



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**  
**JUDGMENT**

Case no: HC-MD-CIV-MOT-GEN-2017/00101

In the matter between:

**CLETIUS SIMATAA MATENGU**

**APPLICANT**

And

**MINISTER OF SAFETY AND SECURITY**

**1<sup>ST</sup> RESPONDENT**

**THE HEAD OF PRISON HARDAP**

**2<sup>ND</sup> RESPONDENT**

**THE COMMISSIONER-GENERAL NAMIBIAN PRISON**

**3<sup>RD</sup> RESPONDENT**

***Neutral citation:*** *Matengu v Minister of Safety and Security* (HC-MD-CIV-MOT-GEN-2017/00101) [2017] NAHCMD 127 (27 April 2017)

**Coram:** UEITELE, J

**Heard:** 14 April 2017

**Delivered:** 27 April 2017

**Flynote:** ***Constitutional law*** - Separation of powers - Between Executive and Judiciary - Judicial intervention in administrative process - When appropriate.

**Correctional Services Act, 2012** – Section 74 the power, to transfer a person - convicted of a criminal offence - serving a lawfully imposed sentence - vested by the legislature in - Commissioner General.

**Summary:** The applicant approached this court on an urgent basis by way of a notice of motion, amongst other things, seeking an order directing the respondent to, within 30 days of the order being granted by the court, transfer him to serve his remaining custodial sentence at Divundu Prison. The applicant cited the Minister responsible for Correctional Services, The Commissioner General: Namibian Prisons and the Head of the Hardap Prison as the three respondents.

The respondents opposed the application and raised two points *in limine*. The first point in *limine* relates to the urgency of the application. The respondents argue that the affidavit in support of the application does not comply with the requirements of Rule 73(4). The second point in *limine* relates to the relief sought by the applicant. The respondents contend that the relief sought by the applicant is incompetent.

*Held that* the point of departure in an understanding of the model of separation of powers upon which our Constitution is based, must be the text of our Constitution. In terms of Article 40 the members of the Cabinet (who are Ministers) have the constitutional authority to carry out functions that are assigned to them by law. The role of the Courts is, however, limited to them intervening in the performance of functions by the other branches of government in order to prevent a violation of the Constitution.

*Held that* from the provisions of s 74 of the Correctional Services Act, 2012 it is abundantly clear that the power, to transfer a person who has been convicted of a criminal offence and who is serving a lawfully imposed sentence, is vested by the legislature in the Commissioner General.

*Held further* that if the Commissioner General had been approached and the Commissioner General had refused to grant the transfer, the applicant's remedy would have been to challenge the lawfulness of the refusal or if an appeal is available appealed against the refusal. However, the applicant has not availed himself of that process. The Court is thus being asked to intervene before the Commissioner General has concluded his work or performed duties.

*Held further* that the applicant has not established that it is appropriate for the Court to intervene at this stage because to do so would be to usurp the powers vested by the Constitution on the executive branch of government. In the circumstances, the application to direct the respondents to transfer the applicant from the Hardap correctional facility to the Divundu correctional facility must be refused.

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### ORDER

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1. The application to direct the respondents to transfer the applicant from the Hardap correctional facility to the Divundu correctional facility is dismissed.
2. There is no order as to costs.

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### JUDGMENT

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**UEITELE, J**

Introduction and background

[1] On the 24<sup>th</sup> day of March 2017 Cletius Simataa Matengu, (I will for purposes of this judgment refer to him as the ‘applicant’) approached this court on an urgent basis by way of a notice of motion, amongst other things, seeking an order directing the respondent to, within 30 days of the order being granted by the court, transfer him to serve his remaining sentence at Divundu Prison.

[2] The applicant cited the Minister responsible for Correctional Services, the head of the Hardap Prison and the Commissioner General: Namibian Prisons as the three respondents. All three respondents opposed the application and collectively filed an answering affidavit deposed to by a certain Mr. Ben Buchane the head of the Hardap Prison. The respondents raised two points in *limine* which, I will deal with later in this judgment.

[3] Briefly stated, the facts of the instant matter are as follows: The applicant who hails from the Zambezi Region of Namibia, is currently serving a 13 years' imprisonment sentence, imposed on him, on 18 March 2015, pursuant to a conviction on a charge of rape. He is incarcerated at the Hardap correctional facility. He wants this court to order the respondents to transfer him to the Divundu correctional facility which is situated in the Zambezi Region where he wants to serve the remaining part of his sentence. The reasons he advances for the order that he seeks are that he is suffering ill health and that he wants to be close to his family members and friends.

[4] I have indicated above that the respondents opposed the application and have raised two points *in limine*. The first point *in limine* relates to the urgency of the application. The respondents argue that the affidavit in support of the application does not comply with the requirements of Rule 73(4).

[5] The second point *in limine* relates to the relief sought by the applicant. The respondents contend that the relief sought by the applicant is incompetent. They argue that in terms of s74 of the Correctional Services Act, 2012<sup>1</sup> the power to transfer an inmate from one correctional facility to another correctional facility vests in the Commissioner General. They further argue that because the applicant has not applied to the Commissioner General for a transfer, this court will be usurping the powers conferred on the Commissioner General if it were to order such transfer. With that short introduction and background I now proceed to consider the points *in limine*.

#### The points *in limine*

[6] I find it appropriate to start with the second point *in limine*. The second point *in limine* raises the question whether it is appropriate for this Court to, in the light of the doctrine of the separation of powers, make any order directing any one of the three respondents to transfer the applicant from one correctional facility to another correctional facility.

[7] It is by now axiomatic that the doctrine of separation of powers is part of our constitutional design. It may be so that there is no express mention of the separation of

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<sup>1</sup> No 9 of 2012.

powers doctrine in the text of the Namibia Constitution but Article 1(3) makes it clear that the Constitution envisages a separation of powers. That Sub - Article states that:

‘The main organs of the State shall be the Executive the Legislature and the Judiciary.’

[8] In the South African case of *In re: Certification of the Constitution of the Republic of South Africa, 1996*<sup>2</sup>, the Constitutional Court stated that (and I agree with that statement) there is, no universal model of separation of powers and, in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute. The Court continued and said:

‘[t]he principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another.’

[9] In the matter of *Doctors for Life International v Speaker of the National Assembly and Others*<sup>3</sup> the Constitutional Court explained the principle of separation of powers as follows:

‘The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle ‘has important consequences for the way in which and the institutions by which power can be exercised’. Courts must be conscious of the vital limits on judicial authority and the Constitution’s design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.’

[10] I endorse the views expressed by the Constitutional Court of South Africa. In the matter of *Glenister v President of Republic of South Africa and Others*<sup>4</sup> Langa J said:

<sup>2</sup> *Ex Parte Chairperson of the Constitutional Assembly: In Re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

<sup>3</sup> 2006 (6) SA 416 (CC) at paras 68-9; 2006 (12) BCLR 1399 (CC) at 1425A-D.

<sup>4</sup> 2009 (1) SA 287 (CC) at para [33].

'In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their powers.'

[11] The point of departure in an understanding of the model of separation of powers upon which our Constitution is based, must be the text of our Constitution. Article 27 (2) of the Constitution vests the executive authority in the President acting with the Cabinet, Article 44 vests the legislative power of Namibia in the National Assembly and Article 78 vests the judicial power of Namibia in the courts. In terms of Article 40 the members of the Cabinet (who are Ministers) have the constitutional authority to carry out functions that are assigned to them by law. The role of the Courts is, however, limited to them intervening in the performance of functions by the other branches of government in order to prevent a violation of the Constitution.

[12] In the present matter s 74 of the Correctional Services Act, 2012 provides as follows:

**'74 Transfer of offender from one correctional facility to another**

(1) A lawfully imposed sentence of imprisonment may be served partly in one correctional facility and partly in another correctional facility.

(2) The Commissioner-General may by general or special order direct that an offender be transferred from the correctional facility to which he or she was committed or in which he or she is detained to another correctional facility taking into consideration-

- (a) the degree and kind of custody and control necessary for-
    - (i) the safety of the public;
    - (ii) the safety of the offender and other persons in a correctional facility; and
    - (iii) the security of the correctional facility applicable;
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(b) the availability of appropriate programmes and services and the offender's willingness to participate in those programmes or services; and

(c) whenever possible, the accessibility to the offender's family.

(3) Where an offender is transferred from one correctional facility to another pursuant to this section, the officer in charge of the correctional facility to where the offender had been transferred must, where the whereabouts of such offender's immediate family is known to that correctional facility's authorities, inform such family of such transfer.'

[13] From the provisions of s 74 it is abundantly clear that the power, to transfer a person who has been convicted of a criminal offence and who is serving a lawfully imposed sentence, is vested by the legislature in the Commissioner General. In the present matter the applicant seeks an order from this Court directing that he be transferred from the Hardap correctional facility to the Divundu correctional facility. In his affidavit the applicant does not state whether he has approached the Commissioner General and that the Commissioner General has refused to transfer him. The respondents say he has not done so and the Commissioner General did not receive and consider a request for the transfer of the applicant.

[14] Clearly, if the Commissioner General had been approached and the Commissioner General had refused to grant the transfer, the applicant's remedy would have been to challenge the lawfulness of the refusal or if an appeal is available appealed against the refusal. However, the applicant has not availed himself of that process. The Court is thus being asked to intervene before the Commissioner General has concluded his work or performed duties. In considering whether the Court can and should intervene at this stage, the starting point should be the respective roles of this Court and of the Executive as provided for by the Constitution.

[15] Judges (and thus the courts) in our constitutional order have the duty to uphold and protect the Constitution. In my view, having regard to the doctrine of separation of powers under our constitutional order, intervention by the court would only be appropriate if an applicant can show that the Commissioner General has in the exercise of his powers acted unlawfully. Such an approach takes account of the proper role of the courts in our constitutional order:

[16] While duty-bound to safeguard the Constitution, the courts are also required not to encroach on the powers of the other branches of government. In my view the applicant has not established that it is appropriate for the Court to intervene at this stage because to do so would be to usurp the powers vested by the Constitution on the executive branch of government. In the circumstances, the application to direct the respondents to transfer the applicant from the Hardap correctional facility to the Divundu correctional facility must be refused.

[17] In view of the conclusion I have arrived at I do not find it necessary to consider the other points raised by the respondents.

#### Costs

[18] The applicant is serving a prison sentence with no source of income. It accordingly seems to me that this is a matter in which this Court should make no order as to costs. In the result I make the following order:

1. The application to direct the respondents to transfer the applicant from the Hardap correctional facility to the Divundu correctional facility is dismissed.
2. There is no order as to costs.

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SFI Ueitele  
Judge



**APPEARANCES****APPLICANT:**

Cletius S Matengu  
In person.

**1<sup>st</sup> to 3<sup>rd</sup> RESPONDENTS:**

Janseline Gawises  
Of Office of the Government Attorney,  
Windhoek