



reference to his asthmatic condition, on or before 25 April 2024.

4. The health practitioner/doctor must, after the full examination, furnish a medical report to this court on or before 16 May 2024.
5. There is no order as to costs.
6. The matter is postponed to **23 May 2024** at **15h00** for a status hearing to determine the further conduct of the matter.

#### **Reasons for orders:**

Prinsloo J:

#### Introduction

[1] The applicant is Andre Friedel Castro Dausab, an adult male and currently an inmate serving sentence in the Hardap Correctional Facility in Mariental.

[2] The respondent is the Government of the Republic of Namibia.

[3] This matter initially came before me as an urgent application. However, as the applicant failed to make out a case for urgency, the urgent application was struck from the roll, and the matter proceeded in the ordinary cause.

#### The relief sought

[4] In his application, the applicant sought the following relief:

‘1. The applicant prays to this honourable Court to order the respondent to transfer the applicant to the Windhoek Correctional Facility, which has isolation facilities that meet the ideal conditions for his medical condition;

2. The applicant prays to this honourable court to order the respondent to afford the applicant

access to electricity for the use of Doctor prescribed devices and items, and thus the use of such devices and items;

3. The applicant prays to this honourable court to order the respondent to allow the applicant access to all types of food provided by his family and to consume this food wherever cell he lives in, and also permits the applicant to buy sufficient food- any kind of food and drinks except alcohol, every item is subject only to a dignified search;

4. The applicant prays to this honourable court to order the respondent to secure and provide the salbutamol respirator solution and inhalers from the state-owned and privately owned pharmacies without delays and as needed by the applicant and

5. The applicant prays to this honourable Court to order the respondent to provide at least ten slices of bread and equal weight of rice on a daily basis and provide either fish or chicken in place of pork; and

6. The applicant prays to this honourable court to order the respondent not to pursue any course of action which shall harm or worsen the applicant's medical condition or which shall cause death.'

#### The founding papers

[5] The basis of the application is that the applicant suffers from a medical condition, i.e. asthma, which he describes as fluctuating between moderate persistent and severe when it can be life-threatening.

[6] The applicant states that his condition is chronic, which requires a lifestyle of monitoring and avoiding asthma triggers.

[7] He further states that the correctional facility is aware of his condition, but his condition is met with hostility. As a result, he does not receive proper medical care for his condition.

[8] According to the applicant, he does not receive the necessary medication or attention to treat his condition. In support of this contention, the applicant highlighted the following:

a) On 16 January 2023, he was rushed to the hospital as a result of a severe asthma attack because the Salbutamol respirator solution was depleted, and although the doctor prescribed it, the pharmacist at the Mariental Hospital refused to dispense it.

b) He applied to the officer in charge of the Hardap Correctional Facility to get the medication, but he received no medicine from the State.

c) On 17 April 2023, the nurses at the correctional facility turned off the air-conditioner, despite being well aware of the benefit the air conditioner has to his health.

d) On 26 May 2023, the head nurse removed the curtain which the applicant used in order to resist airborne asthma triggers. When he confronted the nurse regarding the need for the curtain to remain in place, it led to a confrontation in which he was threatened with assault.

[9] The applicant submits that in order to control his condition, he needs a Salbutamol respirator solution and an inhaler. In addition thereto, he needs to be placed in a single cell and on a diet that would not trigger his asthma. The applicant contends that he is currently limited to five slices of bread per day, which is insufficient because the rest of the food is either inappropriate or unsuitable for consumption.

[10] He further contends that although not urgent, he would require, per the doctor's recommendation, to be furnished with an air conditioner, a nebuliser, a peak flow meter, a spirometer, a fitness monitor (watch) and a mattress and sheets, which are antibacterial.

[11] The applicant states that his constitutional rights are disregarded by the correctional facility by denying him the necessary medication and aforementioned items and diet to control his medical condition, which threatens his life and well-being. According to the correctional facility, everything required by the applicant to control his condition is a 'security threat'. He submitted that it is unclear how medication, food and isolation can constitute a security threat. Contrariwise, this treatment is disrespectful, dehumanising, tormenting and frustrating, which renders the actions of the members of the correctional facility unreasonable.

[12] As a result, the applicant seeks an order as per the terms set out in the Notice of Motion.

#### Answering papers

[13] The Commissioner General ("CG") of the Namibian Correctional Services, Raphael Tuhafeni Hamunyela, deposed to the answering affidavit in this matter.

[14] CG Hamunyela confirmed that the applicant, known to be asthmatic, is an inmate serving life imprisonment at Hardap Correctional Facility. The applicant's condition was, however, categorised as a general condition by the medical practitioners at the Hardap Correctional Facility and not a chronic condition as averred by the applicant. The applicant, therefore according to him, does not require a specialist medical practitioner.

[15] In response to the application, CG Hamunyela stated as follows:

*Claim for transfer*

15.1 The applicant's request for a transfer to the Windhoek Correctional Facility has no nexus/link to the applicant's medical condition, as both Hardap and the Windhoek Correctional Facility have single cells and sharing/communal cells. However, isolation would not prevent the applicant from having an asthmatic attack, and when he does, he has access to the facility's nursing staff.

15.2 The applicant is accommodated in a communal cell at the internal clinic to ensure that someone will render swift support in the event of an asthma attack. In this regard, CG Hamunyela states that the applicant has access to medical officers appointed in terms of s 23 of the Correctional Services Act and also has access to the clinic in the facility.

15.3 CG Hamunyela denies that the applicant was denied the right to adequate healthcare at the current facility where he is detained. The applicant is also provided with the prescribed medication for his medical condition, including a Salbutamol respirator and inhalers.

15.4 For security reasons, none of the cells, single or communal, have electrical outlets. The internal clinic has plugs installed, and the applicant has unlimited access to electricity when he is accommodated at the internal clinic in order to charge or use his nebuliser machine. CG Hamunyela insists that the applicant has never been denied access to the internal clinic and that the applicant has never been denied access to adequate medical care, including that of a medical practitioner. The applicant also receives follow-up treatments for his medical condition by a medical doctor.

15.5 In conclusion on the issue of the applicant's transfer to the Windhoek Correctional Facility, CG Hamunyela states that the applicant was previously detained in the Windhoek Correctional Facility; however, as a result of disciplinary issues, he was transferred to the Hardap Correctional Facility. At the time, his medical condition was considered, and it was concluded that the applicant would still have access to adequate healthcare at the Hardap Correctional Facility.

*Claim for special diet*

15.6 CG Hamunyela states that there is no direct link between the dietary needs, mattress and sheets, air conditioner, fitness monitor and the applicant's medical condition. He states that if this were the case, the applicant would have a special diet from a nutritionist or dietician, which could be presented to the facility. The facility has a standardised diet menu to ensure that adequate food is supplied to meet the inmates' needs. However, should the applicant present the facility with a prescription from a nutritionist or dietician, he will not be denied access to such a specialised diet.

15.7 CG Hamunyela further states that if the applicant has complaints, then there are various internal remedies for channelling inmate's complaints. Such complaints can be escalated as high as the Commissioner-General if necessary or even to the Ombudsman of Namibia.

[16] In conclusion, CG Hamunyela states that the applicant has not been subjected to inhumane or deplorable conditions as the applicant alleges. He contends that the applicant failed to make out a case as to why he should be transferred and failed to show that he required a specialised diet or that he has food allergies that would require a specialised menu.

[17] Furthermore, the applicant did not exhaust the internal remedies available to him, such as making an application to the Commissioner-General to seek a transfer from the Hardap to the Windhoek Correctional Facility.

#### Replying affidavit

[18] The applicant submitted an 18-page affidavit in response to the answering affidavit. The affidavit raised several new issues that the respondent was not given the chance to address. Furthermore, the reply does not align with CG Hamunyela's answering affidavit and seems unrelated.

[19] The applicant further filed a host of new documents which were not attached or referred to in his founding affidavit.

#### Discussion

[20] The applicant raised several issues regarding his health condition but was unfortunately

unable to furnish the court with proper medical reports to substantiate his averment. This is an issue strongly relied upon by the respondent, and it is submitted that the applicant could not submit a medical report to support his relief claimed in that he is suffering from a severe chronic medical condition.

[21] CG Hamunyela stated that with respect to the specific diet that the applicant avers he requires that in the event that the applicant submitted a report from a nutritionist or dietician, the facility will accommodate it accordingly. However, given the fact that the applicant has been incarcerated since 2014, I fail to see how the applicant would have managed to compile such a report without the assistance of the correctional facility.

[22] The applicant complains that there are various factors in the facility that could trigger an asthma attack, and the reality is that a prison environment is not always a conducive environment when an inmate suffers from ill health.

[23] When a person is sentenced to serve time in prison, they are deprived of their freedom. In such cases, it is the responsibility of the correctional facility to ensure that the prisoner's health is taken care of and that the conditions are conducive to their well-being. In *Minister of Correctional Services v Lee*,<sup>1</sup> the South African Supreme Court of Appeal remarked that:

‘A person who is imprisoned is delivered into the absolute power of the state and loses his or her autonomy. A civilised and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation to see to the physical welfare of its prisoner. We are such a society and we recognise that obligation in various legal instruments ...’

[24] The social right to care for health is recognised in several human rights instruments. It applies regardless of a person's legal status. In relation to health, States have to abstain from enforcing discriminatory practices as a State policy. It follows that they ought to refrain from denying or limiting equal access to healthcare for prisoners.<sup>2</sup>

[25] Although this was said in the European context, the same applies in our jurisdiction.

[26] The State is responsible for adequately securing the health of an inmate by providing the

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<sup>1</sup> *Minister of Correctional Services v Lee* 2012 (3) SA 617 SCA at para 36.

<sup>2</sup> Abbing H. R. Prisoners Right to Healthcare, a European Perspective. *European Journal of Health Law*, 20(1), 5-19.

required medical attention. It must be ensured that the manner of detention does not subject a prisoner to hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that his health and well-being are adequately secured by providing him with the required medical assistance.<sup>3</sup>

[27] In our jurisdiction, the State, too, has adopted various measures aimed at complying with the obligation of inmates' right to adequate medical treatment. One such instrument is found in the Correctional Service Act 9 of 2012. More specifically, s 23 provides that:

'(1) The Correctional Service must, as far as is practicable and when so required, provide every inmate with –

- (a) essential health care services;
- (b) reasonable access to non-essential mental health care with an emphasis on the inmate's rehabilitation and successful reintegration into the community; and
- (c) access to preventative health measures.'

[28] Regulation 224 of the Act also provides for the establishment of hospitals or clinics at the correctional facility in the following terms:

'Establishment of hospitals or clinics 224.

- (1) A hospital or clinic must be established at every correctional facility and be equipped according to local requirements to provide a sick offender with accommodation for his or her care and medical treatment by the medical service personnel.
- (2) All the essential services at a correctional facility hospital or clinic must be performed by trained medical service staff only.'

[29] Regulation 224(1)(a)(iv) provides that the medical officer appointed must keep a record or cause a record to be kept of the state of health of every inmate. However, for reasons not clear to this court, these medical records were not presented for consideration during this application.

[30] From the annexures filed by the applicant, it appears that the health practitioner at the Ministry of Health and Social Services recommended that the applicant be issued with the items set out in para 11 above. These items were approved by an official on 01 June 2022, provided that it is at his own cost. It appears that the applicant's family is not able to secure all these items as a result of financial constraints.

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<sup>3</sup> Supra p 9.



[31] On a further note, an unknown official certified that there was an attempt to get the Salbutamol solution from the Mariental Pharmacy, which refused to dispense the medication on the prescription as provided in the health passport of the applicant.

[32] The only way in which this court can determine the severity of the applicant's health condition and the veracity of this application is by having a medical report after a proper medical examination is conducted on the applicant. The application regarding the dietary requirements of the applicant will depend on the findings of the medical examination and the severity of his condition.

#### *Application for transfer to the Windhoek Correctional Facility*

[33] It is evident from the affidavit by CG Hamunyela that both correctional facilities have single cells, and there is no reason to transfer the applicant. The applicant's motivation for being transferred is to be closer to his family in Windhoek. From what I can determine from the facts before me, is that there was no application for transfer directed to the Commissioner-General in terms of s 74 of the Act. It is not the court's place to usurp the authority of the Commissioner-General in this regard. In the event that the applicant filed such an application and the transfer is refused, the applicant can challenge the lawfulness of such a refusal.

[34] This administrative process was not followed. There must be a separation of powers, which this court must strictly apply.

#### Conclusion

[35] It is not in dispute that the applicant, at the very minimum, requires Salbutamol respirator fluid to maintain his condition, and I will order that he be provided with the said medication accordingly, pending a full physical examination into his health and a medical report provided to the court. In the event that his condition is found to be severe, the applicant must be assisted in obtaining a further report from a nutritionist or dietician in the event that the medical practitioner is of the view that the applicant's asthma attacks can be prevented or limited by following a specific diet.

#### Order

[36] My order is set out above.	
	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Applicant</b>	<b>Respondent</b>
A Dausab In person Windhoek	Q Fenyeho Office of the Governmet Attorney Windhoek