

IN THE HIGH COURT OF LESOTHO

In the matter between:

NKALIMENG MOTHOBİ

APPLICANT

AND

DIRECTOR OF PRISONS
ATTORNEY GENERAL

1ST RESPONDENT
2ND RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 16th day of September, 1996.

In this application which was brought *ex parte* applicant
asked the Court for an order in the following terms:

1. That a *Rule Nisi* be issued calling upon the respondents to show cause, if any, why:-

(a) The normal rules relating to the filing of
applications should not be dispensed with to

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enable this application to be dealt with as a matter of urgency.

- (b) First respondent should not be ordered to return applicant to his original place of confinement at the untried prisoners block of the Central Prison.
- (c) First respondent should not be directed to restore to the applicant all privileges given to untried prisoners at the Central Prison, which privileges may only be denied if applicant had been charged and convicted disciplinarily or by order of the Honourable Court.
- (d) The officers of the first respondent should not be restrained from in any manner disturbing the applicant's peaceful stay in the Central Prison where he awaits trial and verdict of this Honourable Court.
- (e) Applicant should not be granted further or alternative relief.

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(f) Respondents should not be directed to pay costs hereof.

(g) Parties should not be bound to the times fixed by this Honourable Court for the completion and disposal of this matter as a matter of urgency.

2. Prayers 1(a) and (g) to operate with immediate effect as an interim interdict.

On the 12th July, 1996, Mr. *Phoofolo* appeared before me to move this application. While the matter was admittedly urgent and I felt applicant's grievance should be ventilated as soon as possible, I took the view that the facts and circumstances of this case did not call for any order to be made without hearing both sides. I therefore made the following order:

That applicant is directed to serve the respondents with the following order:-

(a) That respondents are directed to file opposing papers on or before the 15th July, 1996, if

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they intend to oppose this application.

(b) That application will be heard on the 22nd
July, 1996.

The cause of applicant's difficulties is that he escaped from prison not long after his arrest. He did so while he was in hospital. After more than a year he was re-arrested and punished by the prison authorities. After that punishment he was kept with other awaiting trial prisoners under the same conditions, without incident.

In the meantime the case of his co-accused proceeded. They were recently convicted and sentenced to death. Applicant who had been in Block B along with ordinary awaiting trial prisoners was moved to the more secure New Block.

Applicant says this is a form of harassment or prediction of his sentence. He also does not like his new environment one bit. He claims he is being discriminated against.

The prison authorities argue that the sentence of his co-accused has increased applicant's inducement to escape. Applicant escaped when they had no basis to fear applicant

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could escape, now that there are compelling reasons do so, the prison authorities are taking no chances.

On the 22nd July, 1996, after applicant had begun his argument, I found I could not pin-point the differences between the prison block where applicant is presently kept and the one from which he had been transferred. I was therefore obliged to make the following order:-

(a) The specific differences should be tabulated *ad seriatim*, even those that are not in the affidavits. The list of these differences to be exchanged between both sides.

(b) The matter was postponed to the 31st July, 1996, at 2.30 p.m

On the 31st July, 1996, the matter was argued. Even then I could not really understand what was being said without an inspection *in loco*. I was therefore obliged to have an inspection *in loco* at the Central Prison on the 16th August, 1996. The allegation of applicant is that his living conditions have been changed from the tolerable ones to those which amount not only to punishment but to torture as well.

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In doing the inspection, I was conscious that what the prison authorities were reacting to was just fear that applicant was now even more likely to escape when he had learned that his co-accused had been sentenced to death. Their fear was based on the fact that applicant had escaped two or three years ago when he was a mere suspect and there was nothing known to the prison authorities to fear. It is very difficult to predict whether or not a prisoner will or will not escape. As applicant has not been convicted, he is still a suspect, albeit one who has not just displayed tendencies of running away, but who has actually run away.

There is no doubt awaiting prisoners who live in Block B can easily escape when they are outside. Even the barbed wire between the two high fences is so old and weak that it has lost its barbs. When I went to the New Block I found that there is a wall around which the entire New Block including the open space outside the cells. There are alarm bells and barbed wire on top of the walls. It would be much more difficult for prisoners to escape, but that does not mean with considerable human ingenuity an escape could not be effected. What is at issue here is the comfort of applicant.

I will therefore reconcile the differences with the

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observations I made on the 16th August, 1996. Applicant used to be at what is called B Block and has been moved to what is called the New Block. The new Block is intended for prisoners who are regarded as likely to run away or be rescued by people from outside prison. From what I had been told, I expected to find the New Block to be a bleak and extremely inhospitable place.

Awaiting trial prisoners are during the day kept in the open in a yard on which Kikuyu grass has been planted on the ground. This place measuring 85 paces by 53 paces has clean air and plenty of sunshine. Prisoners even lie on the grass sometimes. They are usually about 700 in number. From there they are taken to six cells each of which measures 8 paces by eight paces, at the centre of which is a four litre rubber pail in which they defecate and urinate during the period they spend in the cells. Each cell takes between 10 and 14 people. At that time I was told there are 11 occupants in Block B where applicant used to live. I was not told, nor did I find out what happens to these prisoners during the day on rainy days. I concluded that rainy days to them make their life very unpleasant as they would have to be indoors in crowded rooms. Awaiting trial prisoners, during the day when they are on the Kikuyu grass patch, are able to see the prison

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gardens, part of the city of Maseru with its green trees.

The New Block to which applicant has been taken is surrounded by a strong stone wall measuring 20 paces by 18 paces. There are ten single cells for 10 prisoners each of which measure 3 paces by 2 paces. There is a verandah outside the cells in front of the cells about 2 paces wide. Bordering the verandah is a 3 feet high stone wall on which prisoners sit when they are outside their cells. There is an open space outside the verandah measuring 10 paces by 10 paces paved with stone. Prisoners sit on rubber buckets or walk about or just stand on this open space.

Before people sleep during the day when it is not raining, prisoners in Block B can walk, stand or lie down about 6 square paces per person. Those in the New Block might seat on the stone which borders on the verandah. Even when it is raining they would have plenty of fresh air and adequate space to move around on. However, those in the New Block see no grass, trees nor can they be able to sit or stand on any grass at any time. Those on B Block can lie or walk on grass although they have no where to sit, see the prison garden and apart of the Maseru City.

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What applicant has definitely been deprived of during the day is any contact with nature by touching or even seeing any vegetation whatsoever. But this is not applicant's complaint. Applicant's moving space has been increased, by being moved from Block B. But this is in surroundings in which everywhere the looks, walks and sits there are only stones. His present environment is dominated by stone. To that extent he is kept in bleak surroundings.

There is one toilet at a corner and a shower in the New Block. But one side of the shower is open so that a guard on the tower can see the occupant of the shower. The water for bathing is heated by a coal stove. Mr. *Phoofolo* felt a person should bathe in complete privacy, and not have partial privacy. I took the view that since a man can give the prison warder his back as he bathes, conditions were not indecent or even intolerable.

When it is raining, if the prisoners in Block B are returned to it during the day, a different scenario obtains. They would have to be taken to a 8 paces by 8 paces cell where between 10 and 14 people are kept with a pail for urinating and defecating. They would be crowded like sardines. I would like to imagine they are not taken to the cells. Probably

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they are taken somewhere else.

The cells in Block B are dirty and the windows which are about 10 feet from the ground are also dirty and are never opened. The smell in the cell never completely dies off even when the door is open. To keep people in there during the day would be unthinkable. In this respect applicant in the New block is far better off. Even the cell walls in the New Block are clean and the windows are also clean and there is no smell in the cells. During rainy days applicant would still remain outside at the verandah and breath clean air.

All prisoners are locked up in their cells at 4 p.m. until 6 a.m. the following day. They therefore spend fourteen hours in their cells. There is a very dim light in Block B while in the individual cells in the New Block in which applicant is there is no light. Applicant claims he could read with that dim light, but in the New Block he cannot read at all. This is a legitimate complaint. I observed some cells in the New Block had a light in the cell.

The walls in all cells both in the New Block and in B Block are very high probably 15 feet high. I have already said in Block B they were very dirty including the windows.

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There is a ceiling in Block B, but it is very dirty. In the room applicant is, there is a no ceiling but the windows and walls are clean. Some of the cells in the New Block have ceilings. Prisoners in Block B sleep on the floor on very thin sponge mattresses about 4 centimetres thick and on some rubber mats below them. Prisoners in the New Block sleep on beds on which 4 to 5 blankets act as mattresses while the other 5 are used for sleeping. Each one of the prisoners has his own chamber pot.

I was told important people when arrested before and after conviction are kept in the New Block. There was no doubt that prisoners in the New Block lived and slept in relative comfort except for their bleak stone surrounding in the block and the fact that they are physically and visually cut off from nature. Furthermore, in the New Block both awaiting trial prisoners and convicted prisoners are kept together while other awaiting trial prisoners are kept separate from convicted ones.

The main complaint is that it is not easy for prison warders to come and check on the prisoners should they get ill in the New Block. I found that this to be true because the man at the tower which guards them would not hear. With Block

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B, I found the position to be the same. There is a door in Block B which opens into a passage you have to go through another heavy door five paces away. there you get to a circular room where a guard is posted. If a prisoner in Block B should suddenly be ill the warders would not hear. I am not sure if the many prisoners would be heard or understood if they made a lot of noise. I do not find the reason why an electric system of inter-communication between prisoners and warders has not been installed in all cells so that in emergencies they could call the prison officers. The present constant lack of visual and audio contact between the prison officers and the prisoners in the cells violates the very Prison Regulations. This is a problem not only of the New Block but of the entire prison.

Applicant pointed out that he does not like to be alone in his cell for 14 hours from late afternoon until in the morning. In Block B he used to have the company of ten to 13 other people. He preferred to converse with other prisoners in Block B to the privacy and silence he has at night in the New Block. This is a matter of personal preference. Unfortunately personal preferences where security is one of the points to be taken into consideration cannot always be catered for.

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The other prisoners in Block B are sometimes allowed to watch television in the Chapel. In the new Block, they never watch television. In Block B they go for Church Service in the Chapel. Except for convicts, awaiting trial prisoners in the New Block never go to the Chapel. The prison authorities said if a donor could be found to provide a television which the New Block prisoners can watch, it can be arranged on special days for them to watch television. Awaiting trial prisoners in the New Block could only go to the Chapel heavily handcuffed and with iron-leggings. This I cannot accept because prisoners go to Chapel on denominational lines. Guarding one or two prisoners could not call for such extreme measures. If they were that afraid, that prisoner could be handcuffed to a prison warder during the service. I consider even this to be unnecessary.

All cells are not heated but the ventilation, cleanliness and healthiness of the environment is greater in the New Block than in B Block. The stench and the stagnant air in Block B is scandalously depressing, conditions there are not fit for human habitation in this respect.

I have already said the walls and the windows there are unaccountably and unnecessarily dirty because there is a great

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deal of labour in the prison. The revenue collection is M442,-63-25 annually. To this must be added the Public Assets Allocation of M93,000-00. With over half a million Maloti and the labour that the prison has, I do not understand why conditions for awaiting trial prisoners in B Block are so deplorable.

It should be emphasised that awaiting trial prisoners are suspects not convicts. The state is obliged to keep them in reasonably healthy and comfortable surroundings than they do. In these days when there are water-flush toilets, there is no conceivable reason why any human should stay in a cell along with others in a cell measuring 8 paces by 8 paces with a bucket or pail containing his excrement and that of others for fourteen hours. Staying with one's excrement might be understandable but staying with that of others is simply torture. Conditions for awaiting trial prisoners cannot be allowed to remain as they are at present. If the purpose of keeping awaiting trial prisoners in this way was to torture them that could be understandable (assuming in this day and age the State considers itself to have a right to torture people)—a right the State no more has even in respect of convicted prisoners.

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Mr. *Phoofolo* for applicant put up an unassailable argument on behalf of the applicant in respect of treatment of awaiting trial prisoners—with which Mr. *Letsie* for the Director of Prisons agreed. Mr. *Phoofolo* referred me to the case of *Conjwayo v. Minister of Justice & Ors.* 1992(2) SA 56 with which I agree. Therefore I quote with approval what Gubbay CJ said at page 60J:—

"Fortunately the view no longer obtains that in consequence of his crime forfeits not only his personal rights, except those which the law in its humanity grants him. For while prison authorities must be accorded latitude and understanding in prison affairs, and prisoners are necessarily subject to appropriate Rules and Regulations, it remains the continuing responsibility of courts to enforce the constitutional rights of all persons, prisoner's included."

Even more to the point was the case of *Goldberg & Others v. Minister of Prisons* 1979(1) SA 14 at 40 to which Mr. *Phoofolo* referred me where Corbett CJ said:

"Whittacker's case admittedly dealt with the position of an awaiting-trial prisoner, whose treatment is necessarily different from that of a sentenced prisoner. The former is imprisoned merely to ensure that he attends his trial and his incarceration should not degenerate into a form of punishment."

Voet 48.3.6 in the 18th century when the human rights

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culture was much more backward than it is to-day warned again keeping awaiting trial prisoners in filthy and crowded cell as happens at the Maseru Central Prison today. I quote:

"Care should further be taken that imprisonment which ought merely to serve the purposes of detention while a criminal proceeding is pending does not degenerate into punishment. This is what would happen if prisoners... are wasted to too confined and filthy custody, and loathsome place, and as it were destroyed by prison."

In Holland in the 17th century it was the duty of bishops to pay periodic visits to prisons to ensure that prisoners are well treated and that prison conditions are satisfactory. In this century it is judges and magistrates who must make these periodic visits. It is precisely for this reason that in Block B I am obliged to order that the practice of prisoners sleeping with urine and excrement in pails for 14 hours should be discontinued. Flush water toilets can be installed in the cells so that these excrements can be flushed away. This can be done within 90 days at a cost that is by no means prohibitive.

It has to be borne in mind that legislation and Prison Regulations have to be reconciled with the *Constitution* and they stand abridged to the extent and insofar as they are not

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consistent with the *Constitution*. See the case of *Woods & Ors. v. Minister of Justice, Legal and Parliamentary Affairs & Others* 1995(1) SA 703. Even so, when determining a prisoner's rights a distinction has to be made comforts of little value and necessities. These revolve on the circumstances of a particular case. See *Minister of Justice v. Hofmeyer* 1993(3) SA 131. Although prison can never be like a person's home, care has to be exercised that violation of a prisoner's human rights, bodily integrity, mental and intellectual well-being does not occur.

I must praise the Maseru Central Prison for the fresh air and access to nature that all prisoners enjoy during the day when they are not in the cells and it is not raining. Those in the New Block are the exception. I noted that the prisoners look healthy and did not show outward signs of despair or discomfort.

ORDER OF THE COURT

I told applicant on the 27th August, 1996, when I reserved judgment that I could never order that he should be returned to Block B on account of its sub-standard conditions. Being in the New Block seems to be in paradise when its

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conditions are compared to those of Block B.

The only thing that he does not have which he and prisoners in B Block should have is easy and continuous access to prison warders during confinement. The Director of Prisons is ordered to investigate (and report to me within 30 days) why an electric internal system of communication cannot be established between the prisoners in the cells and the prison officers. The other one is some contact with nature by having a patch of green grass added to the New Block with some flowers. Extending the wall of the New Block by three paces would along with the length of 16 paces provide the inmates with grass measuring 24 square metres without changing the structure of the New Block in any way. I direct that investigations be made and a report to me within 30 days why this cannot be done.

As for the dirty walls and windows in B Block, although this is not part of applicant's case, I warned the prison authorities that I was making a general inspection of prison condition. Therefore I direct that the walls be painted, windows washed and kept open when prisoners are not there. This is a question of oversight and neglect which should not continue.

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The prison authorities told the Court that lights could be installed in the cells of the New Block, rubber mats provided for the floor. Applicant could be allowed to attend Church services of his Church. The present stone floor should remain. I therefore order that they should provide these within 30 days.

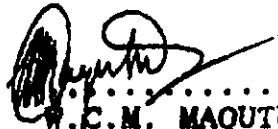
I do not understand why awaiting trial prisoners are not provided with beds when it is now the expected thing that every person in Lesotho sleeps on a bed. An awaiting trial prisoner is merely a suspect, therefore he is entitled to be kept in conditions as near as possible to those he expects outside prison. I will, for this reason, ask the Director of Prisons to furnish me with a report within 30 days as to why this has not yet been done. I consider the present 4 centimetre thick sponge mattresses on which awaiting trial prisoners sleep on the floor, as too thin for people to sleep on with relative comfort. I would appreciate his comments on this matter as well.

I was horrified by what I found about the sanitary conditions of the cells in Block B. No human being should sleep in a room that has human excrement of others. I endorse the long term reforms but insist that water toilets be pro-

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vided inside the cells in Block B within 90 days. This should be easy and relatively cheap.

Having been obliged to refuse applicant's application albeit with some orders for his benefit, I direct that there should be no order as to costs.

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W.C.M. MAQUTU
JUDGE

Delivered at Maseru this 14th day of September, 1996.

For the Applicant : Mr. H. Phoofolo
For the Crown : Mr. L. Letsie