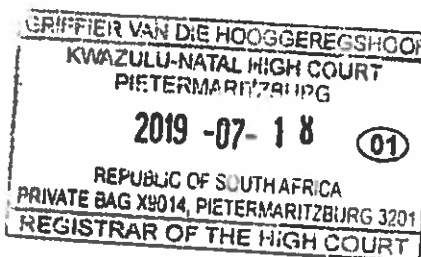


IN THE HIGH COURT OF SOUTH AFRICA
KWA- ZULU NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 5180/19

In the matter between:

MDUDUZI SELEPE



Applicant

And:

**HEAD OF CENTRE: EBONGWENI
CORRECTIONAL CENTRE**

First Respondent

**HEAD OF CENTRE: QALAKABUSHA
CORRECTIONAL CENTRE**

Second Respondent

**KWA-ZULU NATAL REGIONAL
COMMISSIONER, CORRECTIONAL
SERVICES**

Third Respondent

**NATIONAL COMMISSIONER,
CORRECTIONAL SERVICES**

Fourth Respondent

**THE MINISTER OF JUSTICE
AND CORRECTIONAL SERVICES**

Fifth Respondent

NOTICE OF MOTION

KINDLY TAKE NOTICE that the aforementioned Applicant intends to make an application to the above Honorable Court at a time and date to be determined by the Registrar, for an order in the following terms:

1. That the decision of the First, Second and Third Respondents to transfer the Applicant from the Qalakabusha Correctional Centre to Ebongweni Correctional Centre on 21 November 2017 be reviewed, declared unlawful and invalid, and set aside;
2. That the applicant is transferred from Ebongweni Correctional Centre to Westville Correctional Centre, the Applicant's center of origin, within **15 days** of the granting, alternatively, of the service of this order;
3. Directing that the First, Second and Third Respondents to pay the costs of this application, the one paying the other to be absolved; and
4. Granting further and / or alternative relief that this Honourable Court deems appropriate.

TAKE FURTHER NOTICE that the founding affidavit of **MDUDUZI SELEPE** together with annexures thereto, will be used in support of the application.

TAKE NOTICE FURTHER that:

- a) In terms of Rule 53(1)(a) of the Uniform Rules of Court, the Respondents are called upon to show cause why the decision referred to in paragraph 1 above should not be reviewed, declared unlawful and invalid, and set aside;

- b) In terms of Rule 53(1)(b) of the Uniform Rules of Court, the Respondents are hereby called upon to deliver to the Registrar of this Honourable Court, within **15 (fifteen) days** of receipt of this Notice,
- i) the record of the proceedings pursuant to which the decision referred to in paragraphs 1 was taken (including all documents, memoranda, reports, minutes and other materials of whatsoever nature which were before the decision makers when they made the decision),
 - ii) together with such full reasons as are required by law or as they desire to give or make, and
 - iii) to notify the Applicants that they have done so.
- c) In terms of Rule 53(4) of the Uniform Rules of Court, the Applicants may within **10 (ten) days** after the Registrar has made the record available to them, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of this notice of motion and supplement the supporting affidavit.

TAKE FURTHER NOTICE that should the Respondents intend opposing the granting of the orders prayed for in the Notice of Motion, they shall-

- a) within five days (5) after receipt of the notice of motion or any amendment thereof provided for above, deliver notice to the Applicants that they intend so to oppose and shall in such notice appoint an address within 15 (fifteen) kilometres of the office of the Registrar at which they will accept notice and service of all process in such proceedings;

- b) within **fifteen days** after the expiry of the time referred to (a) above, deliver any affidavits they may desire in answer to the allegations made by the Applicant; and.
- c) the Applicant shall have the rights and obligations in regard to replying affidavits set out in Rule 6.

TAKE FURTHER NOTICE that the Applicant has appointed **CENTRE FOR APPLIED LEGAL STUDIES** as the attorneys of record **C/O SHEPSTONE AND WYLIE ATTORNEYS, ABSA HOUSE, FIRST FLOOR 15 CHATTERTON ROAD PIETERMARITZBURG**, as the address at which he will accept all notice and service of all process in these proceedings.

Dated : at **PIETERMARITZBURG** on the 17th day of July 2019.

S Mkhize

CENTRE FOR APPLIED LEGAL STUDIES

Applicants' Attorney

1st floor, DJ du Plessis Building

West Campus, University of the Witwatersrand

1 Jan Smuts Avenue

Johannesburg

Tel: 011 717 8600

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Email: [Thandeka.Kathi2@wit.ac.za/](mailto:Thandeka.Kathi2@wit.ac.za)

Sithuthukile.Mkhize@wits.ac.za

Ref: T Kathi/ S Mkhize

C/O SHEPSTONE AND WYLIE ATTORNEYS

ABSA House, First Floor

15 Chatterton Road

Pietermaritzburg

3201

Tel: 033 355 1780

Email: jmanuel@wylie.co.za

Ref: J Manuel

**TO: THE REGISTRAR OF THE ABOVE
HONOURABLE COURT,
KWAZULU-NATAL DIVISION,
PIETERMARITZBURG**

**AND TO: HEAD OF EBONGWENI CORRECTIONAL
CENTRE**

**SERVICE BY
HAND**

First Respondent

R56 Matatiele Road,

Kokstad

4700

(039) 797 2099

C/O State Attorney

6th floor, Metlife building,

391 Anton Lembede street,

Durban,

4000

(031) 365-2500

AND TO: HEAD OF QALAKABUSHA CORRECTIONAL

SERVICE BY

CENTRE

HAND

Second Respondent

Melmoth Rd,

Empangeni,

3880

(035) 902 3600

C/O State Attorney

6th floor, Metlife building,

391 anton Lembede street,

Durban,

4000

(031) 365-2500

**AND TO: KWAZULU- NATAL REGIONAL
COMMISSIONER OF CORRECTIONAL
SERVICES**

**SERVICE BY
HAND**

Third Respondent

4 College Road,

Old Supreme Court,

Pietermaritzburg,

3201

(033) 355 7306

C/O State Attorney

6th floor, Metlife building,

391 Anton Lembede street,

Durban,

4000

(031) 365-2500

**AND TO: THE MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

**SERVICE BY
HAND**

Fourth Respondent

124 WF Nkomo Street
Poyntons Building (West Block)
Pretoria,
0001
(012) 406 4669

C/O State Attorney

Physical Address: SALU Building
316 Thabo Sehume Street
Pretoria
0001
(012) 309 1500

**AND TO: THE NATIONAL COMMISSIONER OF
CORRECTIONAL SERVICES**

**SERVICE BY
HAND**

Fifth Respondent

124 WF Nkomo Street
Poyntons Building (West Block)
Pretoria,
0001
(012) 406 4669

C/O State Attorney

SALU Building
316 Thabo Sehume Street
Pretoria,
0001
(012) 406 4669

IN THE HIGH COURT OF SOUTH AFRICA
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Second Respondent

**KWA-ZULU NATAL REGIONAL
COMMISSIONER, CORRECTIONAL
SERVICES**

Third Respondent

**NATIONAL COMMISSIONER,
CORRECTIONAL SERVICES**

Fourth Respondent

**THE MINISTER OF JUSTICE
AND CORRECTIONAL SERVICES**

Fifth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

MDUDUZI SELEPE

Do hereby make oath and say:

M.H.S.

B.M

1. I am a major male (ID No: 6205245804082) with Prisoner number: 211139417, currently serving a prison sentence at the Ebongweni Correctional Centre of Excellence ("Ebongweni"), located at R56, Matatiele Road, Kokstad, Kwa Zulu Natal Province.
2. I am the applicant in this matter.
3. The facts contained herein are, to the best of my knowledge, true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge. Where I make submissions of a legal nature, I do so on the advice of my legal representatives, which I accept to be correct and accurate.

A. THE PARTIES

4. As stated above, I am the only Applicant in this matter. I act in my own interest and capacity.
5. The First Respondent is the **HEAD OF CENTRE: EBONGWENI**, situated at Kokstad, Kwa-Zulu Natal Province. He is cited herein in his official capacity as the correctional services official designated by the National Commissioner to manage and control Ebongweni, care of **THE STATE ATTORNEY, 6TH FLOOR, METLIFE BUILDING, 391 ANTON LEMBEDE STREET, DUBAN, 4000.**

M.H.S.

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6. The Second Respondent is the **HEAD OF CENTRE: QALAKABUSHA CORRECTIONAL CENTRE OF EXCELLENCE**("Qalakabusha"), situated at Empangeni, Kwa-Zulu Natal. He is cited in his official capacity as the correctional services official designated by the National Commissioner to manage and control the Qalakabusha. He is also responsible for submitting the application for my transfer to Ebongweni from Qalakabusha. This is the transfer I am challenging through this application.

7. The Third Respondent is the **KWA-ZULU NATAL REGIONAL COMMISSIONER OF CORRECTIONAL SERVICES**, cited herein in his official capacity as the correctional services official designated by the National Commissioner to manage and control the operations of the Department of Correctional Services within the Kwa-Zulu Natal province. The Regional Commissioner received and approved the approval for my transfer by the head at Qalakabusha. The Regional Commissioner is served at care of **THE STATE ATTORNEY, 6TH FLOOR, METLIFE BUILDING, 391 ANTON LEMBEDE STREET, DURBAN, 4000.**

8. The Fourth Respondent is the **NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES**, cited herein in his capacity as the government official exercising control over the Department of Correctional Services as per section 5 of the Correctional Services Act 11 of 1998. He is served at care of **THE STATE ATTORNEY, GROUND FLOOR, SALU BUILDING, CNR FRANCIS BAARD AND THABO SEHUME STREETS, PRETORIA,**

M.H.S.

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GAUTENG PROVINCE. No relief is sought against the Fourth Respondent. He is merely cited as an interested party.

9. The Fifth Respondent is the **MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**, cited herein in his official capacity as the Minister responsible for the government of the Department of Correctional Services. He is served at care of **THE STATE ATTORNEY, GROUND FLOOR, SALU BUILDING, CNR FRANCIS BAARD AND THABO SEHUME STREETS, PRETORIA, GAUTENG PROVINCE.** No relief is sought against the Fifth Respondent. He is merely cited as an interested party.

B. JURISDICTION

10. The above Honourable Court has jurisdiction to hear this application by virtue of the fact that the cause of action arose in the jurisdiction of the Honourable Court. I was transferred from the Qalakabusha to Ebongweni. The relief I seek is to have me transferred back to Westville Correctional Centre of Excellence ("Westville"). All the said correctional centres are located within the Honourable Court's jurisdiction.

C. PURPOSE AND NATURE OF THE APPLICATION

11. This is an application brought in terms of Rule 53 of the rules of this Honourable court. The application is also brought in terms of section 6 (1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). I bring this

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application in order to enforce my Constitutional right to just administrative action, and to review the decision of the First to Third Respondents ("the Respondents") to transfer me from Westville maximum security facility to Ebongweni.

12. Ebongweni is South Africa's only super maximum security facility. In this facility inmates are placed in segregated cells for 23 hours a day, they are only given an hour per day of exercise. I was moved to this facility unlawfully and without justification or legal basis as required in terms of the Correctional Services Act 11 of 1998 ("the Act) and its Regulations. I am thus completely isolated from my family and close community.
13. The decision to transfer me to Ebongweni was procedurally unfair and thus infringes upon my constitutional right to just administrative action as set out in section 33 (1) of the Constitution. In terms of section 33 (2) I am entitled to written reasons where my rights have been adversely affected by an administrative decision. The Respondents have therefore also failed to comply with section 33 (2) of the Constitution.
14. The decision to transfer me to Ebongweni was unlawful as it failed to observe the provisions of the Act and Regulations. Section 43(1) of the Act provides that I am entitled to be housed at the correctional facility closest to where I will reside after release. Regulation 25 (1) of the Act provides that I am entitled to written reasons before being transferred and/or relocated to another

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correctional facility. It further states that I am entitled to make representations in relation to the decision to transfer and/or relocate me.

15. The decision was orchestrated in a procedurally unfair manner which not only violates my constitutional rights but also violates the Respondent's own laws and regulations, and has resulted in severe prejudice to me in that:
 - 15.1. I have been moved from a maximum security facility to a super maximum security facility. The distinction between the two and the onerous consequences of such a move will be fully explained hereunder.
 - 15.2. I have been completely separated from my family and close community as the Ebongweni is now too far away for them to visit.
 - 15.3. The decision has also had significant and prejudicial impact on my eligibility for parole.

16. It is for the above reasons that I seek that this Court hear this application and provide me with a fair opportunity to be heard, for my rights to be vindicated and for the decision maker (s) to be held accountable for their actions.

17. In brief, my case is as follows:
 - 17.1. The Respondents have failed to provide me with adequate reasons for their decision to transfer me from Qalakabusha to Ebongweni in terms of section 5 (3) of PAJA. The respondent have also violated section 43 (1) of the Act read with Regulation 25 (1).

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- 17.2. The Respondent's decision was unlawful as it violates a mandatory procedure set out in the Act. Thus the decision is subject to review in terms of section 6 (2) (b) of PAJA.
- 17.3. Due to the failures of the Respondents, I am entitled to recourse and/or relief from this court in terms of section 8 (1) (c) (ii) and (f) of PAJA. I am entitled to have the decision set aside and substituted or varied. This would result in me being transferred back to Westville.
18. For convenience, this affidavit is set out as follows:
- 18.1. The factual background from which this application arises;
 - 18.2. The grounds of review under which this application is brought;
 - 18.3. Whether internal remedies were exhausted;
 - 18.4. How the Respondent's decision has affected my rights;
 - 18.5. Costs; and
 - 18.6. Conclusion.

D. FACTUAL BACKGROUND

19. On 13 July 2011, I was convicted of robbery, a crime committed in 2007. I was sentenced to 15 years imprisonment at Westville. Westville is a maximum security facility, unlike Ebongweni, which is a super maximum security facility.
20. During my sentence at Westville, I was advised of a possibility of a parole application after serving at least half of my sentence. Westville was my centre of origin because it was, and still is within close proximity to my family and

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close community. My family is located in Sherwood in Durban. Sherwood is approximately 9.1 kilometres away from Westville.

21. I am informed that the decision on where to place an inmate is made in terms of where they would be residing once they are released.
22. Since my conviction in 2011, I have been subjected to numerous transfers from Westville to various other correctional centres, within Kwa-Zulu Natal, which were also maximum security facilities. The reason I was provided with for the said transfers was that Westville was full.
23. It is important for me to set out the history of my incarceration and put on record the amount of transfers I have endured since I started serving my sentence in 2011. I do so in order to contextualise my case.
24. Below is a brief summary of the prison transfers I have experienced:
 - 24.1. I spent one night at Westville before being transferred to Qalakabusha.
 - 24.2. At Qalakabusha I served 3 months of my prison sentence before I asked for a transfer back to Westville. I was informed by the head of the correctional centre at the time that I could only request transfer after serving at least 3 months at Qalakabusha.

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- 24.3. When I was eventually transferred back to Westville, I did not stay more than a month before being transferred to Ncome Correctional Centre of Excellence ("Ncome"). The reasons given for the transfer was again that Westville was "full". Upon my arrival at Ncome I requested that I be transferred back to Westville. The request was denied.
- 24.4. In August 2012, I was transferred to Qalakabusha. I was not provided any reasons for such a transfer but I was informed that I could ask for a transfer back to Westville. I took up the offer and I was then transferred to Westville after spending a month at Qalakabusha.
- 24.5. In May 2013, I was once again transferred back to Ncome. The reason was that Westville was once again "full and overcrowded".
- 24.6. On 11 November 2013 I was then transferred outside of Kwa-Zulu Natal Province for the very first time to the Mangaung Correctional Centre of Excellence ("Mangaung") in Bloemfontein, Free State Province.
- 24.7. A few days later, on or about 13 November 2013, I was then once again transferred, and for the first time sent to the super maximum correctional facility at Ebongweni. I spent close to 4 years at Ebongweni from November 2013 to October 2017. I was transferred to Qalakabusha on 19 October 2017.

M. H.S.

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25. The abovementioned transfer to Ebongweni was the "first transfer" which was accordingly dealt with at the time by my attorneys of record. My attorneys assisted me in requesting reasons for the transfer and information related to the detention programme as Ebongweni. An application in terms of the Promotion of Access to Information Act ("PAIA") was instituted. The requested information was duly furnished to me.
26. More relevant for the purpose of the current application is the "second transfer" to Ebongweni. I set out the details of the second transfer below.
27. On 21 November 2017, I was re-transferred to Ebongweni after having spent just a month at Qalakabusha. The said transfer was done in the absence of a fair procedural process as I was not provided with adequate reasons nor was I given an opportunity to make representations.
28. I experienced some difficulties in communicating with my attorneys of record who are at the Centre for Applied Legal Studies ("CALs"), when transferred to Ebongweni. I was therefore unable to communicate with them on a frequent basis and as a result, they were not always updated on the progress of my detention. My attorneys' offices are based in Johannesburg and I am in Kokstad. Telephonic communication at Ebongweni is also somewhat restricted which made it even more difficult to communicate.

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29. My attorneys have advised me though that they had been writing letters and emails to the previous head of correctional centre at Ebongweni, Mr. Zimema. The purpose of the letters were to enquire about my whereabouts and transfer from Ebongweni. I am advised that Mr. Zimema has been the least helpful in the history of engagements with my attorneys as he would seldom respond to letters addressed to him pertaining to my stay at Ebongweni.
30. I outline efforts made to engage with the Respondents prior to bringing this application in the paragraphs below.

Engagement with the Respondents

31. On 19 February 2018, unaware of my whereabouts and unaware of the transfer back to Qalakabusha in October 2017, and the subsequent second transfer to Ebongweni, my attorneys sent a letter to Mr. Zimema. The letter sought confirmation that I was still detained at Ebongweni. Unfortunately there was no response obtained.
32. My attorneys were later advised by my sister Malifu that I was detained at Ebongweni. On 3 May 2018 another letter was sent to Mr. Zimema by my attorneys. The letter requested a consultation with me on 17 May 2018 from 8:00 to 14:00. The said letter is attached hereto marked "MS 1".

M. H. S.

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33. On 17 May 2018 I had a face to face consultation with my attorneys as scheduled, who travelled from Johannesburg to Ebongweni. It was during the said consultation that I had able to update my attorneys on the second transfer. I further informed them that I was not been provided any reasons for the said transfer.
34. Subsequently, on 16 October 2018, my attorneys sent a letter requesting reasons for the transfer to Ebongweni. The request noted my entitlement to receive reasons based on section 5 (1) of PAJA. The letter further stated that section 43 (1) of the Act provides that I am entitled to be housed at a correctional centre closest to my place of residence after release. It then requested written reasons for the second transfer. The letter is attached hereto marked "MS 2".
35. There was no response from the Respondents.
36. On 31 January 2019 CALS addressed another letter to Mr. Zimema and was subsequently informed that the letter ought to be addressed to Mr. Goodwill Tshobede who was the new acting head of correctional centre as Mr Zimema was no longer the head of correctional centre. The letter requested a consultation with me on 11 February 2019. The consultation was to discuss and determine the process to be followed going forward in light of the lack of response from Mr. Zimema.

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37. A positive response was received from Mr. Tshobede. He agreed to the request for consultation. The letter from my attorneys dated 31 January 2019 and the subsequent response from Mr. Tshobede is annexed hereto marked "MS 3".
38. On 11 February 2019, I had a face to face consultation with my attorneys at Ebongweni. Subsequent to the consultation my attorneys advised that they would be sending the new head of correctional centre at Ebongweni and the head of correctional centre at Qalakabusha a letter requesting written reasons for my transfer. The letter further noted that in the event that they failed to respond I would bring the current application before this court. The reason why another letter was to be sent was firstly because Mr Tshobede was new at Ebongweni and he may not have been aware of my previous letter (s) sent to Mr. Zimema. Secondly, I had not sent a letter to the head of correctional centre at Qalakabusha who were also equally involved in the decision to transfer me to Ebongweni.
39. I was therefore also trying to make sure that I had given the Respondents every opportunity to rectify the invalid decision, without having to bring the parties before the Honourable Court.

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40. The letter to Ebongweni and Qalakabusha's current head of correctional centres was sent on 19 February 2019. The letter reiterated the request for reasons made in the previous letter dated 16 October 2018. The letter further requested an immediate acknowledgment of receipt and a response. The said letter and proof of delivery to both head of correctional centres is annexed hereto marked "MS 4".
41. I am advised that CALS received a response to the letter from a Mr. Arnold Mbono from Ebongweni. I am unsure of Mr Mbono's role at the correctional centre but it is apparent from his email signature that he is also the acting head of correctional centre at Ebongweni. The email from Mbono purports to provide reasons for the transfer. It states that an application by the Qalakabusha Centre was made to the Kwa-Zulu Natal Regional office for me to be transferred due to "misbehaviour". It further states that the said application from the Qalakabusha head, noted that I was involved in gang activities, that I was disrespectful to officials, and assaulting other inmates.
42. Prior to this email, I had never been informed of these reasons, nor had I been given an opportunity to respond to them. The email concludes that the decision to transfer me to Ebongweni cannot be reversed due to the above mentioned reasons. The email is attached hereto marked "MS 5".

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43. The response from Mr Mbono does not provide any further details on the allegations made against me, nor does it even speak of specific incidents that occurred on specific dates which resulted in the conclusion that I be sent to Ebongweni.
44. An earlier response by Mr Mbono on 21 February 2019 at 11:53 stated that the head of correctional centre was not authorised to deal with legal matters and that the request would be dealt with by the legal office at the Kwa-Zulu Natal office in Pietermaritzburg. The email is annexed hereto marked "MS 6".
45. In response to the emails from Mr Mbono, on 26 February 2019 CALS requested the full contents of my file containing the application for my transfer to Ebongweni. This was required in order to retrieve further details regarding the allegations against me. The request was accompanied with the power of attorney authorising CALS to request the information. The email is annexed hereto marked "MS 7". Unfortunately, no response was forthcoming.
46. It is submitted that the response from Mr Mbono, which purportedly provides reasons for my transfer to Ebongweni is not only insufficient but inadequate as it falls short of what an administrator in the same position as Mr Mbono (or any other official from the office of the Respondents) is required to provide. These purported reasons do not meet the threshold prescribed in section 33

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(2) of the Constitution, section 5 (1) and (3) of PAJA and regulation 25 of the Act.

47. The decision to transfer me to Ebongweni without providing me with adequate reasons, without giving me an opportunity to make representations, contravening provisions of the Act, are the reasons why I come before the Honourable Court to seek review of such decision.

E. GROUNDS OF REVIEW

48. I have been advised that the decision to transfer me to Ebongweni falls squarely within the ambit of the definition of administrative action under PAJA and section 33 of the Constitution.

49. Section 33 (2) of the Constitution stipulates that:

“Everyone whose rights have been adversely affected by an administrative action has the right to be given written reasons”.

50. Section 5 of PAJA gives effect to the right in the Constitution. More specifically, s5(3) of PAJA stipulates that:

“If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason”.

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51. Section 5(4) goes on to make provision for an administrator to depart from the requirement to provide adequate reasons if it is 'reasonable and justifiable in the circumstances' after taking into consideration all relevant factors, some of which are listed in section 5(4) (b).
52. It is submitted that the onus of proving that departing from the dictates of section 5 of PAJA is reasonable and just in the circumstances, lies with the administrator, who in this case, are the Respondents.
53. A failure to dispense with this onus would mean that the rebuttable presumption in section 5(3) of PAJA – to the effect that this honourable court would have to presume that the decision to transfer me to the super-maximum security facility was taken without good reason - is in place, and that the decision is unreasonable. The said decision ought therefore to be reviewed and set aside.
54. Accordingly, I rely on section 6 (2) (b) and (c) of PAJA.
55. The administrators who took the decision failed to observe "a mandatory and material procedure or condition prescribed by an empowering provision":
- 55.1. Section 43 of the Act provides for the location and transfer of sentenced offenders. Section 43 (1) states: "*a sentenced offender*

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must be housed at the correctional centre closets to the place where he or she is to reside after release....."

- 55.2. Regulation 25 (1) of the Act states: "*when a prisoner is transferred, the Head of correctional centre or a correctional official authorised by him, must, subject to paragraph (b) convey the reason for the proposed transfer to the prisoner to make representation in this regard, which must be recorded in writing, where after the Head of correctional centre or the authorised official may take a decision on the proposed transfer*".
- 55.3. Regulation 25 (1) (b) of the Act states: "*If the transfer is for security reasons, the Head of correctional centre or authorised official need not inform the prisoner of the proposed transfer, but the prisoner must be informed of the reasons as soon as practicable after his or her admission to the place where he or she is transferred and must be allowed an opportunity to in this regard as well as an opportunity to notify his or her spouse, partner or next of kin in the manner prescribed by the order*".
56. The above mentioned provisions provide for mandatory procedures to be observed by an administrator before an inmate is transferred and/or removed from the correctional centre which he would reside after release.

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57. In the circumstances, the Respondents have failed to observe the said mandatory procedure. Their conduct thus falls squarely within the provisions of section 6 (2) (b) of PAJA.

58. The Respondent's decision was also procedurally unfair as it failed to observe its own procedural steps set out in its regulations when transferring me to Ebongweni. Not only was I not provided with adequate written reasons, but I was also not provided with an opportunity to make representations.

Is the application brought within the correct time periods as prescribed in PAJA?

59. Section 7 (1) of PAJA provides that a review application must be instituted without unreasonable delay and no later than 180 days from the date on which internal remedies are exhausted.

60. I filed a request to be provided with reasons to the new head of correctional centre at Ebongweni as well as the head of correctional centre at Qalakabusha on 19 February 2019. A response was received shortly thereafter but the reasons provided were wholly inadequate. Furthermore, the reasons did not provide me with an opportunity to make representations.

61. I believe that the internal remedies were exhausted after I received a response from Mr Mbono, described above on 26 February 2019. It is

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submitted therefore that at the time of filing the application, the 180 days set out in section 7 (1) of PAJA had not expired. The said period would expire on 26 August 2019.

62. I further submit that if there has been any delay in bringing the application it has been due to the fact that I waited for the Respondents to provide me with reasons. Section 5 (2) gives a waiting period of 90 days before I can obtain a response. CALS sent a request for the full details of my file, concerning the transfer on 26 February 2019. I am advised that there was no response obtained from the Respondents.
63. To the extent that the time periods may not be complied with, I seek the above Honourable Court's condonation for such, and state that there can be no prejudice to the Respondents.

Whether all internal remedies were exhausted?

64. I submit that I have exhausted all internal remedies prior to approaching this Honourable Court for relief, and have made every effort to engage with the Respondents prior to launching this application:

- 64.1. I have, through my attorneys at CALS on numerous occasions from October 2018, approached the Respondents for reasons and information pertaining to my incarceration at Ebongweni. I would either get a vague response or no response as it would be

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M.H.S.

completely ignored. Full details are contained in the above paragraphs 30 – 45.

64.2. On 28 February 2018 I was visited by the Judicial Inspectorate for Correctional Services (“JICS”). I lodged a complaint with JICS regarding manner in which I was transferred and that I had not received any reasons. I further explained that I was also denied the opportunity of making representations on the decision. I consulted with a Mrs Mavuso from JICS who after listening to my complaint and perusing my “file”, promised to investigate further. Unfortunately, I have never heard from her since that time, almost a year later.

64.3. In light of the above circumstances I submit that I have done all reasonably possibly, and have exhausted all internal steps available prior to approaching this honourable court.

F. HOW THE RESPONDENTS’ DECISION AFFECTS MY RIGHTS

65. The decision to transfer me has adversely affected my rights: -

65.1. To family life, in that my family, particularly my elderly mother Matrine Selepe and my minor son, Junior Selepe, are unable to visit me or have limited access to me due to the fact that I am almost 300km away from our family residence, and transport for them is difficult, whereas at when I was at Westville they lived within walking distance.

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- 65.2. To not be treated or punished in a cruel, inhuman or degrading way and/or to bodily and psychological integrity as per section 12(1)(e) and section 12(2) of the Constitution. Ebongweni only accommodates inmates in segregated windowless cells for 23 hours a day, with absolutely no contact with other inmates and very little contact with any other correctional centre personnel. We are allowed out for 1 hour of exercise.
- 65.3. To conditions of detention that are consistent with human dignity as per section 35(2)(e) of the Constitution. The living conditions at Ebongweni are appalling to say the least. We are often subjected to cold showers, and poorly maintained cells where taps and toilets are often dysfunctional. Furthermore, there are no doctors available at Ebongweni (unlike Westville), and as such, receiving medical attention or care is only provided by nurses who assist. I suffer from high blood pressure and asthma, but due to an absence of a doctor at Ebongweni, and bureaucratic obstacles, I am not able to obtain a confirmatory affidavit from a doctor.
- 65.4. To not be deprived of freedom arbitrarily or without just cause as provided in section 12(1)(a) of the Constitution, in that although I was eligible for parole in October 2018, after having completed half of my 15 (fifteen) year sentence, this was rendered null after being transferred to Ebongweni. The program prescribed at Ebongweni requires me to complete a three-phased Behaviour Modification

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Programme in order to qualify for transfer back to Westville, the centre of origin. The programme takes at least three (3) years to complete. Until I am transferred back to Westville, I do not qualify for parole, and ultimately release. In other words, had I still been at Westville, I would have already qualified for parole, and would have potentially been released.

G. COSTS

66. Costs occasioned by this application must be paid by the Respondents. I am an indigent litigant with no access to resources. I am unable to pay for legal representation as I do not have any source of income. CALS is providing legal services on pro bono basis but seek the payment of disbursements and other costs incurred. The payment of costs by the Respondent must also include the cost of employment of Counsel.
67. Should the above court not find in my favour, I pray that the court not order costs against me in accordance with the Biowatch principle. This issue will be addressed in legal argument.

CONCLUSION

68. For the reasons as set out above, I pray for an order in which :
- 68.1. The decision to transfer me to the Ebongweni be reviewed and set aside; and

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68.2. This Honourable Court substitute the decision of the Respondents by ordering that I be transferred to my correctional centre of origin, at Westville; and

68.3. The Respondents be ordered to pay the costs of this application.

WHEREFORE I pray for an order in terms of the Notice of Motion to which this affidavit is attached.

M.H.S.

MDUDUZI SELEPE

I CERTIFY that this affidavit was signed and sworn to before me at _____ on this the ____ day of _____ 2019, by the deponent who acknowledged that he knew and understood the contents of this affidavit, had no objection to taking this oath, considered this oath to be binding on her conscience and who uttered the following words: "I swear that the contents of this affidavit are true, so help me God."

LEONARD BHEKI MADADASE

COMMISSIONER OF OATHS
PRACTISING ATTORNEY
REPUBLIC OF SOUTH AFRICA
98 MAIN STREET
MPITHI BUILDING, KOKSTAD

COMMISSIONER OF OATHS

Full names:

Address:

Capacity:

**CERTIFIED COPY
OF THE ORIGINAL**

B.in

M.H.S.

"MS 1"

Basetsana Koitsioe

From: Basetsana Koitsioe
Sent: 03 May 2018 08:21 AM
To: 'Zacharius.Zimema@dcs.gov.za'
Cc: Palesa Madi; Lubabalo Mabhenxa
Subject: CALS' Request for Client Consultation on 17 May 2018
Attachments: CALS Letter to the Ebongweni Correctional Centre Head Regarding Request for Client Consultation.pdf

Dear Mr Zimema,

Please find attached a letter for your attention.

Kind Regards,
Basetsana

Ms Basetsana Koitsioe
Candidate Attorney

Centre For Applied Legal Studies
University of The Witwatersrand

T +27 (0) 11 717 8600

C +27 (0) 66 216 7276

Private Bag 3 | Wits 2050 | South Africa

CAL
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B.m

M.H.S.

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Our Ref: ROL/0042/PM

Direct: 011 717 8614

**TO: EBONGWENI CORRECTIONAL CENTRE
HEAD OF CENTRE**

ATT: Mr Z Zimema

PER EMAIL: Zacharius.Zimema@dcs.gov.za

PER FAX: 039 797 2003

03 May 2018

Dear Sir,

RE: CONSULTATION WITH OUR CLIENT MR MDUDUZI SELEPE (Prisoner Number: 211139417) ON 17 May 2018

1. We refer to the matter above and to our letter dated 19 February 2018.
2. Please be advised that Palesa Madi (Ms Madi), Lubabalo Mabhenxa (Mr Mabhenxa) and Basetsana Koitsioe (Ms Koitsioe) intend on consulting at Ebongweni Centre of Excellence on 17 May 2018. The consultation will take place from 08h00 to 14h00.
3. The consult will be with Mr Mduduzi Selepe (Prison Number 211139417). Ms Madi, Mr Mabhenxa and Ms Koitsioe are legal representatives of Mr Selepe. Confirmation of their identity and all respective accreditation will be provided at the visit.
4. Regarding our letter dated 19 February 2018, we sought confirmation whether our client was still detained at the Centre. To date we have not received any response

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University of the Witwatersrand



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M.H.S.

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however we have received instructions that our client remains detained at the Centre.
The said letter is attached as annexure A for your convenience.

5. We therefore confirm that we will be consulting with our client as per the details above.

Kind Regards,



Palesa Madi

Attorney: Centre for Applied Legal Studies

Email: Palesa.Madi@wits.ac.za

Faculty of Commerce, Law and Management
University of the Witwatersrand



B.m

M. H. S.

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"MS 2"

Ref: P Madi

Direct: 011 717 8614

TO: EBONGWENI CORRECTIONAL CENTRE
HEAD OF CENTRE

ATT: Mr Z Zimema

PER EMAIL: Zacharius.Zimema@dcs.gov.za

PER FAX: 039 797 2003

16 October 2018

Dear Mr Zimema

RE: REQUEST FOR REASONS FOR FAILURE TO TRANSFER MDUDUZI SELEPE
(Prisoner number: 211139417)

1. We act on behalf of Mr Mduduzi Selepe ("Mr Selepe"), an inmate who was transferred from Mangaung Correctional Centre ("Mangaung") to your care at Ebongweni Correctional Centre ("Ebongweni").
2. We have been informed by our client that he has been refused transfer from Ebongweni to his centre of origin. He had completed phase 2 of the three phases of the Ebongweni transfer programme and was meant to have been promoted to the final phase. However, he was never transferred to phase 3 of the programme. He was informed by officials that there is insufficient space in the phase to accommodate him.
- * 3. Mr Selepe was subsequently moved to Mangaung for a short-while but then found himself moved back to Ebongweni following the death of another inmate at Mangaung. He does not understand why he was transferred back to Ebongweni as he was not implicated in the death of that inmate. He has since been moved back to phase 1 of the Ebongweni transfer programme. He is of the opinion that this adversely affects his constitutional rights.

¹ M.A.S.

B.m

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4. Section 5 (1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) states the following:

"any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action".

5. Section 5 (3) of PAJA further provides any decisions made must be regarded as a decision with no good reasons if there is a failure to provide adequate written reasons for the decision.
6. In addition, section 43(1) of the Correctional Services Act 111 of 1998 provides the following:

"a sentenced offender must be housed at the correctional centre closest to the place where he or she is to reside after release, with due regard to the availability of accommodation and facilities to meet his or her security requirements and with reference to the availability of programmes".

7. It is our instruction that we herewith request written reasons for Mr Selepe's transfer back to Ebongweni.
8. Should you require any further information, kindly email me on Palesa.Madi@wits.ac.za or contact my colleague Mr Lubabalo Mabhenxa on Lubabalo.Mabhenxa@wits.ac.za.
9. We look forward to your response.

Yours Sincerely,

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2 M.A.S.

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Palesa Madi

Centre for Applied Legal Studies

1st floor DJ Du Plessis Building

West Campus, Wits University

Docex 197, Johannesburg

Tell: 011 717 8614/8651

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"MS 3"

Ref: S Mkhize

Direct: (011) 717 8616

**TO: EMBONGWENI CORRECTIONAL CENTRE
ACTING HEAD OF CENTRE**

Attention: Mr. G Tshobede

Per email: Goodwill.Tshobede@dcs.gov.za

31 January 2019

Dear Mr. Tshobede

**RE: CONSULTATION WITH OUR CLIENT MT MDUDUZI SELEPE (Prisoner Number:
211139417) ON 11 February 2019**

1. We refer you to the above matter and confirm our instructions on behalf of Mr. Mduduzi Selepe ("Mr. Selepe").
2. Kindly be advised that Ms Sithuthukile Mkhize and Ms Sandile Ndelu intend on consulting with Mr Mduduzi Selepe (Prison Number: 211139417) at the Ebongweni Centre for Excellence on Monday 11 February 2019. The consultation will take place from 08h00 to 14h00.
3. Ms Mkhize and Ms Ndelu are legal representatives of Mr Selepe. Confirmation of their identities and all respective accreditation will be provided on the date of the visit.

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We hope that you find the above in order.

Yours faithfully,

Not signed, sent electronically.

Sithuthukile Mkhize

Attorney: Centre for Applied Legal Studies

Telephone: +27 11 717 8616

Email: Sithuthukile.Mkhize@wits.ac.za

M.H.S.

B.m

Sandile Ndelu

From: Microsoft Outlook
To: Goodwill.Tshobede@dcs.gov.za
Sent: 31 January 2019 01:02 PM
Subject: Relayed: RE: Request to consult Mduduzi Selepe (Prisoner No: 211139417) on 11 February 2019

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

Goodwill.Tshobede@dcs.gov.za (Goodwill.Tshobede@dcs.gov.za)

Subject: RE: Request to consult Mduduzi Selepe (Prisoner No: 211139417) on 11 February 2019

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M.H.S.

"MS 4"

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Ref: S Mkhize

Direct: (011) 717 8616

**TO: EBONGWENI CORRECTIONAL CENTRE
HEAD OF CENTRE**

Attention: Mr. G Tshobede
Per email: Goodwill.Tshobede@dcs.gov.za
Per Fax: 039 797 2003

**CC: QALAKABUSHA CORRECTIONAL CENTRE
HEAD OF CENTRE**

Per email: Samukelisiwe.Mdladla@dcs.gov.za
Per Fax: 035 9023779

19 February 2019

Dear Sirs

RE: TRANSFER OF MDUDUZI SELEPE PRISONER NO: 211139417

1. We refer you to the above matter and confirm our instructions on behalf of Mr. Mduduzi Selepe ("Mr. Selepe"). We also refer you to our letter sent on 16 October 2018, addressed to the previous Prison Head Mr. Zimema to which we did not receive a response. We attach hereto the said letter for ease of reference.
2. As you may be aware, Mr. Selepe was transferred from Qalakabusha Correctional Centre at Empangeni ("Qalakabusha") to Embongweni Correctional Centre ("Ebongweni") on 21 November 2017 without any reasons.

B. m

M.H.S.

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3. We are instructed that the transfer occurred following the death of another inmate at Qalakabusha which he was never implicated on. As a result, he does not understand why he was transferred to Ebongweni. There was no explanation to this effect nor any written reasons furnished to him, which he was entitled to receive.
4. Mr. Selepe's right to procedurally fair administrative action has been violated. He was entitled to written reasons and/or an explanation as to why he was transferred to Ebongweni. Despite several requests made for written reasons, you have failed to provide such.
5. In terms of section 5(1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), *"any person whose rights have been materially and adversely affected by administrative action and who has not been given any reasons for the actions may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action"*.
6. Failure to provide reasons by the administrator, section 5 (3) of PAJA states: *"if an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason"*.
7. Subsection (4) states *"an administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must forthwith inform the person making the request of such departure"*.
8. In the circumstances of this case, it is not reasonable and justifiable for the administrator to depart from the requirement to furnish any reasons. The action was arbitrary and denies Mr. Selepe's right to be housed at the centre of origin which he instructs is Westville Correctional Centre. The centre is the most closets to where his family resides. The conduct further denies Mr Selepe's right to receive written reasons in respect of an administrative action.

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M.A.S.

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9. We have received instructions to institute a judicial review application in terms of section 6 (1) of PAJA which states that *"any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action"*.
- Subsection 2 (a) states further, *"A court or tribunal has the power to judicially review an administrative action if- the administrator who took it- (i) was not authorised to do so by the empowering provision;*
(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
(c) the action was procedurally unfair;
(i) the action is otherwise unconstitutional or unlawful".
10. You have failed to provide Mr Selepe reasons for the transfer to Ebongweni and have failed to respond to our requests (on behalf of Mr Selepe) to obtain written reasons for his transfer. Such conduct is procedurally unfair. Your conduct is also not authorised by an empowering provision.
11. In terms of section 43 (1) of the Correctional Services Act 111 of 1998 *"a sentenced offender must be housed at the correctional centre closest to the place where he or she is to reside after the release, with due regard to the availability of accommodation and facilities to meet his or her security requirements and with reference to the availability of programmes"*.
12. Furthermore, in terms of the Correctional Services Regulations, regulation 25 provides for the location and transfer of prisoners, in sections 25 (1) (a) its states: *"when a prisoner is transferred, the Head of Prison or a correctional official authorised by him or her must, subject to paragraph (b) convey the reason for the proposed transfer to the prisoner and allow the prisoner to make a representation in this regard, which must recorded in writing, where after the Head of Prison or the authorised official must take a decision on the proposed transfer"*.

Section 25 (1) (b) provides: *"if the transfer is for security reasons the Head of Prison or the authorised official need not inform the prisoner of the proposed transfer, but the prisoner must be informed of the reasons as soon as practicable after his or her admission to the place*

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M.H.S.

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where he or she is transferred to and must be allowed an opportunity to make a representation in this regard...".

13. You have failed to comply with your own procedural requirements as set out in the Correctional Services Act 111 of 1998 as well as its Regulations.
14. In light of the above, we demand that you do the following:-
 - 14.1 Provide us with an immediate acknowledgement of receipt of this letter;
 - 14.2 Furnish written reasons on why Mr Selepe was transferred to Ebongweni coupled with an indication of steps he can follow to make representations in this regard, within 24 hours of receipt of this letter;
15. Failure to provide us with written reasons, we will have no other option but to institute judicial review proceedings as outlined in paragraph 9 above. We will be seeking an order to set aside the decision to re-transfer Mr Selepe and transfer him back to Westville Correctional Centre. We will also be seeking a costs order against you.

We hope that you find the above in order.

Yours faithfully,

Not signed, sent electronically.

Sithuthukile Mkhize

Attorney: Centre for Applied Legal Studies

Telephone: +27 11 717 8616

Email: Sithuthukile.Mkhize@wits.ac.za

B.m

M.H.S.

"MSB"

Sithuthukile Mkhize

From: Mbono, Arnold <Arnold.Mbono@dcs.gov.za>
Sent: 21 February 2019 01:32 PM
To: Sithuthukile Mkhize
Subject: FW: Transfer of Mduduzi Selepe Prisinor No 211139417

Good Afternoon

In response to your request for clarity regarding offender Selepe Mduduzi's transfer. The Qalakabusha correctional centre made an application to the KZN Regional office for offender Selepe Mduduzi's to be transferred to Ebongweni Correctional centre due to misbehaviour of the offender.

As per Qalakabusha's application the offender was involved in gang activities, disrespectful to officials and assaulting other offenders. Therefore the transfer of this offender cannot be reversed due to the above mentioned reasons.

Regards

Mbono A.M.Z
Acting Head of Centre
Ebongweni Correctional Centre
Kokstad Management Area
Department Correctional Services
Landline :039 797 2003
Cell phone:083 328 1916

From: Mbono, Arnold
Sent: 21 February 2019 11:53 AM
To: sithuthukile.mkhize@wits.ac.za
Subject: RE: Transfer of Mduduzi Selepe Prisinor No 211139417

"MS6"

Good Morning

1. I hereby acknowledge the receipt of your letter dated the 19th February 2019
2. Your letter will be forwarded to the legal office at KZN regional office in Pietermaritzburg
3. Heads of centres are not authorised to deal with legal matters.

Your office is advised to contact Kader Adilla in the future at regional office for any query or copies concerning your clients as Kader Adilla is the one who deals with legal matters.

Adilla Kader's contact details below:
Contact details:033 355 7320
E-mail :adilla.kader@dcs.gov.za

Regards

Mbono A.M.Z
Acting Head of Centre
Ebongweni Correctional Centre
Kokstad Management Area
Department Correctional Services
Landline :039 797 2003
Cell phone:083 328 1916

B.M.

M.H.S.

"MS 7"

Sithuthukile Mkhize

From: Sithuthukile Mkhize
Sent: 26 February 2019 12:43 PM
To: 'Mbono, Arnold'
Cc: Sandile Ndelu; 'Goodwill.Tshobede@dcs.gov.za'
Subject: RE: Transfer of Mduduzi Selepe Prisinor No 211139417
Attachments: M Selepe POA.pdf

Dear Mr. Mbono

We confirm receipt of your email and would like to thank you for your prompt response herein.

Would it be possible for you to provide us with the full contents of his file with the application made to the KZN Regional office?

We attach hereto a copy of the Power of Attorney which authorizes us to request the documents.

We hope you find the above in order.

Kind Regards,

Ms Sithuthukile Mkhize
Senior Attorney
Centre For Applied Legal Studies
University of The Witwatersrand
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Private Bag 3 | Wits 2050 | South Africa

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UNIVERSITY OF THE
WITWATERSRAND
JOHANNESBURG



From: Mbono, Arnold [<mailto:Arnold.Mbono@dcs.gov.za>]
Sent: 21 February 2019 01:32 PM
To: Sithuthukile Mkhize
Subject: FW: Transfer of Mduduzi Selepe Prisinor No 211139417

Good Afternoon

In response to your request for clarity regarding offender Selepe Mduduzi's transfer. The Qalabusha correctional centre made an application to the KZN Regional office for offender Selepe Mduduzi's to be transferred to Ebongweni Correctional centre due to misbehaviour of the offender.

As per Qalabusha's application the offender was involved in gang activities, disrespectful to officials and assaulting other offenders. Therefore the transfer of this offender cannot be reversed due to the above mentioned reasons.

Regards

Mbono A.M.Z
Acting Head of Centre
Ebongweni Correctional Centre
Kokstad Management Area
Department Correctional Services

1 M.H.S.

B. M

competent to enter into agreements on behalf of the University and recipients are thus advised that the content of this message may not be legally binding on the University and may contain the personal views and opinions of the author, which are not necessarily the views and opinions of The University of the Witwatersrand, Johannesburg. All agreements between the University and outsiders are subject to South African Law unless the University agrees in writing to the contrary.

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B. m 3 M. H. S.