P (at **687 H – 688 A** paragraph **[20]**) states the following:

> "The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality which is part of that law. The question whether the President acted *intra vires* or *ultra vires* in bringing the Act into force when he did is, accordingly, a constitutional matter. The finding that he acted *ultra vires* is a finding that he acted in a manner that was inconsistent with the Constitution."

Later (at **692 E - G** paragraph **[33]**) the following appears:

> "The control of public power by the Courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common-law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts."

At **698 D – F** paragraph **[50]** Chaskalson P states:

> "What would have been *ultra vires* under the common-law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of

> constitutional law and common law in respect of the validity of administrative decisions within the purview of section 24 of the interim Constitution. What is 'lawful administrative action', 'procedurally fair administrative action' and administrative action 'justifiable in relation to the reasons given for it' cannot mean one thing under the Constitution and another thing under the common law."

[35] The challenge to the new system by the respondents, seen in proper prospective, is premised on the principle of legality. In the present case it is clear that the second appellant fundamentally misconceived his powers in terms of the Act and that he acted beyond his powers. He disregarded the provisions of the Constitution and fashioned a privilege system inconsistent with its core values and not countenanced by the statutory regime from which he assumes his powers. In my view there is some merit to the conclusion by Maritz AJ that complaints such as those related to the preparation of food and the use of a private television set may be unfounded. However, since the second appellant so fundamentally misconceived his powers the system designed by him cannot be allowed to stand. It is not for this or any other court to fashion a workable privilege system. The learned judge in the Court below did not err in his conclusions that the specific restrictions lifted by him were in violation of the rights of unsentenced prisoners. However, given the fundamental flaw in the second appellant's approach to the determination made by him the new system so far as it relates to unsentenced prisoners is liable to be set aside in its entirety. Prison authorities if they intend to fashion a new privilege system for unsentenced prisoners must take into

account the *residuum* principle, act within the confines of their statutory powers and, most importantly, must respect the Constitution. Appellants' counsel was constrained to concede that in the event of it being held that the new system should be set aside in its entirety, prison authorities could revert to the provisions of the Act and the regulations to continue to manage and administer unsentenced prisoners as they did before the introduction of the new system. There will be no vacuum. Prison authorities in exercising their statutory powers must take care to ensure that they act in accordance with the principle of legality.

[36] This judgment should be made available to senior officials in the Department of Correctional Services who have been delegated in terms of the Act to act in the second appellant's stead and it is directed accordingly.

[37] For the reasons set out the appeal is dismissed with costs. The order of the Court below, up to and including paragraph 7, is set aside and substituted as follows:

> "The new privilege system (Annexure A to the notice of motion) as determined by the second respondent in respect of unsentenced prisoners is reviewed and set aside."

The costs order in the Court below remains unaffected.

M S NAVSA
JUDGE OF APPEAL

CONCUR:
SMALBERGER ADP
OLIVIER JA
ZULMAN JA
MTHIYANE JA