

IN THE NORTH GAUTENG HIGH COURT – PRETORIA
(REPUBLIC OF SOUTH AFRICA)

15
20/11/2010

THE HONOURABLE ACTING JUSTICE ROELOF DE PLESSIS

In the application of:

PIETER HENDRIK GROENEWALD

and

THE MINISTER OF CORRECTIONAL SERVICES

THE NATIONAL COMMISSIONER OF
CORRECTIONAL SERVICES

THE PROVINCIAL COMMISSIONER OF
CORRECTIONAL SERVICES (GAUTENG)

THE CHAIRPERSON OF THE CASE
MANAGEMENT COMMITTEE ZONDERWATER
PRISON

THE CHAIRPERSON OF THE PAROLE BOARD,
ZONDERWATER MEDIUM B PRISON

THE HEAD OF PRISON, ZONDERWATER
CORRECTIONAL FACILITY

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

JUDGMENT

DELETE WHICHEVER IS NOT APPLICABLE	
CASE NUMBER 1532/09	
(1) REPORTABLE: YES/NO.	YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	YES/NO.
(3) REVISED: ✓	
15/01/2010	
DATE	SIGNATURE

- [1] This application was brought before me on Tuesday, 24 November 2009. I let it stand down until Wednesday, 25 November 2009 because there was no appearance on behalf of the respondents and I wanted to make sure that there would be no appearance on behalf of the respondents.
- [2] The application was properly served on all the respondents as well as the State Attorney. A notice to oppose was filed on 12 November 2009 by the attorneys of the respondent, being the State Attorney.
- [3] However, there was no appearance on behalf of respondents when the matter was called again on Wednesday, 25 November 2009.
- [4] Because of the fact that freedom and liberty of persons in a democratic constitution state is of the utmost and paramount importance, I deemed it fit to hear the application on an urgent basis. This application was launched by the applicant for review of a decision which was taken by the first respondent not to recommend or approve the applicant's placement on parole.
- [5] The applicant is serving a twenty year sentence, having been sentenced on 19 March 2003 on two charges of murder and ten years imprisonment on a charge of attempted murder, both sentences to run concurrently.

- [6] In the application the applicant sets out the legal provisions applicable to parole.
- [7] Section 65 (4) of Act 8 of 1959, which was the previous Act dealing with parole issues before the current Act, namely Act 111 of 1998 came into operation on 1 October 2004, determined that a prisoner shall not be considered for placement on parole before he has served one half of his term of imprisonment. Consideration could however be given to place a prisoner on parole earlier, taking into account the number of credits earned by the specific prisoner. Credits are earned in terms of section 22A of Act 8 of 1959, by observing the rules which apply in the prison and actively taking part in the programmes which are aimed at his treatment, training and rehabilitation.
- [8] A person receives one day credit for every two days imprisonment served by him. He therefore may become eligible for consideration for placement on parole after serving one third of his sentence.
- [9] Act 111 of 1998 is not applicable pertaining to parole provisions, to prisoners sentenced before 1 October 2004, which is the case of the applicant. This appears clearly from section 136 of Act 111 of 1998.

- [10] Furthermore, the previous credit system was never abandoned and has throughout applied to prisoners who were sentenced prior to the coming into operation of the parole provisions of Act 111 of 1998.
- [11] It follows therefore that the applicant qualified to be considered for placement on parole by the Parole Board after having completed one third of his sentence, obviously taking into account all other requirements. The applicant was also granted six months amnesty by the State President during May 2005 and has been classified as an A-group prisoner since September 2003. According to the applicant's report he became eligible for placement on parole on 9 September 2009.
- [12] Furthermore, I was referred to a police directive of 8 August 2007 in terms of which the Commissioner of Correctional Services issued a policy directive under reference 1/8/B, in terms of which certain categories of prisoners should serve minimum periods of their respective sentences, and then be placed on parole. This policy directive was to ensure uniformity of Parole Board decisions throughout the country because of a previous lack of consistency.
- [13] The applicant appeared on 2 October 2009 before the Parole Board whereafter it was recommended that a further profile should be requested on 15 October 2010.

[14] The applicant states that the Parole Board gave reasons for the decision, namely the seriousness of the offences of which he had been found guilty of, and that he had just served one third of his sentence and had to serve more time.

[15] He states that the Parole Board did not take into account the following:

- (a) The fact that he had completed a BA Psychology degree while in prison;
- (b) He had completed all courses available to him in the institution;
- (c) Certain reports had to be completed within the six months period prior to the parole hearing which were not completed, such as the social worker's report, a psychologist report and other reports, which were all older than six months;
- (d) The unit manager's report was not before the Parole Board;
- (e) The application for presidential pardon was not placed before the Parole Board.

[16] The approach of the Parole Board apparently was simply that the applicant had to wait longer until these reports were obtained. There appears to have been no regard to the right to liberty and the right to be considered for parole of the applicant.

[17] The applicant contends that the Parole Board did not give any attention to his suitability for placement on parole with reference to his achievements and his personal circumstances, and that the requirements of the Department of Correctional Service's B orders were not complied with. He contends that there was simply not enough information placed before it to make an informed decision.

[18] He contends that he did not receive a fair hearing and that as a result of the lack of steps that had to be taken by the respondents, he was prejudiced.

[19] The applicant referred me to the policy directive issued by the second respondent dated 8 August 2007 and requested that that policy directive should not be considered as part of my consideration of this application. The applicant contended that that policy does not differ substantially from a previous policy directive, annexure "E", which was found to be unconstitutional.

[20] The policy directive, issued by the Commissioner for Correctional Services, S J Kunene, states that the office deemed it necessary to

request Case Management Committees and Parole Boards not to recommend or allocate parole placement dates in cases of aggressive and sexual offences to offenders before they have at least served a designated minimum his or her sentence, except if compelling evidence exists of rehabilitation and with due consideration to the protection of the community.

- [21] It is then stated that this is in line with the provisions of section 65 of Act 8 of 1959 in terms of which offenders in all crime categories could be considered for parole after one third of their sentence has been served.
- [22] In the policy directive reliance is placed on sections 51 and 52 of the Criminal Law Amendment Act, which came into operation on 1 October 2004, stating that minimum sentences for aggressive and sexual offences, should be applied on the basis that offenders should serve between two thirds and 80% of their sentences.
- [23] I have not been able to find any legislative authority for interference with the rights of the Parole Board and Case Management Committees in this fashion. This is in fact an instruction to the Parole Board to act in a specific way whereas there is no legal statutory right created in any statute that I could find for acting in such a fashion, limiting the discretion of the Parole Board in such a way.

[24] The policy directive is in fact contrary to the legal provisions applicable to parole for offenders before 1 October 2004 and is contradictory therewith.

[25] I am therefore of the view that this policy is *ultra vires* and of no force and effect whatsoever.

[26] I do not understand why there should be a continuous attempt by the respondents to interfere with the work to be done by the Parole Board, outside the scope of the authority of the respondents.

[26] The legal position as set out above is also supported by an affidavit which was made by Sarel Johannes Wilkins, apparently in a different matter, but the evidence is clearly evidence that I can take into account. Wilkins is in the employ of the Department of Correctional Services and he holds the position of Regional Co-Ordinator: Corrections Gauteng, being a Deputy Director position in the office of the Regional Commissioner Gauteng. He states in his affidavit that he is fully acquainted with the applicable legislative provisions pertaining to the placement of prisoners on parole and the policy of the Department of Correctional Services.

[27] The applicant relies on this expose of the law for the relief sought, and my analysis of the law above is in accordance with this expert witness' views, regarding the legal provisions applicable to parole.

[28] In his affidavit he refers to the previous policy directive of 1998 which became the subject matter of various court cases. As a result of the different court judgments, the policy directive was subsequently jettisoned by the Regional Commissioner Gauteng¹.

[29] Wilkins states that the instruction was that the Parole Boards were to disregard that policy directive when considering prisoners for placement on parole. The new policy referred to above, attempted to achieve the same result as the one that was jettisoned.

[30] In respect of referral of a prisoner back to court for reconsideration of his sentence, I follow the decision of *S v Leeb*² to the effect that it is inappropriate to refer a prisoner who has become illegible for consideration for placement on parole, back to the court. For this reason I am of the view that an application for parole is the only avenue open for the applicant, and in the light of the foregoing facts, that the applicant had no choice but to approach this court for the relief sought.

¹ *Combrink and Another v Minister of Correctional Services and Others* 2001 (3) SA 338D; *Saunders v Minister of Correctional Services and Others* unreported judgment of the TPD, case number 14015/2000; *Mohammed v Minister of Correctional Services and Others* 2003 (6) SA 169 (SE)

² 1993 (1) SACR 315 (T)

- [31] I find the attitude of the respondents in this matter totally deplorable, reprehensible, and completely unacceptable. There is no explanation why all the necessary information and reports were not placed before the Parole Board. There is no explanation before me why the applicant should remain further incarcerated because of the fact that the respondents clearly cannot or do not want to do their work properly.
- [32] The situation has been exacerbated by the total lack of respect towards the court and court procedures. The court was not even afforded the decency and respect of a person appearing at court, explaining that papers will be filed, or that papers will not be filed, or what exactly the approach of the respondents will be in respect of the matter. A notice of intention to oppose was filed and that was all.
- [33] There seems to be a complete and utter disregard by the respondents as well as by the State Attorney for procedures set out in statutory provisions, for the rights of prisoners, and in particular those of the applicant, and for the authority, status and powers of this court.
- [34] I, in the light of the foregoing, certainly have no hesitation to find that the applicant was not afforded a fair hearing, and that the attempt to postpone his parole application to 15 October 2010 so

that the necessary documents and reports could be obtained, which should have been placed before the Parole Board in the first instance, is a clear and flagrant infringement of the applicant's rights, and in particular the applicant's constitutional rights, his right to freedom, his right not to be detained unnecessarily, and his right to fair administrative action, as are clearly reflected in sections 12 and 33 of the Constitution, Act 108 of 1996, and the provisions of the Promotion of Administrative Justice Act, No 3 of 2000.

[35] There was no indication before me whatsoever why the matter should be referred back for consideration, and if all the relevant documentation would then be placed before the Parole Board, and if the Parole Board would then afford the applicant a fair hearing.

[36] I have no faith in any possibility that the respondents will procure the necessary reports referred to in paragraph 2.3 of the Notice of Motion, in the light of the actions of the respondents, and their total disregard and respect for this court.

[37] I am therefore of the view that, to refer the matter back to the Parole Board, would simply lead to a further extension of the parole application and unfair treatment of the applicant. Furthermore, if the applicant was entitled to be granted parole before this application was launched, in law, such a referral would cause a further infringement to the rights of the applicant, which will

be unwarranted. In my view this is an exceptional case which warrants this court's interference. Fairness dictates that the applicant should not wait until October 2010³

[40] For the reasons given above I am of the view that the matter should not be referred back for further consideration, and that I am in a position to grant the relief.

[41] I have already issued an order in this regard and the abovementioned constitutes the reasons for the order. The order that I had granted on 25 November 2009 was the following:

- (a) The matter is disposed of by way of urgency in terms of rule 6 (12) and the forms and service provided for in the rules of this court are dispensed with;
- (b) The decision of the respondents not to recommend or approve applicant's placement on parole is hereby reviewed, set aside and substituted with the following:

The respondents are ordered to place the applicant on parole within 30 days from date of this order

³ *W C Greyling and Erasmus (Pty) Ltd v Johannesburg Local Transportation Board and Others* 1982 (4) SA 427 (A) at 449 F to H; *Ruyobeza and Another v Minister of Home Affairs and Others* 2003 (5) SA 51 (C) at 65 C to 66 B; *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) at 349 G; section 8 (1) (c) of the Promotion of Administrative Justice Act, No 3 of 2000

subject to the terms and conditions approved by the
Correctional Supervision Parole and Release Board.

- (c) The respondents are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

BY ORDER OF COURT:



Ron Plessis, AJ

REGISTRAR

Van Heerden Suzette

From: Hennie Joubert [hjoubert@law.co.za]
Sent: 10 February 2010 02:25 PM
To: Van Heerden Suzette
Subject: Groenewald v Min. of Correctional Services and others

Beste Suzette hiermee inligting soos versoek

APPLICATION FOR LEAVE TO APPEAL

APPLICANTS' COUNSEL

ADV SA NTHAI (SC)

ADV P M LEOPENG

STATE ATTORNEY: MR SELEKA 012 309 1500

RESPONDENT'S COUNSEL

ADV HP JOUBERT

ATTORNEY: JULIAN KNIGHT AND ASSOCIATES

012 346 3853

APPLICATION IN TERMS OF RULE 49 (11)

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