CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 322/23

In the matter between:

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES First Applicant

NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES Second Applicant

HEAD OF CORRECTIONAL CENTRE, JOHANNESBURG MEDIUM "C" Third Applicant

and

MBALENHLE SYDNEY NTULI Respondent

and

JUDICIAL INSPECTORATE FOR CORRECTIONAL SERVICES Amicus Curiae

Neutral citation:	*Minister of Justice and Correctional Services and Others v Ntuli* [2025] ZACC 7
Coram:	Madlanga ADCJ, Kollapen J, Majiedt J, Mhlantla J, Rogers J, Seegobin AJ, Theron J, Tolmay AJ and Tshiqi J
Judgment:	Majiedt J (unanimous)
Heard on:	14 November 2024
Decided on:	30 April 2025

Summary: Correctional Services Policy Procedures on Formal Education Programmes — right to further education — use of personal computers in prison cells by inmates — policy unconstitutional

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ORDER

On application for leave to appeal from the Supreme Court of Appeal:

1. The order of constitutional invalidity made by the Supreme Court of Appeal is confirmed.
2. The Policy Procedure Directorate Formal Education, as approved by the second applicant and dated 8 February 2007, is unconstitutional and invalid to the extent that it prohibits the use of personal computers in cells for purposes of further education in circumstances where such use is reasonably required for such further education, and is set aside.
3. The order of constitutional invalidity is suspended for 12 months from the date of this order.
4. The second applicant is directed, within 12 months from the date of this order, to prepare and promulgate a revised policy consistent with the principles laid down in this judgment (revised policy).
5. The second applicant is directed, within one week after promulgating the revised policy, to disseminate that policy to the head of every correctional centre, and, where one is employed, to the head of education at each centre.
6. Notice of the revised policy must be posted on notice boards in all prisons where prisoners customarily receive information, and such notice must set out where prisoners may obtain copies of the revised policy.
7. Pending the revision of the policy:
   (a) Any inmate in a correctional centre registered as a student with a recognised tertiary or further educational institution and who

reasonably needs a computer to support their studies, and any student who has registered for a course of study that reasonably requires a computer as a compulsory part of the course, is entitled to use their personal computer without the use of a modem in their cell.

(b) Any registered student who keeps a personal computer in their cell in accordance with paragraph 7(a) above must make it available for inspection at any given time by the head of the correctional centre or any representative of the second applicant.

(c) In the event of a breach of the rules relating to the use by an inmate of their computer in their cell, the head of the correctional services centre may, after considering any representations the inmate may make, direct that the inmate may not use their computer in their cell.

8. The first and second applicants are ordered to pay, jointly and severally, the costs of this application, the costs in the Supreme Court of Appeal and the High Court, including in all instances the costs of two counsel, where so employed.

JUDGMENT

MAJIEDT J (Madlanga ADCJ, Kollapen J, Mhlantla J, Rogers J, Seegobin AJ, Theron J, Tolmay AJ and Tshiqi J concurring):

Introduction and background

[1] This is an application challenging the Supreme Court of Appeal's declaration of constitutional invalidity of a policy emanating from a statute. The central issue is the constitutional validity of a blanket ban imposed by the Department of Correctional

Services (Department) on the possession and use of computers by inmates in their cells in correctional centres. At issue is the right to further education enshrined in section 29(1)(b) of the Constitution.[1] The blanket ban emanates from a Departmental policy, the Policy Procedures on Formal Education Programmes (Policy) which regulates the use of computers by inmates who have registered for studies and require the use of a computer. The Policy was approved by the Acting Commissioner for Correctional Services on 8 February 2007.

[2] The High Court of South Africa, Gauteng Local Division, Johannesburg (High Court), held that the Policy was unconstitutional as it infringed the right to further education in section 29(1)(b) of the Constitution.[2] That Court held further that the Policy constituted unfair discrimination between inmates and the general public and also between inmates at Johannesburg Correctional Centre, Medium "C" and other inmates, in violation of the Promotion of Equality and Prevention of Unfair Discrimination Act[3] (PEPUDA). An appeal to the Supreme Court of Appeal, with its leave, was unsuccessful.[4]

[3] The first applicant is the Minister of Justice and Correctional Services. The second applicant is the National Commissioner of Correctional Services. The third applicant is the Head of Correctional Centre, Johannesburg Medium "C" (Medium C). The respondent is Mr Mbalenhle Sydney Ntuli, who was incarcerated in Medium C as

[1] Section 29(1)(b) reads:

> "(1) Everyone has the right—
>
> . . .
>
> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible."

[2] *Ntuli v Minister of Justice and Correctional Services*, unreported judgment of the High Court of South Africa, Gauteng Local Division, Johannesburg, Case No 2019/083 (27 September 2019) (High Court judgment).

[3] 4 of 2000.

[4] *Minister of Justice and Correctional Services v Ntuli* [2023] ZASCA 146; [2024] 1 All SA 333 (SCA) (Supreme Court of Appeal judgment).

a maximum offender when he launched the application in the High Court. He had at the time been engaged in tertiary distance learning, paid for by his family.

[4] The Judicial Inspectorate for Correctional Services (JICS) was admitted as amicus curiae (friend of the court), and made both written and oral submissions. JICS is an independent statutory body established in terms of section 85 of the Correctional Services Act[5] (Act). In accordance with its statutory mandate, JICS exercises oversight over the inmates and facilities falling under Correctional Services. JICS made useful submissions about the role that education plays in the wellbeing of inmates; the limitation placed by the Policy on the respondent's right to further education and access to reading materials; the failure of the state, through the impugned Policy, to comply with its obligation not to interfere with or diminish the respondent's enjoyment and exercise of the right to further education; and lastly, South Africa's obligations under international law.

[5] In relevant part, the Policy reads:

> "Utilisation of Desk Top Computers/Notebooks/Laptops (Personal Computers):
>
> > 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 [a] compulsory part of the course are allowed to have a personal computer within the Correctional Facility.
> >
> > All applications relating to the utilisation of personal computers received from offenders must be approved by the Head of the Correctional Centre.
> >
> > A room within the Correctional Centre or at the School must be made available specifically for the placement of the personal computers of students.
> >
> > . . .
> >
> > No computer shall be allowed in any cell (communal and/or single)."

[5] 111 of 1998.

The prohibition relating to computers in single or communal cells stipulates in the policy procedures that the ban applies "at all times".

[6] Almost the entire factual matrix is undisputed. As stated, at the time of the High Court application, the respondent was an inmate at Medium C where he is serving a 20-year imprisonment sentence. At that time, he was registered with the Oxbridge Academy to pursue computer studies with a focus on data processing. The respondent has since passed and graduated. However, during the time that he was studying, he required the use of a computer for his course. The computer was not only the means of studying, but it comprised the object of study itself (data processing).

[7] The respondent was transferred to Medium C from the Medium "B" Correctional Centre (Medium B) on 20 July 2018 for undisclosed reasons. While in Medium B, he was authorised to have and to use a personal desktop computer in his single cell for the purpose of furthering his tertiary education. Upon his arrival at Medium C, the desktop was taken away and he was told to use the computers in the computer room. Medium C has a computer room for inmates who require the use of a computer for their studies. The computer room has computers which are designated specifically for inmates registered with the University of South Africa (UNISA) and other computers for inmates registered with other institutions. Inmates are allowed access to the computer room during stipulated hours.

[8] The computer room is open from 09h00 to 12h00. It re-opens at 13h00 and remains open until 15h00 on Mondays to Fridays. It occasionally opens on weekends but never on public holidays. The respondent is permitted to be outside his cell for six hours per day. During the time he is permitted to be outside the cell, he has to take a shower, consume breakfast and lunch, clean his cell and occasionally do his laundry. Since every cell in the entire centre is opened at the same time, the centre is exceptionally noisy and studying with many distractions is extremely challenging.

Litigation history

[9] In the High Court, the respondent sought relief, among others, that the High Court declare the parts of the Policy, cited above, inconsistent with the Constitution, insofar as it did not allow the use of personal computers in cells for study and education purposes. He also sought a declaratory order that the Policy's prohibition on the use of laptop computers in cells constitutes unfair discrimination, as contemplated in PEPUDA, against him. Lastly, the respondent also sought orders that:

(a) he be entitled to use his personal computer without a modem in his single cell for as long as he remains a registered student with any recognised tertiary institution of South Africa;

(b) he should have supervised and restricted internet access at reasonable times by using his own personal modem, to any websites which he may from time to time be required to access by his tertiary institution for study purposes; and

(c) his personal computer be made available for inspection at any given time to any representative of the applicants.

[10] The respondent's general complaint was that he was often deprived of sufficient time to study due to delays in having his meals and to attend to his daily chores and other obligations. All of this had to be done within six hours. The applicants' objection to the respondent being allowed use of his computer in his cell was largely based on the contention that it would create a security threat. The applicants' primary concern was that inmates may smuggle modems into their cells or use illegal cell phones to create hotspots.[6] The actual risk that the applicants fear was not specified, but presumably entailed their concern that the inmates' use of computers in the cells may either pose a flight risk, or that they may become involved in illegal activities over the internet. The applicants alleged that in Medium B, inmates had smuggled in cell phones and had used

[6] Physical locations where users can wirelessly connect their mobile devices (smartphones, tablets and laptops) to the internet.

them to communicate with gang members, issuing instructions to incite and execute crimes.

[11] The High Court took the view that the applicants had not provided any evidence that, where computers have been allowed in cells, even with modems, there had been any security breach as a result thereof.[7] It held further that the respondent had the right to study as much as he pleased, within the legitimate limitations that prison life inevitably presents. That right, held the Court, was being limited by the Policy.[8]

[12] The ensuing question considered by the High Court was whether the limitation was justified, which required a weighing-up of competing interests. That Court held that there was no substance to the argument that inmates might initiate contact with the outside world and cause a security risk.[9] According to the High Court, computers can be screened to ensure that they do not contain modems. The applicants could also prevent the use of external modems by simply enforcing proper security protocols in their facilities. The High Court held that the applicants had not alluded to a single incident where the use of a computer in a cell, with or without a modem, had led to a security risk. According to the High Court, it seemed that there were a large number of inmates who had access to computers in Medium "A", some with modems. Had there been any security breaches as a result thereof, it was expected of the applicants to place those facts before the Court. The fact that they had failed to do so led to the inevitable conclusion that there had not been any such incidents.[10]

[13] In conclusion, the High Court held that the Policy constituted an unjustified limitation of the right to further education of all inmates and was therefore inconsistent with the Constitution. Furthermore, the High Court held that the Policy constituted unfair discrimination in accordance with the provisions of PEPUDA – to the extent that

[7] High Court judgment above n 2 at para 27.

[8] Id at para 33.

[9] Id at para 40.

[10] Id at para 41.

the Policy prohibited computers in cells for study purposes, it unfairly discriminated against the respondent on the basis that it imposed disadvantages on him. It withheld benefits, opportunities and advantages, on the ground that he is a prisoner, thereby adversely affecting the equal enjoyment of his right to further education. According to the High Court, the Policy not only discriminated between prisoners and the general public, but the Department, in the manner in which it implemented the Policy, also discriminated between inmates in Medium C and inmates in other prisons.[11] In the result, held the High Court, the respondent was entitled to use his personal computer without a modem in his cell, for as long as he remained a registered student with any recognised tertiary institution in South Africa, subject to inspection by the applicants as they deemed necessary.[12]

[14] On appeal, the Supreme Court of Appeal considered the respondent's unfair discrimination challenge to the Policy under PEPUDA and whether the High Court enjoyed jurisdiction to entertain this challenge. That Court held that the Judge in the High Court had not been properly designated in terms of section 16(1) of PEPUDA by the Minister of Justice to serve as a presiding officer in the Equality Court. Consequently, the Supreme Court of Appeal held that the Judge had no power to make an order declaring that the Policy constitutes unfair discrimination in terms of PEPUDA, and it set aside that order.[13]

[15] Regarding the section 29(1)(b) challenge, the Supreme Court of Appeal was of the view that the dispute did not concern whether a prisoner's pursuit of further education should be permitted, but how it should be done. Essentially, what the case turned upon was whether the state could prevent the respondent from using his personal computer, provided to him by his family, to study in his cell.[14]

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[11] Id at para 46.

[12] Id at para 52.

[13] Supreme Court of Appeal judgment above n 4 at para 14.

[14] Id at paras 19-20.

[16] According to the Supreme Court of Appeal, the Policy which imposed the prohibition on the usage of his computer in his cell inhibited the respondent's pursuit of his studies. The Court held that it was an infringement of the respondent's right to further education because the content of the right includes the right to pursue the course of study for which the respondent was enrolled.[15] It followed that the outright prohibition of the Policy, that excludes a prisoner from using a personal computer in his cell to study, was an infringement of the respondent's right to pursue his further education, and was thus an infringement of section 29(1)(b) of the Constitution. Further, the respondent's case was a particularly clear infringement because access to a computer was intrinsic to his studies as the computer itself is the object of the studies.

[17] The Supreme Court of Appeal upheld the High Court's conclusions and dismissed the appeal, save in one respect, the part of the order that related to unfair discrimination under PEPUDA. As stated, the Supreme Court of Appeal held that the High Court had no power to make that order, and set that part aside.

[18] The Supreme Court of Appeal made the following order, which included interim relief:[16]

> "1. The appellants' application for condonation and reinstatement of the lapsed appeal is granted.
>
> 2. The first and second appellants are to bear the costs of the applications for condonation and reinstatement, jointly and severally, on an attorney and client scale, including the costs of two counsel.
>
> 3. The appeal is partially upheld and the order of the court [of first instance] is set aside and replaced with the following:
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> '1. To the extent that the Policy Procedure Directorate Formal Education as approved by the second respondent and dated

[15] Id at para 22.

[16] In the Supreme Court of Appeal's order, the first and second appellants in that Court, and the first and second respondents in the High Court, refer to the Minister of Justice and Correctional Services and the National Commissioner of Correctional Services respectively.

8 February 2007 prohibits the use of personal computers in cells, it is declared invalid and set aside.

2. The order in paragraph 1 is suspended for 12 months from the date of this order.

3. The first and second respondents are directed, within 12 months from the date of this order, after consultation with the Judicial Inspectorate for Correctional Services ("JICS"), to prepare and promulgate a revised policy for correctional centres permitting the use of personal computers in cells for study purposes ("the revised policy").

4. The first and second respondents are directed, within one week after promulgating the revised policy, to disseminate that policy to the head of every correctional centre, and, where one is employed, to the head of education at each centre.

5. Notice of the revised policy must be posted on notice boards in all prisons where prisoners customarily receive information, and such notice must set out where prisoners may obtain copies of the revised policy.

6. Pending the revision of the education policy:

    6.1 The applicant is entitled to use his personal computer in his cell, without the use of a modem, for as long as he remains a registered student with a recognised tertiary or further education institution in South Africa.

    6.2 Any registered student in a correctional centre who needs a computer to support their studies, and/or any student who has registered for a course of study that requires a computer as a compulsory part of the course, is entitled to use their personal computer without the use of a modem in their cell for as long as they remain a registered student with a recognised tertiary or further educational institution in South Africa.

6.3 The applicant or any other student who keeps a personal computer in their cell in accordance with paragraphs 6.1 and 6.2 above must make it available for inspection at any given time by the head of the correctional centre or any representative of the first and second respondents.

6.4 In the event of a breach of the rules relating to the use by a prisoner of their computer in their cell, the head of the correctional services centre may, after considering any representations the prisoner may make, direct that the prisoner may not use their computer in their cell.

7. The first and second respondents are to pay the costs of this application jointly and severally, the one paying the other to be absolved.'

4. The first and second appellants are to pay, jointly and severally, the costs of the application for leave to appeal before the High Court.

5. The first and second appellants are to pay, jointly and severally, the costs of the appeal, including the costs of two counsel.

6. The first and second appellants are directed to disseminate this order to all correctional centres and make it available to prisoners, within ten days of the order."

Submissions in this Court

[19] In challenging the order of the Supreme Court of Appeal, the applicants submit that the central question before this Court is whether prohibiting a convicted prisoner from using a personal computer in a prison cell for study purposes is a violation of the right to further education, enshrined in section 29(1)(b) of the Constitution.

[20] The primary submission made by the applicants is that, to the extent that the second and third applicants do not prohibit access to computers for purposes of study,

the applicants have complied with the requirements of the Constitution in section 29(1)(b).

[21] According to the applicants, the respondent is not being divested of his right to further education, nor is that right being infringed; it is purely being regulated in a reasonable manner under the circumstances imposed on offenders. They say that there are systems and resources in place for registered students seeking to pursue computer-based training courses. In addition, a registered student is not prohibited from using their own personal computer as long as they apply formally, but they are required to use the computer in the correctional facility's dedicated computer room. The restriction on offenders regarding the use of personal computers in their cells at all times does not deprive them of the right to pursue further education.

[22] The applicants concede that the respondent was given permission while he was in Medium B to use a personal computer in his cell. However, according to them, this was a clear violation of the Policy. His request to use his personal computer was granted pending the development of a computer facility, which was scheduled to be operational in the following financial year. Moreover, the applicants point out that Mr Samuel Jabulani Mahlangu, who oversees the management of Medium B, states that he was forced to permit the respondent to use his personal computer in his cell pending the development of the computer facility, and that his decision to permit the use of computers in single and communal cells has resulted in Medium B experiencing operational frustrations with security breaches in the facility.

[23] The applicants point out that, by not allowing the use of personal computers in cells, the authorities are not only complying with the Policy procedures, but are also enforcing preventative measures to prevent security breaches. According to the applicants, despite the respondent stating that his laptop does not have a modem or internet access, with cell phones being smuggled and used in the prison facilities, inmates will have the means to access the internet on their computers via their cell phones and commit crime. His willingness to have his laptop searched and inspected

on a regular basis is not sufficient to combat the authorities' reservations about the security that could be compromised. Inmates are searched on a daily basis, but they say that not a month goes by without a security breach where a cell phone or electronic device has been found in the possession of an inmate. The applicants argue that the security concerns of the authorities are justifiable, the Court should not second-guess the authorities on this issue and should respect the separation of powers principle.

[24] The applicants' earlier averment that, based on information obtained from Oxbridge Academy, where the respondent was registered, the respondent did not need the use of a laptop, save for the submission of his assessments, was not pursued in oral argument. And the initial erroneous claim that the respondent was not a registered student was withdrawn in the applicants' supplementary affidavit, in the face of clear evidence by the respondent of his student registration, which had been accepted by the Correctional Centre. The applicants accept that prisoners retain all the rights to which every person is entitled, subject only to limitations imposed by the prison regime that are justifiable under the Constitution. But they take issue with the reasoning of the Supreme Court of Appeal that the prison regime is not justified in prohibiting prisoners from using personal computers in their cells. The function of deciding what regime should apply in a correctional facility is a function which must be left exclusively for the applicants to determine.

[25] The applicants submit that the right to pursue further education does not entail that, because the respondent may have some idle time, he should be allowed to use a personal computer in his cell. Ultimately, so the submission goes, the Policy does not prevent or restrict the respondent from pursuing his studies. Instead, according to the applicants, they have provided the respondent with what the Constitution requires. They have allowed him the use of his personal computer and access to other computers in the computer room in order for him to pursue his right to further education. The right to further education does not mean having a personal computer at all times in a cell.

[26] The applicants thus contend that there is no need to examine whether there is a justifiable restriction of the right, because once this Court accepts their submissions that the Policy does not infringe section 29(1)(b), that should be the end of the enquiry. However, if this Court should find that the Policy is a limitation of the respondent's section 29(1)(b) right, then they submit that the restriction is justifiable. In conclusion, the applicants submit that this Court should not uphold the findings of the Supreme Court of Appeal in circumstances where the Department does not have adequate checks to monitor and control the private and unsupervised use of personal laptops in cells. They maintain that the Supreme Court of Appeal erred in not considering the contextual framework of the facts before them in terms of the risk. According to the applicants, as it stands, the Department cannot be expected to meet the additional needs of the respondent on the basis that it is obliged to enable him to utilise his idle time for studying. Therefore, the rights enshrined in section 29 of the Constitution have been fulfilled and, as a result, there is no violation.

[27] The respondent accepts that this matter raises constitutional issues. He submits that the application for leave to appeal ought to be dismissed as it is devoid of merit. He argues that his computer studies focused on data processing with the Oxbridge Academy and that, therefore, for him, a computer is not just a tool for studying but is in fact the object of study. He contends that he needs a personal computer in order to complete this course, since it is axiomatic that a course in data processing cannot be done on paper.

[28] According to the respondent, the Policy is antiquated and does not take into consideration the specific study methods of a student inmate. The respondent submits that a personal computer is critical to success in his field of study. Furthermore, the cost of electronic versions of books is much less than hard copies of the same prescribed textbooks. In addition, downloading his study materials in electronic format from the student website is much faster than receiving them through the conventional postal services which are so unreliable that most correspondence colleges strongly discourage

their students from making use of them. It is also far more convenient and safer for him to submit his completed assignments online.

[29] The respondent submits that the systems in place to use computers in the computer room or to apply to use a personal computer there do not permit sufficient access to a computer and the restrictions on access are neither reasonable nor justifiable. He points to the limited hours of use of the computer centre, how noisy it is and how he has to use his time, as alluded to before.[17] These restricted hours afforded to inmates to be outside of their cells is the context in which access to personal computers in cells becomes even more necessary. A substantial amount of time is spent locked up in cells, doing nothing and the time could be constructively utilised for study purposes.

[30] The respondent submits that the rights of prisoners must be understood in the context of the primacy of the Constitution. He points out that even prior to our constitutional dispensation, prisoners' rights were protected by the residuum principle[18] which traces back through a line of cases. His case in the main is that the Policy is inconsistent with the Constitution on various grounds – first, that the Policy is an unjustifiable limitation of the right to further education; and second, that it unjustifiably limits the constitutional rights to conditions of detention consistent with human dignity, including access to reading material, in terms of section 35(2)(e) of the Constitution,[19] and human dignity in terms of section 10 of the Constitution.[20] It also transgresses the

[17] At [8] above.

[18] The residuum principle entails that an inmate retains the basic residual rights of an ordinary citizen except those rights (such as freedom of movement) that are a necessary consequence of imprisonment.

[19] That section reads:

> "Everyone who is detained, including every sentenced prisoner, has the right—
>
> . . .
>
> (e) 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."

[20] Section 10 provides:

> "Everyone has inherent dignity and the right to have their dignity respected and protected."

prohibition on unfair discrimination in section 9(3)[21] and PEPUDA. And, lastly, that the Policy is inconsistent with the principle of legality embedded in the rule of law in that it is *ultra vires* (exceeding the legal scope of authority) and irrational.

[31] In relation to section 29(1)(b), the respondent submits that "further education" as connoted therein should be broadly construed to include all forms of education outside "basic education" covered in section 29(1)(a) of the Constitution and it includes all forms of adult education.

[32] With regard to the right enshrined in section 35(2)(e), the respondent submits that this provision unequivocally protects the rights of detained persons to have access to reading material, a reaction to the history of prisoners under apartheid being deprived of it. Where reading material is sought under section 35(2)(e) of the Constitution for the specific purpose of study, such access lies at the intersection of this right and the right to further education in section 29(1)(b) of the Constitution. It is the respondent's submission that these provisions should be read together with section 18 of the Act[22] and regulation 13 of the Correctional Services Regulations.[23]

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[21] Section 9(3) reads:

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

[22] Section 18 provides:

> "(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 prison or may be sent to the prisoner from outside the prison in a manner prescribed by regulation."

[23] Correctional Services Regulations, GN R323 *GG* 35277, 25 April 2012. All reference in this judgment to regulations are to these Regulations. Regulation 13 reads:

> "(1) A properly organised library containing literature of constructive and educational value, as prescribed by the Order, must as far as reasonably practicable, be established and maintained at every Correctional Centre.
>
> (2) An inmate may receive reading material from outside the Correctional Centre in the manner as prescribed by the Order.
>
> (3) A correctional official may inspect an envelope or package sent or received by an inmate to the extent necessary to determine whether the envelope or package contains any article that may pose a danger to the security of the Correctional Centre or the

[33] In respect of section 10 of the Constitution, the respondent submits that the right to dignity requires an individualised approach, and as such, blanket bans which restrict rights and which are based on generalised assumptions are often constitutionally offensive because they impair dignity. A general prohibition will, by definition, fail to take account of differences between individuals. According to the respondent, in addition to unjustifiably limiting these constitutional rights, the Policy is contrary to the principle of legality in section 1(c) of the Constitution. The respondent submits that the Policy is inconsistent with the Act and Correctional Service Regulations, including section 38(1)(c) of the Act which provides for an individual prisoner's needs in regard to education.[24]

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safety of any person, but the correctional official may not read the contents of the envelope or package, except in the circumstances contemplated in regulation 8(4).

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

(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—

(i) would likely be viewed by other persons; and

(ii) 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, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.

(5) (a) Documents and correspondence between inmates and their legal practitioners may not be censored if they relate to legal matters.

(b) Documents and correspondence between inmates and their legal practitioners that purport to relate to legal matters may be examined only to determine whether in fact they do relate to such matters."

[24] Section 38(1)(c) reads:

"(1) As soon as possible after admission as a sentenced prisoner, such prisoner must be assessed to determine his or her—

. . .

(c) educational needs."

[34] The respondent submits that the blanket prohibition on the use of computers for study purposes in single and communal cells is not rationally connected to the objective that it seeks to achieve. The Policy must be interpreted in the light of the Higher Education Act[25] and the United Nations Standard Minimum Rules for the Treatment of Prisoners[26] (Minimum Rules), which recognise the benefits of further education, recreational and cultural activities and maintaining social relations with family.

[35] Regarding the argument of the applicants that the Court, in setting aside the Policy and prescribing how it should be rectified, will breach the principle of separation of powers and overreach its role under the Constitution, the respondent submits that it is the responsibility of the courts to determine the constitutional validity of any law or policy. The respondent argues that the applicants do not have unfettered power to implement policies which undermine the Constitution.

[36] The JICS submits that the right to education (including basic and further education) falls under the class of rights that are non-derogable, and is thus one of the fundamental rights of which an inmate cannot be denied. Once an inmate has been accepted by an institution and permitted by the prison authorities to pursue further education, as was the case in this matter, the state has an obligation to ensure that its actions or policies do not diminish the inmate's right to pursue further education. The rights to dignity and education are not limited merely because a person is incarcerated. Inmates are and remain entitled to all their personal rights, and their dignity cannot be taken away by law while they are incarcerated.

[37] According to the JICS, the right to education includes access to textbooks and other tools necessary for fulfilling the right. The prohibition on personal computers in cells infringes the right to education because inmates cannot access reading material for

[25] 101 of 1997.

[26] These Rules, also known as the Nelson Mandela Rules, were adopted by the United Nations on 17 December 2015 by way of General Assembly resolution 70/175.

their studies and complete educational tasks when they are in their cells. The limitation on their access to reading material is also a limitation of section 35(2)(e), which stipulates that part of making an inmate's detention dignified is allowing them access to reading material, and of section 16(1)(b) and (d), which provide for a right of access to information.

[38] The JICS points out that section 7(2) of the Constitution imposes both a positive and negative duty on the state. The state must not act in a manner that interferes with or diminishes the enjoyment of a right. Any retrogressive measure which actively harms or undermines access to a fundamental right is a breach of the duty to respect, protect, promote and fulfil the rights in the Bill of Rights and, at the very least, would require very careful consideration and justification.

[39] Turning to international law, the JICS refers to various international law instruments and treaties which recognise the virtues and empowering force of access to education. These include commentary on Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[27] and rule 104 of the Minimum Rules.[28] These international instruments place an obligation on South Africa to adopt and implement education policies that meet incarcerated persons' needs to be part of an equal, fair and just society. The Policy should accordingly not unreasonably infringe inmates' rights to access education by prohibiting the use of tools necessary for accessing education.

[27] The ICESCR was adopted by the United Nations on 16 December 1966 and ratified by South Africa on 12 January 2015. The JICS referred us to *General Comment No.13: The right to education (article 13 of the Covenant)*, adopted by the United Nations Committee on Economic, Social and Cultural Rights (CESCR) at its 21st session, 15 November – 3 December 1999 (General Comment 13). The General Comment recognises the right to education as a vehicle for realising other fundamental rights and as an "empowerment right".

[28] See n 26 above.

Analysis

The unfair discrimination claim

[40] It will be recalled that the Supreme Court of Appeal upheld the appeal against the unfair discrimination claim on the basis that the Judge in the High Court had not been properly designated by the Minister of Justice in terms of section 16(1) of PEPUDA to serve as a presiding officer in the Equality Court, and could not make any order under PEPUDA. The Court consequently set aside that part of the High Court's order. There is no cross-appeal against this order and nothing further need be said about it.

Incarceration and the ambit of the rights in sections 29(1)(b) and 35(2)(e)

[41] Before discussing the respondent's position, the importance of education for inmates as part of their rehabilitation bears consideration. At the outset, three central features of the Policy bear emphasis. First, it is a *blanket prohibition* with no exceptions at all. Second, inmates who study are only permitted to use their computers within a communal computer room at the correctional centre *for limited hours* from Monday to Friday. And, last, *not all correctional facilities have communal computer rooms*. A further important consideration that must be emphasised is that a computer is not only the means of study for students who pursue the type of course that Mr Ntuli did (data processing), but it is also the *object* of study.

[42] Incarceration does not take away or limit fundamental rights like education (including further education), dignity and access to reading material.[29] In *Sonke*,[30] this Court put it thus:

> "Incarceration per se is not a justification for the limitation of inmates' rights, and they continue to enjoy all rights save those which it is absolutely necessary to curtail in order

[29] *Whittaker v Roos and Bateman*; *Morant v Roos and Bateman* 1912 AD 92 (*Bateman*) at 122.

[30] *Sonke Gender Justice NPC v President of the Republic of South Africa* [2020] ZACC 26; 2021 (3) BCLR 269 (CC).

> to implement the sentence or order of a court (the residuum principle). . . . All the rights in the Bill of Rights apply to inmates . . . Inmates remain members of our democratic society, equally entitled to rights except where these are justifiably limited in light of the residuum principle."[31]

[43] The virtues of education in general were eloquently explicated in *FEDSAS*[32] by Moseneke DCJ as "primordial and integral to the human condition".[33] The positive effect of prison education programmes on recidivism and the importance of education in reducing recidivism were alluded to in an address by the previous Minister of Correctional Services, Mr Sibusiso Ndebele. The respondent cited this in his papers and it rightly remained undisputed. To be effective, education must include adequate learning resources. This is true both inside and outside prison. Learning resources include textbooks, writing materials and, given the rapid evolution in this digital age, the availability of technological tools like computers for e-learning.

[44] It became common cause that the respondent is a bona fide data processing student. A computer is essential for his studies. Section 29(1)(b) of the Constitution entrenches the right to further education. That right plainly encompasses access to textbooks and other tools necessary for fulfilling the right, including electronic tools.[34] The onset of the digital era and the rapid evolution of electronic hardware, software and systems is a reality that must self-evidently affect studies in prison too.[35]

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[31] Id at paras 30, 32 and 34.

[32] *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng* [2016] ZACC 14; 2016 (4) SA 546 (CC); 2016 (8) BCLR 1050 (CC).

[33] Id at para 1.

[34] Compare *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) at para 20.

[35] See the observations of the Supreme Court of Appeal in *Minister of Basic Education v Basic Education for All* [2015] ZASCA 198; 2016 (4) SA 63 (SCA) at para 1:

> "The world has progressed from being limited to printed works and has moved to the technological wonders of electronic media. The advent of electronic reading materials has not lessened the impact of the expressions cited above. If anything, there has been an explosion of information which has rendered reading in the modern world all the more important."

[45] Based on the well-established residuum principle, our courts have, in a long line of cases over many decades, acknowledged that prisoners retain the constitutional rights of an ordinary citizen except those rights (such as freedom of movement) that are a necessary consequence of imprisonment.[36] In the minority judgment of Corbett JA in *Goldberg*, it was enunciated thus:

> "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 person'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."[37]

[46] With reference to the dictum of Innes CJ in *Bateman*[38] more than a century ago, in *Hofmeyr*,[39] Hoexter JA stated:

> "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. . . . [I]n truth a prisoner retains all his personal rights save those abridged or proscribed by law. The root meaning of the

[36] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*); *Minister of Correctional Services v Kwakwa* [2002] ZASCA 17; 2002 (4) SA 455 (SCA) (*Kwakwa*); *Minister of Justice v Hofmeyr* [1993] ZASCA 40; 1993 (3) SA 131 (A) (*Hofmeyr*); *Mandela v Minister of Prisons* 1983 (1) SA 938 (A) (*Mandela*) and *Goldberg v Minister of Prisons* 1979 (1) SA 14 (A) (*Goldberg*).

[37] *Goldberg* id at 39C-E cited with approval in *Hofmeyr* id at 141G-H.

[38] *Bateman* above n 29.

[39] *Hofmeyr* above n 36.

> 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 be reference to his inviolable common law rights."[40]

[47] Of course, the "inviolable common law rights" alluded to by Hoexter JA in *Hofmeyr* have now been superseded and fortified by the rights entrenched in the Bill of Rights.[41] In *Makwanyane* this Court reaffirmed that—

> "prisoners retain all the rights to which every person is entitled under [the Bill of Rights] subject only to limitations imposed by the prison regime that are justifiable under section 33 [of the Interim Constitution]."[42]

[48] The Supreme Court of Appeal correctly noted that the residuum principle does not find application under our constitutional dispensation, since—

> "a prisoner does not have a residuum of rights. A prisoner enjoys the rights the Constitution extends to all persons and those specifically given to every sentenced prisoner (section 35(2)), unless these rights are limited by a law of general application in terms of section 36."[43]

Prisoners' rights are dictated by the supreme law and no longer by the residuum principle – the rights under that well-established principle now fall under the Constitution.

[49] The rights at issue here, as stated, are those entrenched in sections 29(1)(b) and 35(2)(e). They are related, but are also self-standing rights and, importantly, the section 35(2)(e) right is pertinently linked to human dignity, one of the founding values of our Constitution:

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[40] Id at 141C-E citing *Bateman* above n 29 at 122-3.

[41] *Kwakwa* above n 36 at para 28.

[42] *Makwanyane* above n 36 at para 143; see also the concurring judgment of O'Regan J in *Makwanyane* at para 331 and *August v Electoral Commission* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) at para 18, regarding the rights of prisoners.

[43] Supreme Court of Appeal judgment above n 4 at para 16.

> "(2) Everyone who is detained, including every sentenced prisoner, has the right—
>
> . . .
>
> (e) 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." (Emphasis added.)

[50] The right to further education should be generously interpreted to encompass all forms of education outside basic education which is mentioned separately in section 29(1)(a) of the Constitution. Section 41(1) of the Act echoes the right in these terms:

> "(1) The Department [of Correctional Services] must provide or give access to as full a range of programmes and activities, including needs-based programmes, as is practicable to meet the educational and training needs of sentenced offenders."

In conjunction with that section, regulation 10(2)(a) provides:

> "Education and training services must be rendered to sentenced offenders who have a need for such services, [and] subject to paragraph (b), those services will be rendered in accordance with education and training programmes."[44]

[51] The right to further education plainly includes tertiary education.[45] We are concerned here with a limitation of the right of a person pursuing further education to have access to electronic study material. And, as explained earlier, it matters not that that person is an inmate, because he enjoys all the rights accorded to non-inmates, save as they are reasonably limited in consequence of his incarceration (like the rights to liberty and freedom of movement). This matter is concerned with a blanket prohibition

[44] The regulation reads ungrammatically. Perhaps the word "and" should be understood before "subject to".

[45] *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society* [2019] ZACC 47; 2020 (2) SA 325 (CC); 2020 (4) BCLR 495 (CC) (*Independent Institute*) at para 24.

on access to learning resources for prisoners who require such access for the purposes of further education.

[52] The right to reading material, entrenched in section 35(2)(e), is mirrored in section 18(1) of the Act, which provides:

> "(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."

Section 18(2) of the Act provides how reading material is to be procured by an inmate:

> "(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."

[53] Regulation 13(2) regulates access to reading material, including electronic material. It reads:

> "(2) An inmate may receive reading material from outside the Correctional Centre in the manner prescribed by the Order."[46]

In terms of regulation 13(4), the head of a correctional centre or a correctional official designated by him or her may prohibit:

> "(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

[46] The Regulations do not define "the Order", but it is apparent from the Regulations as a whole that they envisage that the National Commissioner will issue an order or orders in terms of section 134(2) of the Act to further regulate the matters dealt with in the Regulations.

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

(i) would likely be viewed by other persons; and

(ii) 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, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth."

[54] "Reading material" includes material in an electronic format. In *Hennie*,[47] a case which also involved the use of personal laptop computers (without the use of a modem) in the applicants' cells for study purposes, the Court expressed it thus:

> "Section 18(2) [of the Correctional Services Act] 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."[48]

[55] Before assessing the constitutionality of the outright ban on personal computers and laptops in cells, what bears consideration first is whether the Policy can be categorised as a law of general application for purposes of section 36(1) of the Constitution with regard to a declaration of unconstitutionality. If the Policy is a limitation of fundamental rights, that limitation can only be justified under section 36(1) if it has the quality of a "law of general application". As was pointed out by the Supreme Court of Appeal in *Akani*,[49] the word "policy" is inherently vague and can

[47] *Hennie v Minister of Correctional Services* [2015] ZAGPPHC 311.

[48] Id at para 33.

[49] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* [2001] ZASCA 59; 2001 (4) SA 501 (SCA).

have a variety of meanings. The Court found that the policy determination in that case was meant to be elevated to subordinate legislation.[50]

[56] In *Dladla*,[51] there was disagreement between the majority and minority on whether the rules of occupation at a temporary shelter were "law[s] of general application". The majority held that, "[f]or the limitations to be justified under section 36, they must first and foremost be authorised by a 'law of general application'". It held that "this is a threshold test which must be met before a justification analysis may begin".[52] The minority judgment of Cameron J disagreed with the majority's view that "law of general application" is a threshold consideration that can preclude a limitations analysis. It opined that it is possible, and must be possible, to enquire into the reasonableness of a measure intended to fulfil section 26 without first searching for a "law of general application" enabling that measure.[53] In an extensive analysis, the minority pointed out that not any policy, practice, standard or daily decision made by a government agency or local authority could justify a rights infringement. Policies meant for purely internal use, for example, could not. But the reason for that, said Cameron J, is "because people are entitled to know the extent of their rights", and to this end, "norms intended to limit rights must be both adequately accessible and precisely formulated".[54]

[57] I agree with the Supreme Court of Appeal that the Policy is an order as contemplated in section 134(2) of the Act and is a species of delegated legislation. That section provides that the National Commissioner may issue orders, not inconsistent with the Act and the Regulations, which must be obeyed by all correctional officials.

[50] Id at para 7.

[51] *Dladla v City of Johannesburg* [2017] ZACC 42; 2018 (2) SA 327 (CC); 2018 (2) BCLR 119 (CC).

[52] Id at para 52.

[53] Id at para 92.

[54] Id at para 99.

Although called a policy, the instrument is one that permissibly imposes a duty of compliance.[55]

Is the blanket prohibition constitutional?

[58] In relevant part the Act and Regulations appear to espouse the recognition and upholding of the right to further education. Access to learning resources, including electronic tools and material, is guaranteed, except for specific, circumscribed exceptions. And, significantly, even the Policy itself declares its central purpose thus:

> "The objective of education programmes *is to utilise education as a basis for further development opportunities for offenders*. These programmes should be outcomes-based, needs driven, cost effective and market-related in order to empower offenders for sustainable life after release." (Emphasis added.)

The blanket ban in respect of computers is contrary to the legislative scheme and the stated central purpose of the Policy. More importantly, it is also inconsistent with the Constitution.

[59] In *Independent Institute*, this Court emphatically stated that the right to further education, as a fundamental right, must be interpreted in accordance with and in furtherance of the injunction in section 39(2) of the Constitution which requires the Bill of Rights to be interpreted so as to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.[56] And, as stated, the right of access to reading material in section 35(2)(e) is pertinently undergirded by human dignity.

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[55] Paragraph 2 of the Policy states that it will be recognised at all levels within the Department; that the National Head Office will ensure compliance with the Policy prescripts in the form of monitoring and evaluation; that Regional Offices will ensure the correct interpretation and implementation of the Policy; and that Management Areas will implement the Policy and ensure adherence.

[56] *Independent Institute* above n 45 at paras 22-3.

[60] Section 7(2) of the Constitution, which imposes positive and negative duties on the state, requires that the state must not act in a manner that interferes with or diminishes the enjoyment of a right.[57] The state has a negative duty not to interfere with existing access to fundamental rights. In *Juma Masjid*,[58] this Court expressed it thus:

> "Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another *or a failure to respect the existing protection of the right by taking measures that diminish that protection*."[59] (Emphasis added.)

[61] In the present instance, the applicants bear a negative duty not to impair the respondent's right to further education. The duty of the state is to remove barriers to education and actively allow access to the necessary resources to realise the right to education. The Department may not impede the fulfilment of the right to further education unless that is justified. Here, the applicants have failed to comply with their obligations in their limitation of the respondent's access to the tools necessary for realising the right to further education. That failure is a breach of the applicants' section 7(2) obligation.

[62] The Policy therefore limits the respondent's right to further education through its blanket prohibition on the use of computers in cells. However, what must be made

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[57] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 78. See also *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (*Rail Commuters Action Group*) at paras 68-71.

[58] *Governing Body of the Juma Musjid Primary School v Essay N.O. (Centre for Child Law as Amicus Curiae)* [2011] ZACC 13; 2011 (8) BCLR 761 (CC).

[59] Id at para 58, citing *Rail Commuters Action Group* above n 57 at paras 68-71; *Jaftha v Schoeman, Van Rooyen v Stoltz* [2004] ZACC 25; 2005 (1) BCLR 78 (CC); 2005 (2) SA 140 (CC) at paras 33-4 and *S v Baloyi* [1999] ZACC 19; 2000 (1) BCLR 86 (CC); 2000 (2) SA 425 (CC) at para 11. Recently, that principle was reaffirmed by this Court in *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* [2022] ZACC 44; 2023 (4) SA 325 (CC); 2023 (5) BCLR 527 (CC) at para 267:

> "The state's duties under section 7(2) can be breached 'directly' or 'indirectly', for instance, when there is a 'failure to respect the existing protection [or enjoyment] of the right by taking measures that diminish that protection [or enjoyment]'."

clear is that this finding is not to the effect that there is a positive obligation under section 29(1)(b) of the Constitution to allow prisoners to use personal computers in their cells. The holding instead is that the state must not, without justification, take measures that undermine or diminish the protection of the right to further education, and the blanket ban under the Policy is such a measure. Furthermore, the conclusion reached here is fact-specific for two reasons. First, the time available for use of personal computers at communal computer rooms is so short as not to afford meaningful use of personal computers for study purposes and, in any event, some correctional centres do not have communal computer rooms. Second, the respondent required his computer not only as a means, but also as the very object, of his data processing studies.

[63] The blanket prohibition on personal computers in inmates' cells infringes the right to education, because they cannot access reading material for their studies and complete educational tasks when they are in their cells. This finding makes it unnecessary to consider the further argument whether the limitation on inmates' access to reading material is also a limitation of section 35(2)(e)[60] and of section 16(1)(b) and (d)[61] of the Constitution.

[64] It bears emphasis that the fact specificity of the conclusion reached here does not mean that the inquiry into constitutionality is subjective – it is well established in our law that this is an objective inquiry.[62] All this Court needs to decide is whether a prohibition on the use of laptops in cells is an unjustifiable limitation of the section 29(1)(b) right where such use is necessary for the prisoner to pursue further education. Thus, so as to avail themselves of the benefit of an order in those terms, prisoners will need to show that the use of a laptop in their cell is reasonably required for purposes of further education.

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[60] That section stipulates that part of making an inmate's detention dignified is allowing them access to reading material.

[61] These provisions concern the right of access to information.

[62] *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (4) BCLR 441 (CC) at para 26.

[65] What bears consideration next is whether the defences put up by the applicants to the constitutional challenge qualify as justification for the limitation under section 36(1). As stated, and for the reasons given, the Policy is a law of general application. Stripped of all the unmeritorious denials and disputes raised by them, in essence the applicants advance two main defences. They aver that there is in fact no blanket ban and thus no infringement. This defence is based on the argument that the Policy does not prevent or restrict the respondent from pursuing his studies. Instead, so the applicants contend, they have provided the respondent with what the Constitution requires, by permitting him the use of his personal computer and access to other computers in the computer room in order for him to pursue his right to further education. The applicants state in their papers that "the right to education is not being deprived or infringed, but is purely [being] regulated in a reasonable manner under the circumstances imposed on offenders". They argue that the right to further education does not mean having a personal computer at all times in a cell.

[66] The simple answer to this is that access to the computer room is wholly inadequate and in effect boils down to an unjustifiable limitation of the right to further education. This is because the computer room's hours are inadequate – on the common cause facts it is open between 09h00 to 12h00 and 13h00 to 15h00 only on weekdays, some weekends only and never on public holidays. This is a total of five hours per day on only some days.

[67] The respondent furthermore has very limited time in his own schedule to access the computer room. He is a maximum-security inmate and the hours when he is permitted to be outside his cell are severely restricted. The respondent is permitted to be outside of his cell daily for approximately six hours in total. During those hours he is required to attend to all his daily needs and chores like consuming breakfast and lunch, exercising, taking a shower, cleaning his cell and doing his laundry. Amidst all of this he must find time to access the computer room. Furthermore, the noise in the centre is not conducive to proper studying.

[68] The wasted time spent in his cell when he could have been accessing the computer room during the very limited time that it is open is strikingly enunciated thus by him:

> "I am locked in my cell for 17 hours and 45 minutes a day. I can only reasonably sleep 8-9 hours a night. This effectively means that approximately 8 hours a day which I could spend studying are being wasted as a result of the extremely restrictive policies of the Department of Correctional Services."

[69] This illogical and seemingly irrational state of affairs was explained by the applicants solely based on security fears, their second main defence. According to the applicants, inmates are searched on a daily basis, and there are regular security breaches where cell phones or electronic devices are found in the possession of inmates. Even without modems, the illicit cell phones can "hotspot" computers in the cell, granting access to the internet, and facilitate the commission of serious crimes. The applicants argue that their security concerns are justifiable, and a court should not second-guess the authorities on this issue.

[70] The applicants' attempted justification does not get out of the starting gate. Illicit possession of a cell phone in and of itself provides the possessor and user access to the internet. They do not need a computer to achieve such access. But there is an even bigger problem for the applicants – not an iota of evidence of incidents manifesting this alleged grave risk was adduced. The applicants have instead contented themselves with generalised and opaque averments regarding this risk. That is no good. They bear the onus of justifying their limitation of the right to further education through the outright ban on computers in the Policy.[63]

[71] In their written submissions the applicants vaguely make mention of an "endless list" of daily security issues that face the Department. But no evidence of any of these

[63] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* [2004] ZACC 10; 2004 (5) BCLR 445 (CC); 2005 (3) SA 280 (CC) at para 36.

myriad issues was adduced. Moreover, we are still in the dark as to the rationale behind the Policy. Belatedly, new alleged security concerns were raised by the applicants in this Court, namely the potential danger presented by the electrical cords of computers and laptops in the cells. This, too, like the bogeyman threat posed by illicit cell phones, is up the creek without a paddle. At the hearing, the applicants' counsel was forced to retreat when confronted with the stark reality that there are several other utensils freely available in the cells with such cords, like kettles, toasters and so forth. There is simply a glaring dearth of evidence to substantiate these security concerns. That is not what is expected of those responsible for the Policy, the Minister and the National Commissioner (the first and second applicants in this Court).[64]

[72] A similar justification for the outright ban was put up in *Hennie*. The Court emphatically rejected that defence as unsubstantiated. Both defences thus fail to pass muster. The main problem with the Policy is that it contains an absolute prohibition on computers in cells and does not enable Departmental officials to exercise any discretion at all. The Policy applies to all and sundry without any regard whatsoever to inmates' personal circumstances and study needs and requirements or whether the computers are to be used for recreation or bona fide studies.

[73] In sum then, the applicants have failed to put up justification for the limitation of the respondent's right to further education. The blanket prohibition in the Policy limits the respondent's right to further education inasmuch as it deprives him of an essential learning resource, the means and object of his studies, a personal computer. The blanket prohibition not only infringes the right to further education, but also the right to access reading material. Furthermore, as will be shown, the prohibition runs counter to South Africa's international law obligations. Before I do so, something needs to be said in brief about the applicants' complaint that in making its orders, the

[64] Compare *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at para 41: "[This case] also demonstrates the importance of ensuring that all relevant information is placed before the Court at the time of the proceedings for a declaration of invalidity" and *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at para 107: "The Constitution requires candour on the part of government".

Supreme Court of Appeal ventured into the exclusive policy terrain of the Executive and had thus breached the separation of powers principle.

[74] This argument is ill-conceived. Courts have a constitutional duty, as a check and balance on executive power, to determine the constitutional validity of any law or conduct. The applicants do not have unfettered power to implement policies which undermine the Constitution.[65] That is why section 172(1)(a) and (b) explicitly provide that a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and that it must consequentially grant relief that is just and equitable.

South Africa's obligations under international law

[75] Under various international treaties, South Africa is obliged to respect inmates' right to education. The CESCR's General Comment 13 recognises the right to education as a vehicle for realising other fundamental rights and an "empowerment right" because it is—

> "the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from . . . hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment and controlling population growth."[66]

[76] This is echoed in the Abidjan Principles:

> "The right to education is based on the premise that a 'well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence', while recognising that education is also an enabler and multiplier right

[65] *Glenister v President of the Republic of South Africa* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) at para 33.

[66] General Comment 13 above n 27 at para 1.

> serving as 'the primary vehicle by which socially and economically marginalised adults and children can lift themselves out of poverty."[67]

[77] According to rule 104 of the Minimum Rules:

> "Provision shall be made for the further education of all prisoners capable of profiting thereby, including religious instruction in the countries where this is possible. The education of illiterate prisoners and of young prisoners shall be compulsory and special attention shall be paid to it by the prison administration."[68]

[78] The UN Basic Principles for the Treatment of Prisoners[69] notes, among others, that: "all prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality".[70] These instruments guarantee that all UN members (including South Africa) ensure that education in prisons is available, accessible, and adaptable. These instruments provide guiding principles that governments of the various member states should seek to apply and uphold to ensure that the educational needs of each nation's incarcerated persons are fulfilled.

[79] On a conspectus of all these international law instruments, South Africa is thus obliged to adopt and implement education policies that adequately meet the needs of incarcerated persons in a fair, just and equitable manner. In prohibiting tools reasonably necessary to access further education, namely the use of a personal computer in an inmate's cell, the Policy runs afoul of international law principles.

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[67] The Abidjan Principles on the Human Rights Obligations of States to Provide Public Education and to Regulate Private Involvement in Education, 13 February 2019 at 3 where it cites General Comment 13 above n 27 at para 1. These principles have been recognised by the United Nations Human Rights Council and the African Commission on Human and Peoples' Rights.

[68] Minimum Rules above n 26.

[69] United Nations General Assembly, Resolution on the Basic Principles for the Treatment of Prisoners, A/Res/45/111 (28 March 1991).

[70] Id at principle 6.

Foreign jurisdictions

[80] A brief consideration of the position in jurisdictions beyond our shores is useful. As is the case in most prisons around the world, there is no provision of computers in individual cells in New South Wales in Australia. There, correctional centres provide shared classrooms where inmates may access computers for a limited number of hours under supervision provided they submit an "Offender Application for Access to Computers" and agree to the "Guidelines for Offenders Using Computers".[71] Managers must ensure that desktop computers are only used for work, education, training and/or legal use.[72]

[81] In Victoria State in Australia, prisoners may use personal computers in their cells as a privilege and not a right. Prisoners who can demonstrate a need for a computer must make an application to purchase a computer, be able to pay for the purchase of an approved computer and software, and abide by the rules regarding computer use and restrictions on software and games. The position in Tasmania is that the recent state budget provided funding to investigate options to increase in-cell technologies in the state's prisons. Computer access in prisons in Tasmania is generally from common areas, while those enrolled in education programs can apply to access a loaned offline computer in their cells. In Western Australia, inmates can have a computer in their cell only in "exceptional circumstances", such as to help with their legal defence or to view legal documents. Prisons there have computers in education centres for people engaged in education and vocational training programmes. The use of a correctional services-issued computer is considered a privilege that may be removed at any time and is limited to the approved prisoner.

[82] Regarding the Norwegian position, prisoners in the Skien high security prison in southern Norway have access to computers, both in the classroom as well as individual computers in their cells. The prison authorities there have addressed the issue of

[71] Justice Action *Computers in Cells: Maintaining Community Ties and Reducing Recidivism* (2012) at 6-7.

[72] Id.

security by installing firewalls that maintain security protocols, while allowing limited access to the internet and resources that promote educational aims. It is said that this educative approach to the prison system has yielded considerable results – the rates of recidivism of Norway's prisoners are at 20%, as compared to 50% and 60% in the United Kingdom and United States respectively.

[83] Lastly, in Canada, the Correctional Service of Canada (CSC) maintains a standard level of service and consistency, which allows offenders to access the same or similar programs in institutions across Canada. Inmates have access to designated computers in all institutions. CSC allows offenders to use institutional computers in a controlled manner for: learning, work, programmes, legal needs, and recreational use. These computers are stand-alone and are not linked to CSC's security systems, external networks or the internet. In 2002, CSC discontinued offender-owned computers. Offenders who had computers in their cells before this decision continue to have them. These offender-owned computers are also stand-alone. CSC is piloting computer literacy initiatives, such as Microsoft Office Certification, in some regions. CSC continues to explore ways of introducing digital technology to meet reintegration goals. It introduces it into different components of correctional interventions, including education.

Remedy

[84] The Supreme Court of Appeal declared the Policy constitutionally invalid and made an order directing the first and second applicants, the Minister and the National Commissioner respectively, to prepare and promulgate a revised policy for correctional centres permitting the use of personal computers in cells for study purposes. This revised policy development had to occur within 12 months from the date of the order and had to be done in consultation with the JICS. The Supreme Court of Appeal granted further ancillary relief. Before us, counsel for these applicants indicated that they had no difficulty with an order in these terms. That order commends itself to me.

[85] The interim relief granted to the respondent in the Supreme Court of Appeal has become moot, since he has now completed his studies. Nonetheless, since constitutional invalidity is objectively determined, there must be an interim regime regulating access to personal computers for similarly placed inmates. One possibility is to increase access to computer rooms by directing that their hours of operation should be increased. There are two difficulties with an order in those terms. First, it is common cause that not all correctional centres in the country have computer rooms or computer hubs. The second difficulty is that, as was also common cause, since all the cells are unlocked at the same time, the correctional centres, including the computer rooms, are very noisy and do not conduce to studying.

[86] A more sensible and workable option is the one sought by the respondent and granted by the Supreme Court of Appeal. That Court made an order permitting any registered student in a correctional centre who needs a computer to support their studies, and any student who has registered for a course of study that requires a computer as a compulsory part of the course, to use their personal computer without a modem in their cell for as long as they remain a registered student with a recognised tertiary or further educational institution in South Africa. The Court also ordered that other students who keep a personal computer in their cells in this manner must make it available for inspection at any given time by the head of the correctional centre or any representative of the first and second applicants.

[87] The Supreme Court of Appeal ordered that the policy be revised within 12 months from the date of its order and that the revision should be "after consultation with the JICS". It gave no reason for this additional qualification, save to state that, given the JICS' interest in the case, it "would be helpful" if the policy revision were to occur after consultation with the JICS.[73] The JICS did not seek such an order in this Court, nor did it make any submissions in support of that order. There is no basis for elevating the JICS' interest and possible helpfulness to the level of imposing a stricture

[73] Supreme Court of Appeal judgment above n 4 at para 35.

on the second applicant in the exercise of his power to make revised policies on the use of laptop computers in cells for study purposes in line with this judgment. That qualification must therefore be omitted from the order that this Court makes.

[88] Lastly, as far as the order is concerned, there is no basis upon which the first applicant, the Minister, can be ordered, together with the second applicant, the Commissioner, to make revised policy and to disseminate it afterwards. That is because the making of policy and the revision of that part of the Policy which is being declared unconstitutional, is within the powers of the Commissioner, not the Minister. The Supreme Court of Appeal's orders must be varied in that respect.

[89] In conclusion, I must emphasise, that this case is concerned only with the rights of prisoners to personal computers for educational purposes. Nothing in this judgment should be regarded as expressing any view on the justifiability of restrictions on the use of personal computers in cells for any other purposes.

Order

[90] I make the following order:

1. The order of constitutional invalidity made by the Supreme Court of Appeal is confirmed.
2. The Policy Procedure Directorate Formal Education, as approved by the second applicant and dated 8 February 2007, is unconstitutional and invalid to the extent that it prohibits the use of personal computers in cells for purposes of further education in circumstances where such use is reasonably required for such further education, and is set aside.
3. The order of constitutional invalidity is suspended for 12 months from the date of this order.
4. The second applicant is directed, within 12 months from the date of this order, to prepare and promulgate a revised policy consistent with the principles laid down in this judgment (revised policy).

5. The second applicant is directed, within one week after promulgating the revised policy, to disseminate that policy to the head of every correctional centre, and, where one is employed, to the head of education at each centre.

6. Notice of the revised policy must be posted on notice boards in all prisons where prisoners customarily receive information, and such notice must set out where prisoners may obtain copies of the revised policy.

7. Pending the revision of the policy:

   (a) Any inmate in a correctional centre registered as a student with a recognised tertiary or further educational institution and who reasonably needs a computer to support their studies, and any student who has registered for a course of study that reasonably requires a computer as a compulsory part of the course, is entitled to use their personal computer without the use of a modem in their cell.

   (b) Any registered student who keeps a personal computer in their cell in accordance with paragraph 7(a) above must make it available for inspection at any given time by the head of the correctional centre or any representative of the second applicant.

   (c) In the event of a breach of the rules relating to the use by an inmate of their computer in their cell, the head of the correctional services centre may, after considering any representations the inmate may make, direct that the inmate may not use their computer in their cell.

8. The first and second applicants are ordered to pay, jointly and severally, the costs of this application, the costs in the Supreme Court of Appeal and the High Court, including in all instances the costs of two counsel, where so employed.

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