



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case no 2015/32914

In the matter between:

Ernest Ramonetha

Applicant

And

The Chairperson of Case Management Committee (Leeuwkop Med C)

1st Respondent

The Chairperson of the Parole Board

2nd Respondent

The Prison Director (Leeuwkop Med C)

3rd Respondent

The Minister of Justice and Correctional Services

4th Respondent

JUDGMENT

Van der Linde, J:

Introduction

[1] In this matter I heard argument during the motion court week ending 11 March 2016, and on 18 March 2016 gave a reasoned judgment concluding with an order joining the Minister as fourth respondent. Provision was also made for answering affidavits to be filed, but Mr. Poee of the State Attorney, who again appeared earlier this week for the respondents and now also the fourth respondent, advised that there would be no opposition to the relief claimed. A notice of intention to abide was handed up on behalf of the Minister.

- [2] The background to the matter, and the issue that it raises, were set out in the judgment that I gave on 18 March 2016; it is not required to be fully repeated here. Some mention of it is unavoidable to provide context for the conclusion to which I have come.
- [3] In a nutshell, the department had treated two six months Presidential remissions of sentence for lifers disparately. It reasoned that the first Presidential remission, that of 30 May 2005, may not be taken into account to reduce the minimum detention period of a lifer in the position of the applicant; but that the second Presidential remission, that of 27 April 2012, may in fact be taken into account.
- [4] In the applicant's case this meant that the department reckoned his parole eligibility date as 22 January 2017, whereas if he were right, it should be six months earlier, on 22 July 2016. The issue was thus whether the differentiated treatment was legitimate.

Background

- [5] In the discussion of the background in the earlier judgment, I referred to the fact that the applicant was sentenced on 23 March 2004 to two terms of life imprisonment for two murders he had committed. Then applicable legislation regulating his parole prospects then was the Correctional Services Act 8 of 1959. That Act was repealed with effect from 1 October 2004 by the currently operational Correctional Services Act 111 of 1998.
- [6] Under the old Act there was no minimum detention period that a lifer had to have served before s/he could be taken into account for parole. However, the department applied a policy whereby after having served 20 years, a lifer could be considered for parole. Since the applicant's two life sentences were to run concurrently, the applicant would have been eligible for parole on 22 March 2024.
- [7] S.73(6)(b)(iv) of the new Act provides that a person who has been sentenced to life incarceration may not be placed on parole until s/he has served at least 25 years of the

sentence. There are also transitional provisions that are important. By virtue of s.136(3) of these, the applicant's minimum detention period therefore remained 20 years.

[8] After the new Act came into effect, on 30 May 2005, the President, acting under the powers conferred by s.84(2)(j) of the Constitution, granted the first special remission of sentences to indicated categories of prisoners who would have been serving sentences on 30 May 2005. The first period of remission was a six months' remission to all prisoners serving sentences on 30 May 2005 for, inter alia, murder.

[9] On 25 July 2011 Hiemstra, AJ in the North Gauteng High Court, delivered a judgment in *Van Wyk v Minister of Correctional Services and others*, Case no. 40915/10, the effect of which was that the new Act could not be applied to prejudice lifers. They were entitled to have the date on which they may be considered for parole advanced by credits that were earned in terms of s.22A of the old Act, and in terms of the policy of the department which applied at the date of the commission of the crimes for which they were serving life sentence.

[10] On 5 August 2011 the department notified all lifers that in view of the Van Wyk judgment the department had decided that all lifers sentenced before 1 October 2004 would be granted the maximum credits that a lifer could have earned under s.22A of the old Act. The effect of this decision was that the minimum detention dates for all lifers sentenced before 1 October 2004 would be calculated as 13 years and 4 months. Leaving aside for now the effect of the two Presidential special remissions, this reduced the applicant's minimum detention period to 13 years and 4 months, meaning that he was eligible for parole on 22 July 2017.

[11] On 27 April 2012 the President, acting under s.84(2)(j) of the Constitution, again granted a special remission of sentence, including a six months' special remission of sentences to all offenders, irrespective of the crimes committed.

[12] I propose now to deal with the treatment of the two six months' remissions by the department, and refer thereafter to the other points taken by them in March 2016.

The department's treatment of the two six months' remissions

[13]As stated earlier, the department's treatment of the two remissions has been inconsistent. It reasoned that the first six months' remission may not be taken into account to reduce the applicant's minimum detention period, but the second six months' remission period may in fact be taken into account. Accordingly, whereas the applicant argues that his parole eligibility date is 22 July 2016, some four months down the line, the department argued that in fact his parole eligibility date is six months later, being 22 January 2017.¹ The difference between the parties was thus crisply whether or not the first six months' remission period may be taken into account.

[14]The opposing submissions were these. The applicant argued that on the ordinary grammatical meaning of the first remission, it applied to all offenders, including lifers, sentenced by 1 October 2004. Since he was sentenced before that date, on 23 March 2004, he qualified. The only exceptions were the two categories mentioned, and he does not resort under them.

[15]Implicit, if not expressed, in this argument was that a remission of sentence applied both to prisoners serving a sentence which had a sentence expiry date, as well as to prisoners who served a sentence which had no such date, i.e. lifers. In this latter category, the remission is simply not applied to the sentence expiry date, since there is none, but to reduce the minimum detention period.

[16]The respondents' argument was that since a lifer's sentence had no sentence expiry date, the six months' remission could not be applied to those prisoners. The respondents' position was captured in a circular by the Chief Deputy Commissioner of Correctional Services, acting on behalf of the Commissioner, dated 30 May 2005.

¹ The department actually argues 23 January 2017, but since the sentencing date was 23 March 2004, the calendar months' calculation determines the period on the end of the previous day.

[17]In the accompanying directive he wrote: *“With regard to prisoners serving life imprisonment and those who were declared as dangerous criminals in terms of Section 286B of the Criminal Procedure Act, 1977 (Act No 51 of 1977), the applicable period special remission of sentence must be reflected on the warrant and official documents. However whilst such prisoners are serving imprisonment for an indefinite period, it will have no effect on their release dates.”*

[18]The applicant’s warrant was, to be true, endorsed at the foot of the first page: *“Benefitted special remission of sentence: 30 May 2005 (06 – months).”* The respondents were however not able to say what effect or benefit this endorsement had, given paragraph 2.5 of the directive just quoted.

[19]The department’s treatment of the subsequent six months’ remission is reflected in a document headed, *“SPEAKER’S NOTES ON THE GRANTING OF THE SPECIAL REMISSION OF SENTENCE BY THE PRESIDENT ON 27 APRIL 2012.”* In the body of the document paragraph 2.1.1, appearing under the heading *“WHO WILL QUALIFY?”*, reads: *“Maximum of six (6) months special remission of sentence to all offenders, probationers, parolees and day parolees irrespective of crime committed.”* Nothing further of relevance appears.

Suggested approach

[20]In view of the respondents’ present attitude, I state the reasons for my conclusion very briefly. The President plainly has the prerogative under s.84(2)(j) of the Constitution to remit sentences; no-one argues otherwise. When he exercises that prerogative, no arm of government, particularly the executive and its administration, has the power to curtail the exercise of that prerogative.

[21]Since ours is a constitutional democracy and the law rules, not Presidential decree, the exercise of the prerogative is subject to the rationality test: the exercise of the prerogative in a given instance must be rationally connected to the objective sought to be achieved in that

specific instance.² In this case that issue does not arise because as will appear below, in my view the administration, in the guise of the department, did not give appropriate effect to the exercise of the prerogative.

[22] Precisely what the exercise of the prerogative actually entailed is a factual enquiry. In this case the exercise of the power was contained in the Presidential minutes. Since these are documents, they are to be interpreted like any other document, including a statute or contract. That means that the starting point is ordinary grammatical meaning, but one moves from there to context, purpose, and constitutional compatibility.³

[23] The 2005 Presidential special remission contains no words of limitation in the manner suggested by the respondents' submissions, nor by the directive quoted above. The context suggests rather that where the President intended a limitation, he expressed it: this applies to the two special categories quoted above, neither of which applies to lifers. The context further suggests that the President had wished to benefit all who were not expressly excluded.

[24] After all, the President included the crimes of robbery and murder, where he must have known that life sentences were a real consequence, and yet he did not differentiate in those crimes between those who had been sentenced to life imprisonment, and those who received sentences with sentence expiry dates.

[25] Finally the spirit, purport and objects of the Bill of Rights, and the express equality provisions of s.9(1) of the Constitution, proclaiming as it does that everyone has the right to equal benefit of the law, rather favours an interpretation that the generic six months' remission was intended by the President to apply also to lifers.

[26] It follows that in my view the department does not have the power to exclude lifers that fall within the category of the applicant from the benefit of the six months' special remission dated 30 May 2005 and, just as in the case of the six months' special remission of 27 April

² *Albutt v Centre for the Study of Violence and Reconciliation, and Others*, 2010 (3) SA 293 (CC).

³ *Cool Ideas 1186 CC v Hubbard and Another*, 2014(4) SA 474 (CC) at paragraph [28].

2012, that period of six months must serve to reduce the applicant's minimum detention period. His parole eligibility date of 22 July 2017 should accordingly be advanced not by six months, but by twice six months, to 22 July 2016.

The two points *in limine*

[27] The first was the substandard nature of the applicants' papers, and the second was that such "decision" as has been taken, is not reviewable under PAJA for being non-final.

[28] If the conclusion that I have reached on the merits is correct, then the steps to procure the appropriate consideration of the applicant's parole must be set in motion presently. Against that background, the point *in limine* which attacks the substandard state of the applicant's papers does lose some importance. There is another consideration in this regard.

[29] If the view of the legal position that I have expressed is correct, then more lifers than just the applicant may be affected. Assuming that no reviewable decision has yet been taken, it seems plain from these papers that the respondents had all taken the position that the first six months' Presidential special remission may not be taken into account.

[30] On that basis, the attitude of the second respondent would have precluded the applicant from enjoying the benefit of those six months. Moreover, the fact that the first respondent and the third respondent shared that attitude, at least initially, meant that the steps required to prepare the appropriate consideration of the applicant's parole application would not have been set in motion.

Conclusion

[31] As appears from the above reasoning, I have come to the conclusion that it should be declared that the six months' Presidential special remission of sentence dated 30 May 2005 must be applied to advance the applicant's parole eligibility date by that period. Consequential relief should follow.

[32]In the result I make the following order:

- (a) It is declared that the Presidential special remission of sentence dated 30 May 2005 must be applied to advance the applicant's parole eligibility date by six months, to 22 July 2016.
- (b) The Department of Correctional Services must take appropriate steps to ensure that the applicant's parole eligibility date of 22 July 2016 is implemented.
- (c) In order to give effect to paragraph (b) above, the Department of Correctional Services must ensure that any internal prerequisites, including evaluations and assessments of the applicant so as timeously to complete his required profile submission, will take place in sufficient time for the applicant's eligibility date of 22 July 2016 not to be prejudiced in any respect.

WHG van der Linde
Judge, High Court
Johannesburg

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