

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

CASE NUMBER: 10334/10

In the matter between:

DELETED	THIS IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.	☒
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	☒
(3) REVISED.	
6/5/10	
DATE	SIGNATURE

JACOBUS VAN GUND

Applicant

14/7/2010

And

THE MINISTER OF CORRECTIONAL
SERVICES

First Respondent

THE NATIONAL COMMISSIONER
CORRECTIONAL SERVICES

Second Respondent

THE HEAD OF PRETORIA

CENTRAL CORRECTIONAL CENTRE

Third Respondent

THE CASE MANAGEMENT COMMITTEE

PRETORIA CORRECTIONAL

CENTRE

Fourth Respondent

THE CORRECTIONAL SUPERVISION

AND PAROLE BOARD: PRETORIA

CORRECTIONAL CENTRE

Fifth Respondent

JUDGMENT

TOKOTA AJ

[1] The applicant is a sentenced prisoner serving a sentence of 18 years imprisonment at Pretoria Central Prison after he was convicted of murder (count 1), attempted murder (count 2), and attempting to defeat the ends of justice (count 3). He was sentenced on 18 September 2003 before the commencement of the Correctional Services Act No.111 of 1998.

[2] Having served a $\frac{1}{3}$ of his sentence, on 3 September 2009 he appeared before the Parole Board ("the Board") for consideration for possible placement on parole. His application for parole was considered but it was decided that a further profile be placed before the Board on 3 September 2011. In coming to its decision

the Board took into account the nature of the crimes he was convicted of; the length of period of imprisonment he had to serve; the interests of the community and those of the victims.

[3] After the above decision was communicated to the applicant he immediately brought an application, on an urgent basis, on 14 September 2009 for the review and setting aside of the Board's decision. On 6 November 2009 this Court, per Tuchten AJ, as he then was, reviewed and set aside the Board's decision and ordered that it should reconsider its decision.

[4] Pursuant to the decision of this Court on 6 November 2009 the Board sat on 4 February 2010 and the applicant was again considered for placement on parole. Once again the Board decided that his profile should again be presented on 30 November 2011. This decision was again taken on the basis that the applicant was convicted of serious offences and it was not in the interests of the community that he should be released soon. This time the Board also took into account the fact that he was not co-operative with the Case Management Committee in that he refused to sign its report when it appeared that the Committee was

not recommending his placement on parole. It was further decided that he should attend more anger programmes.

[5] When considering the application for placement on parole the Board reasoned as follows: *"He is serving 18 years for Aggressive crimes of murder, Attempted murder and defeating the ends of justice. He has served 6 years 4 months and 26 days of his sentence to date. He has attended some programmes. However the CSPB (referring to the Board) has taken the seriousness of the crimes, length of sentence and interests of the community and victim into consideration. The crimes committed by the offender are common in our communities and as such communities and victims need to be protected. It is stated in the court judgment that the offender's case was postponed until 2011-09-03. That is not the case. On 2009-09-03 the offender appeared for a full hearing before the CSPB. Further profile was approved for 2011-09-03. What it means that (sic) the CSPB came to a decision on 2009-09-03 and that the offender should not be placed on parole at that stage. He also maintains that since he was sentenced before 1st October 2004 he should be released after serving a 1/3 of his sentence. The fact is that he must be considered for placement. However consideration does not*

necessarily mean placement on parole. The CSPB also take (sic) into account factors mentioned above i.e seriousness of crime, length of sentence and community and victims' interests. On 2010-01-08 he appeared before the CMC. He refused to acknowledge the recommendations of the CMC by refusing to sign for that. The CSPB thus doubt (sic) his level of rehabilitation. He must do more Anger Management Related Programmes. Further Profile is approved for 2011-11-30."

[6] This application is a sequel to the above decision by the Board. On 17 February 2010 the applicant filed this application on an urgent basis and set it down for hearing on 9 March 2010. He sought an order:

- 6.1 condoning non-compliance with the rules of the this court and that the matter be heard on an urgent basis;
- 6.2 that the decision of the fifth respondent for the further profile to be placed before it on 11 September 2011 be reviewed and set aside;
- 6.3 that the decision of the fifth respondent be replaced with the order that the applicant be and is hereby placed on parole;
- 6.4 Costs of the application.

I was informed by Counsel from the bar that on 9 March 2010 the matter was struck off the roll on the basis that it was not urgent. Although urgency is no longer an issue I nonetheless deem it expedient to deal with it later in this judgment since this is the general trend that is followed by the prisoners in this division.

[7] It was argued on behalf of the applicant that the approval of further profile for 11 September 2011 (the correct date seems to be the 30th of November 2011) is basically the same result that was arrived at on 3 September 2009 except for the change of date. The nub of the argument was that despite the ruling by this Court on 16 November 2009 that the applicant be considered for parole this was not done but the application was effectively postponed to November 2011. It was further argued that;

- (a) the refusal by the Case Management Committee to recommend the placement on parole before the applicant has served half of his sentence was the application of the previous policies and was therefore an infringement of the applicant's constitutional rights.

- (b) the fifth respondent took into account irrelevant considerations. It was submitted that the length of the period of sentence is irrelevant when considering placement on parole. What is relevant is whether the applicant has served a $\frac{1}{3}$ of his sentence in terms of the policy.
- (c) the Board committed an error in that it laboured under the impression that the applicant had not completed some of the programmes whereas in fact he had completed all the programmes he had to undergo.
- (d) no reference was made to the recommendations by Professor Van der Hoven. The prime factor which was taken into consideration was the seriousness of the offence.
- (e) the Board was biased.
- (f) the seriousness of the offence was a factor which was already taken into account by a court of law when it imposed the sentence.

- (g) the Social Worker's report dated 3 December 2009 which indicated that the applicant has completed the anger management was not taken into account.
- (h) the Board failed to take into account the report by Dr Verster which was to the effect that the applicant was a model prisoner and was extremely repentant and therefore a fit candidate for parole.

[8] Before dealing with the above argument it is expedient to set out very briefly the events that led to the conviction and sentence of the applicant as found by the trial court. The applicant was a policeman. On 24 December 2001 he arrived at the scene of crime where he found the deceased and the complainant already handcuffed. He ordered them to get up and flee and when they did so he shot at both of them whilst they were still handcuffed. One of the victims was killed and one was injured. The applicant influenced the State witnesses not to tell the truth about what happened. He was accordingly convicted and sentenced to effectively 18 years.

[9] The determination of the length of the period of detention in prison after conviction is the function of the trial Court taking into account all relevant factors including the seriousness of the offence. The prison authority's function is to manage the sentence bearing in mind the remarks, if any, of the trial court during the sentence stage. When considering the possibility of placement on parole the Board is not altering the sentence of the offender. The offender is expected to serve his full term of his sentence subject to the privileges accorded to him by the prison authorities.¹ These privileges include the award of credits to prisoners sentenced to determinate sentences.

[10] In terms of section 136(1) of the Correctional Services Act No. 111 of 1998 *"(1) Any person serving a sentence of incarceration immediately before the commencement of Chapters IV, VI and VII is subject to the provisions of the Correctional Services Act, 1959 (Act 8 of 1959), relating to his or her placement under community corrections, and is to be considered for such release and placement by the Correctional Supervision and Parole Board in terms of the policy and guidelines applied by the former*

¹ See section 73 of the Correctional Services Act 111 of 1998.

Parole Boards prior to the commencement of those Chapters.” At the time when the applicant was sentenced the policy applicable to him was that he should serve at least a $\frac{1}{3}$ of his sentence before he can be considered for placement on parole. On 3 September 2009 he therefore qualified to be considered for placement on parole.

[11] It is trite law that a prisoner has no right to be released on parole.² He, however, has a right to be considered. Furthermore once an offender has been lawfully sentenced by a court of law he or she has no right to liberty. That right to liberty is deprived by process of law after he/she has been sentenced. The right to be considered for parole should not be equated to the right to be freed from prison. That right only arises once the Board decides to grant parole. The right to be considered for parole is an administrative action and consequently a prisoner is entitled to a fair procedure. Section 33 of the Constitution of the Republic of South Africa Act No. 108 of 1996 provides that *“Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.”*

² Combrinck v Minister of Correctional Services 2001 (3) SA 338 (D) at 341

[12] When considering the merits of the application for placement on parole the Board is entitled to take into account the seriousness of the offence. The argument that this is irrelevant consideration must therefore be rejected. The Board is not misdirecting itself when it considers murder as a serious offence which warrants detention for a longer period otherwise this would make a mockery of the justice system. When a court of law decides to sentence a person to 18 years it is expected that that person will stay for longer period in prison. The prison authorities from time to time formulate policies regarding management of sentences. They do so in order to set their own guidelines. It does not follow that a person who qualifies for consideration must be released as matter of course without further ado.

[13] It is now a well established principle that, in controlling the exercise of administrative actions by functionaries of the government, Courts must always respect the separation of powers. If in the opinion of the Board the prisoner does measure up with its standards to be released on parole, it is not for this Court to substitute that decision simply because in its view it would not have done so. The function of this Court is to control, by way of judicial review, an abuse of power where a decision is, *inter alia*,

so unreasonable that no reasonable person would have taken it in the circumstances. The Court should take care not to usurp the functions of administrative agencies.³

[14] If one has regard to the reasons of the Board as set out in paragraph 5 above it is clear that the Board applied its mind to the matter. The fact that it failed to state each and every aspect that it considered is no justification that its decision was unreasonable or bias. Although there were recommendations such as those of Professor Van der Hoven and Dr Verster they remain recommendations. They are not binding on the Board. The Board must still apply its mind in the fulfilment of its statutory mandate. It is expected of those who are entrusted with the duty to protect the society to do the best they can to ensure, as far as is practically possible, that the justice system is not rendered a mockery by their conduct. If the Board decides that for violent crimes it will enforce the will of the sentencing Courts to keep offenders away from the society this Court should be loath to interfere.

[15] It was argued that the Board made an error by deciding that the applicant needed more Anger Management Related

³ Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC) at 513 para 45-46

Programmes. I do not agree. The fact that the applicant has undergone this anger management programme is no bar to the Board deciding that he should do it again if it did not achieve the desired effect. It is up to the applicant to obey the authorities or stay longer in prison. The choice is his. This Court will be inundated with urgent applications for the release of prisoners on parole if it were to easily usurp this power of the parole Board. Courts ought to adopt a "hands off" attitude to matters reserved for other arms of the government and only intervene when circumstances warrant such intervention. In my view this is not such a case.

[16] The notice of motion has been formulated in such a manner as to give an impression that the applicant is of the view that his application for placement on parole was simply postponed to 2011. The reading thereof implies that this Court should review the decision to postpone the consideration of placement on parole. However during oral argument we debated this aspect with Counsel for all parties. Counsel for the applicant stated that it was unfortunate the way the prayer was couched. It was intended to include a prayer that the decision not to place the applicant on parole be reviewed and set aside. He applied for amendment to

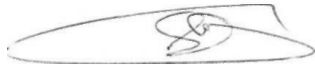
the prayer to put this as an alternative prayer. Although Mr Sithole SC, who appeared for the respondents, objected to this I see no prejudice in this regard and I grant the amendment.

[17] Lastly I want to comment on the manner in which these applications are brought to this Court. Prisoners invariably, and in almost all their cases, bring their matters in an urgent court. In some cases the prisoners have been sentenced to life imprisonment. The argument is often advanced that cases involving prisoners are urgent in that they involve their liberty. They argue that they have a right to freedom of security in terms of section 12 of the Constitution. In my view there is a fallacy in this argument. It loses sight of the fact that once a prisoner has been lawfully sentenced by a court of law his/her right to freedom is limited to prison grounds. This limitation is justifiable in an open democratic society. A prisoner has no right to be released before he has served his sentence in full. For this reason I see no reason why they should be treated differently from ordinary litigants. They, like all litigants, must comply with the well established principles relating to urgent applications. In particular if a prisoner claims urgency, such urgency must be shown and grounds thereof be clearly stated on the papers. The right to liberty is not per se a

ground constituting urgency. Something more is required. It is now well settled that in the absence of the grounds for urgency these cases ought to be struck off the roll. The right to freedom can only arise once the prisoner has served his full sentence or has been granted parole. Lest I be interpreted as saying that prisoners cannot bring their cases to court on an urgent basis, this is not so. Each case will have to be determined on its own merit.

[18] In view of all of the above I am not persuaded that the applicant has made out a case for the review and setting aside of the decision of the fifth respondent. There is no reason why costs should not follow the event. In the result I make the following order.

The application is dismissed with costs.

A handwritten signature in black ink, appearing to be 'B R Tokota', enclosed within a hand-drawn oval border.

B R TOKOTA

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 10 June 2010

Date of judgment:

Appearances for the applicant Adv H P Joubert

Instructed by Brewis Attorneys

For the respondents: Adv M N S Sithole SC

Adv S Mphahlele

Instructed by the State Attorney Pretoria