Human rights, prisoners and the courts: quo vadis?

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Introduction

It is frequently asserted that protection of the human rights of prisoners in South Africa has deteriorated in recent years, and is now in a worse state than was the case prior to the adoption of a fairly elaborate set of constitutional rights for accused, detained and imprisoned persons, first in the 1993 and then in the 1996 Constitution. This comment has been publicly made before oversight bodies such as the Portfolio Committee on Correctional Services. It is also implicit in the pleas of the Judicial Inspectorate of Prisons for a reduction in prisoner numbers to reduce chronic overcrowding caused, inter alia, through the abolition of prescribed minimum sentences resulting in escalation in the number of long-term prisoners. Concerns about human rights violations have featured in several recent television documentaries. Clandestine and dramatic video footage taken at Grootebloem prison in 2002 was broadcast to the world and gave rise to the appointment of the Jali Commission of Inquiry into designated South African correctional facilities. (The Jali Commission report is still awaited.)

This article explores some of the practical aspects of the application of constitutional standards in South African prisons in more detail, reviewing a (selected) range of issues that may illuminate the extent of the gap between what should be and what is. The subject is more of than merely academic interest: as will be argued below, rights-based litigation involving prisoners appears to have escalated, and, whilst some ‘old hands’ in our courts may perhaps dismiss this as no more than evidence of an emerging litigious bent amongst certain groups of inmates, another view would hold that prevailing conditions have created a fertile ground for the institution of claims against the authorities, and that what has surfaced thus far may well be the trickle preceding the flood.

The constitutional issues are examined in three parts. The first section briefly reviews recent jurisprudence in the prisoners’ rights field. A second section reflects on some of the issues currently before various courts, gleaned in the main from press reports. A third part speculates on future issues that may come to enjoy judicial attention, provides some possible reasons for this, and concludes with some predictions about human rights and litigation by prisoners in the future.

Recent cases

Two notable recent judgments concerning prisoners’ rights are Minister of Correctional Services and Others v Kwakwa and Others 2002 (4) SA 455 (SCA) and Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders and Others 2004 (5) BCLR 445 (CC) (the NICRO case) 4 The former concerned the legality of a new prison ‘privilege’ system introduced in respect of unsentenced prisoners in November 1998. A consequence of the new regime was that several ‘privileges’ previously enjoyed by awaiting-trial prisoners were withdrawn, leading to a successful application in the Transvaal High Court by several aggrieved prisoners for relief, principally reinstatement of the privileges they had previously enjoyed. On appeal to the Supreme Court of Appeal, Navsa JA premised much of his judgment upon the established fact that ‘there is a substantial part of the prison population that spends a lengthy period of time waiting for their trials to commence or to be finalised’ (para [31]), and that the long delays in the commencement or finalisation of trials cannot be laid at the door of the prisoners themselves. Hence, the new system (encompassing, for instance, more restrictive provisions about receiving food from visitors and indeed more restrictive visiting and contact provisions generally; a prohibition on the possession of private musical instruments or cassette players; embargo on the use of prison library lending facilities) did not cater for those prisoners who had to wait an inordinately long time for their trials to commence or be finalised, but instead treated all unsentenced prisoners as if they were in prison for a short time only. Further, the determination of a ‘privilege’ system in prisons was not to be regarded as falling outside the scope of judicial scrutiny (para [35]), and, bearing in mind the then prevailing constitutional and statutory framework, the Supreme Court of Appeal had no hesitation in declaring the system as devised to be fundamentally flawed (para [36]). In doing so, the court took into account the well-established principle that prisoners retain all of the rights and liberties of ordinary citizens, except those necessarily inconsistent with their circumstances as prisoners (the residuum principle, articulated most notably in Goldberg v Minister of Prisons and Others 1979 (1) SA 14 (A)).

The NICRO case also concerned the exercise by persons of a particular civil right whilst in prison, namely, the right to vote. An amendment to the Electoral Act 73 of 1998, promulgated in December 2003, sought to deprive convicted prisoners serving sentences of imprisonment without the option of a fine, of the right to register for and thus participate in elections during the period of their imprisonment. The timing and purport of the introduction of the amendment was clearly linked to the forthcoming national and provincial elections, which were in fact held in April 2004. The import of the amending legislation was to disallow both registration as a voter whilst a person was serving a sentence of imprisonment without the option of a fine; and to bar the actual exercise of the vote by such prisoners, where their names did in fact appear on the voters roll. The applicants relied on the right to vote and the right to equality. Of course, foreshadowing the application in NICRO was the prior decision of the Constitutional Court in August and Another v Electoral Commission and Others 1999 (4) BCLR 363 (CC), which upheld prisoners’ rights to vote in the previous general election and required special arrangements to be effected to enable polling to take place in prisons during such election. In the NICRO case, the main thrust of the argument for prisoner disenfranchisement, according to Chaskalson CJ, ‘was directed to the logistical and costs issue’ involved in organising special voting stations and registration facilities for prisoners, at the expense of making special efforts for other worthy citizens who would, for one or other reason, be constrained in the exercise of their right to vote (eg, by virtue of disability

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* More information about the Civil Society Prison Reform Initiative (CSPRI) can be obtained from the CSPRI website which can be accessed at www.nicro.co.za/cspri. The views expressed in this paper are those of the author alone and are not attributable to any organisation or institution. I am grateful to Lukas Muntingh, Deputy Executive Director of NICRO, for his insightful comments on drafts of this article.
or absence from the voting district) (para [66]). Policy considerations, such as the objective of denouncing crime or sending a message to the public that the government would not tolerate crime, were purportedly only of tangential relevance. At the centre, therefore, was the obvious impairment of the foundational right to vote, and the subsequent inquiry as to whether such limitation was justifiable. The Constitutional Court held that the blanket exclusion of all prisoners subjected to serving a term of imprisonment without the option of a fine did not pass muster, terming it ‘a blanket exclusion akin to that which failed to pass scrutiny in the first Saube case’ (para [67]). Some 33,000 prisoners thereafter voted in the 2004 elections.

In an insightful analysis of the NICRO judgment, Prof Pierre de Vos points out that, in the context of prisoners’ rights litigation, the assessment or weighing of all the interests (including those of the individuals whose rights are being limited, and those of society and the state in seeking to limit those fundamental rights) will inevitably comprise a contextual analysis, during which the provision of adequate information is essential to enable the court to conduct the proportionality inquiry.

Prof De Vos further notes that the court has made it clear that the state has a special duty towards prisoners precisely because they have been incarcerated at the will of the state. This is why a failure to make special arrangements to enable prisoners to vote at places other than demarcated polling stations is an effective denial of the right to vote. Taking this line of thinking a step further, should physical accommodation and nutritional arrangements in prison be challenged as violating basic constitutional rights, it would not, in his view, avail the authorities to argue that many South Africans live in appalling socio-economic conditions outside correctional facilities, and that prisoners’ living conditions should be given less preferential attention.

The above cases appear to indicate that, despite the (likely) lack of public sympathy for prisoner-related issues, courts will vig­lantly safeguard prisoners against unjustifiable intrusions into constitutionally guaranteed rights. The rich jurisprudence concerning prisoners’ rights that has been built up since Whitaker v Roos and Bateman; Morant v Roos and Bateman 1912 AD 92 will not easily be abandoned.

Trends in recent media reports

Prof De Vos’ initial assessment of prisoners’ rights litigation, conducted in 2003 and referred to above, expresses the view that a surprisingly small number of cases dealing with prisoners’ rights have been reported, although his research pointed to evidence of a large number of unreported judgments dealing with the alleged infringement of the rights of individual prisoners. Concluding that prisoners’ rights litigation has until now failed to deal effectively with issues that will set legal precedents and bring about institutional change, he also mentioned that searches revealed remarkably little media coverage of cases brought against the Department of Correctional Services.

The latter half of 2004, however, seen a veritable slew of media reports about pending litigation challenging conditions of detention, parole and release, and a host of other issues. For instance, it was widely reported in a variety of media in September 2004 that a large number of cases (140 or more), involving the consideration of prisoners for parole after serving one-third of their sentences, was being heard in a court in Gauteng. The litigation was given heightened impetus by the looming date on which the new sections of the Correctional Services Act 111 of 1998 dealing with parole would come into operation (on 1 October 2004). One report noted that Judge Kathy Satchwell began hearing prisoners’ applications at the beginning of the week in question, and that she had already issued 55 orders by mid-week, at one stage sitting in a darkened court room studying papers by torchlight during a power failure (the torch having been supplied by an applicant prisoner!). Some of the cases involved battles with the department about medical releases for terminally ill prisoners. The applications followed on the successful court challenge in the 2003 Cape High Court case of gang boss Colin Stanfield, whose release was ultimately granted by the court. In the judgment in the Stanfield case, mention was made of the paucity of successful applications for release on medical grounds, foreshadowing the prospect of considerable judicial sympathy for well-founded future requests for this form of release.

In the Stanfield case, Judge Van Zyl stated that ‘[t]he facts set forth in the most recent annual report of the Judicial Inspectorate of Prisons (para [51] above) indicate a shocking state of affairs. Despite the huge increase in the prevalence of HIV/AIDS and other terminal diseases in our prisons, only the tiniest percentage of prisoners suffering from such diseases were released on medical grounds during 2002. I associate myself fully with the call by Inspecting Judge JJ Fagan that the release of terminally ill prisoners should receive far more attention, if not priority attention, than is the case at the present time. The alternative is grotesque: untold numbers of prisoners dying in prisons in the most inhuman and undignified way. Even the worst of convicted criminals should be entitled to a humane and dignified death’ (para [128]).

A more unconventional claim was launched in the courts and reached the press in October 2004 concerning an application for damages (R20 million) arising from the exposure of an awaiting-trial prisoner to smoking. The Minister of Correctional Services is alleged to have failed to ensure that prisons comply with the Tobacco Products Control Amendment Act 12 of 1999, and to have failed to protect the plaintiff from the potential risk of harm occasioned by exposure to tobacco smoke.

On 15 November 2004 a not unfamiliar report surfaced of yet another claim for personal damages due to adverse conditions facing awaiting-trial prisoners held in detention. The businessman concerned was found not guilty of the alleged offence after being incarcerated for three months. More specifically, his complaints related to the acquisition of sores from lice-infected blankets, being forced to witness how cell-mates were sodomised and assaulted with sharpened spoons, and he himself being forced to become a dagga courier. Interestingly, it appears from the press report that his claim was brought against the Minister of Safety and Security on the basis of malicious prosecution, which had given rise to the arrest and subsequent period of detention in prison.

Finally, going to the very root of the status of a prisoner in our society is the recent challenge to the bright orange prison uniform introduced as standard issue to sentenced prisoners in this decade, comprising garishly coloured overalls stamped more than a hundred times with the word ‘prisoner’, as an infringement of the right to dignity of incarcerated persons. The allegation is that this form of labelling is inconsistent with the constitutional injunction that prisoners be kept in conditions that are consistent with human dignity, that it is stigmatising and derogatory. (Lest this be thought a ridiculous assertion in the prisons context, it must be noted that church groups and others concerned with rehabilitative efforts amongst prisoners have in the past expressed similar sentiments. It is also not unusual to see prisoners wearing their uniforms inside-out in order to hide the word ‘prisoner’ printed all over the uniform.) The case has been postponed, and will be heard in 2005.

Conclusion

The scope of litigation detailed above provides some important clues, it is argued, about the future. First, as noted in the Stanfield case, it may be predicted that court applications for medical releases are going to escalate as the HIV/AIDS pandemic continues to take its toll in the prison system. Whilst the authori-
ties continue to oppose such applications, or delay approval until the prisoner is within an inch of his life, as suggested by newspaper and other (informal) reports access to courts will no doubt appear to prisoners to be the way to obtain the appropriate remedy for their plight.

Second, it can be predicted that the recent coming into operation of the Correctional Services Act 111 of 1998 may provide fertile ground for the preparation of lawsuits, as prisoners come to insist on adherence to the letter of the law and where no daily exercise period is granted due to staff shortages and overcrowding; where nutritional requirements fall short of the set prescribed minima; where accommodation (eighty in a cell for eighteen) allows a separate bed for each prisoner; or ‘sufficient, accessible ablution facilities’; where those aged below 21 years are not held separately from those aged between 18 and 21 years (and those under 18 years held separately from those over 18 years), these conditions will violate not only the Act and its regulations, but ultimately also constitutional provisions protecting the dignity and rights of incarcerated people.

Third, prisoners are often most aggrieved by two kinds of (unrelated) issues affecting their lives in prison: unmet expectations of release, and any curtailment of the minutiae of daily life, which can keep boredom at bay. The new provisions on release in the Correctional Services Act – which increase the minimum period to be served before consideration of parole – have therefore already become a target for dissatisfied inmates. And, slightly incongruous though it may seem, access to cassette players and TVs, study opportunities, music and books, games and hobbies, sportsfields and family visits probably looms larger in the daily life of the average prisoner than access to adequate rehabilitative social work services! Hence, apparently trivial issues are likely to continue to form the basis of litigation against the prisons’ administration.

It is also apparent that protesting about deteriorating human rights conditions (for example, concerning inadequate sanitation, failure to provide exercise periods and so forth), occasioned for no small part through prison overcrowding, is not simply a mathematical pastime, in which approved accommodation is ‘ruled off’ (on a graph) against ‘daily average inmate numbers’. Overcrowding has serious ramifications for the effective administration of prisons, necessary to ensure compliance with a broad range of human rights standards. Although a reduction in the prison population is not the only answer to an improved human rights environment, it may lead to a less litigious future for prisoners.

Finally, in the context of the well-known violence, particularly sexual violence, prevalent in South African prison environments, the question arising relates to the impact of the Constitutional Court’s decision in the Metrorail case on the state’s civil liability for harm suffered by persons detained in correctional facilities. In this regard, the heightened constitutional protection that must be afforded prisoners by virtue of their having been deprived of their liberty by the state (as referred to by Chaskalson CJ in the NICRO case above) raises alarm signals.

As a final point, despite the spectre of increased litigation by prisoners that I argue has already begun to occur (and with it a good chance of state fiscal liability escalating), it should be remembered that the civilised and orderly route of litigation is not the only vehicle for prisoners intent on securing delivery of constitutional guarantees. A more alarming possibility is the emergence of violent protest actions, which occurred in 1994, and which have begun to surface recently. For this reason, rights-based litigation by South African prisoners should not be viewed as detrimental to departmental or even national interests – rather, it may serve to hold bigger risks at bay.

Endnotes

1 It should be pointed out that legislation giving effect to the constitutional imperatives, although passed by Parliament in 1998 (Act 111 of 1998) was only put fully into operation in August and October 2004. Human rights organisations have asserted that the absence of legislation has contributed significantly to the deterioration in human rights conditions in prisons. Of course, equally, now that clear standards of humane detention are in place, the scope for litigation to secure their implementation looms large, as argued in the conclusion.

2 See Judge Fagan’s contribution on page 33 of this issue.

3 See for example the press reports concerning the ‘prison court’ dedicated to outstanding applications by prisoners in the TPD during September, discussed in the second part of this article.

4 A more thorough survey of reported case law in this field since 1996 is to be found in P de Vos ‘Prisoners’ rights litigation in South Africa since 1994: A critical evaluation’ CSPRI Research Series No 3 (November 2003), also available online at www.nicro.co.za/cspri. An update of the De Vos paper, discussing the Constitutional Court case of Minister of Home Affairs and Others v Nicro and Others, is also available on the website.

5 Even if a person was released from prison before voting day, and even where his or her sentence was under appeal or review.

6 De Vos is, however, of the view that in fact the policy consideration of demonstrating government’s abhorrence of crime lay at the crux of the case, a view which the present author supports (see De Vos op cit note 4).

7 Sauve v Canada (Attorney General); Belczowski v Canada [1993] 2 SCR 438. This decision was followed by a successful constitutional challenge to subsection 28(6) of the ‘approved accommodation’ definition (Sauve v Canada (Chief Electoral Officer) 2002 SCC 68, and the European Court on Human Rights’ decision in a similar vein in Hirat v UK (No 2) (Application 74025/01, judgment handed down on 30 March 2004).

8 Note 4 above.

9 The Constitutional Court was not provided with adequate information about the cost and resource implications of registering prisoners and enabling them to vote, particularly as arrangements had already been made to accommodate non-affected prisoners, ie those who were unsentenced, or sentenced with the option of a fine.

10 At p 17 of the original De Vos report on prisoners’ rights litigation (note 4 above).

11 See for example, the Cape Times, 16 September 2004, and Legal Brief, 23 September (website accessed 24 September 2004).


13 Stanfield v Minister of Correctional Services [2003] 4 All SA 282 (C).


16 The applicants say that they are labelled ‘Oros men’.


18 The author concedes that there may well be sound policy grounds for adopting a conservative stance in relation to medical releases, especially if there is a real possibility of recovery. However, the cases referred to suggest an overly restrictive application of the criteria, as the Stanfield case illustrates.

19 For the large part in operation from 31 July 2004, and, as regards the parole provisions, from 1 October 2004.

20 Regulation 3(d)(ii) of the Regulations to the Correctional Services Act promulgated in GG R38 of 31 July 2004.

21 Regulation 3(d)(ii).

22 Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail (case number CCT 5603).

23 For instance, evident in violent gang activity that occurred recently at Pollsmoor in the Western Cape, and at Helderstroom prison.