

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

Case No: 37111/2008

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
21/5/2010
DATE SIGNATURE

In the matter between:

SEBOKOE BOBBY MARTIN

APPLICANT

And

21/7/2010

MINISTER OF CORRECTIONAL SERVICES
CHAIRMAN: CSPB PRETORIA CENTRAL CC
CHAIRMAN: CMC PRETORIA CENTRAL CC

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

JUDGMENT

MAVUNDLA, AJ.

[1] The Appellant brought on urgent basis this application seeking to have the decision by the second respondent issued on 4 March 2008 not to grant him parole reviewed and set aside. He further sought an order that the respondent be ordered to have him released on parole within 30 calendar days of the order.

[2] The applicant was convicted of robbery with aggravating circumstances as defined in s1 of Act 51 of 1977 on 10 May 2001 and sentenced on 8 August 2003 to an effective 15 (fifteen) years imprisonment under section 276(1) (b) of the Criminal Procedure Act, No. 51 of 1977. He has received a six months general Presidential amnesties resulting in an effective sentence of 14 years. He has since served, at the time of the application, 5 years of his sentence.

[3] It is common cause that applicant has completed various rehabilitative courses and programmes, namely successful anger management programs, life skill programmes, HIV/Aids awareness programme, a business orientation course, a course in public speaking and motivation. He has also received positive reports from the Workshop Manager and Religious Care worker.

[4] It is also common cause that the applicant had served at least one third of his sentence and that he qualifies to be considered to be released on parole. It is also common cause that he

appeared before the second respondent on 4 March 2008 for consideration whether he should be placed on parole. The second respondent decided that he should not be placed on parole but rather a further profile for reconsideration of possible placement on parole be submitted on 4 March 2010.

[5] The applicant's chagrin with the decision of the second respondent is that:

- (1) he qualifies for a possible placement on parole on completion of a third of his sentence in terms of the previous Correctional Services Act;
- (2) he was not furnished with a report as contemplated by section 42 of Act 111;
- (3) he was not afforded an opportunity to submit a written representation as required by section 42(3) of the Act;
- (4) the second respondent did not seriously consider the positive reports as indication of his readiness for placement on parole;
- (5) the respondent did not seriously apply its mind to the credits he has since earned, notwithstanding the fact that

he qualified for placement on parole after completing one third of his sentence;

(6) the respondent has failed to comply with the provisions of section 65(4)(a) of Act 8 which is peremptory;

(7) the respondent failed to consider placing him on day parole.

[6] The applicant contends further that there is no rational basis for the decision of the respondent in not placing him on parole.

[7] With regard to urgency the respondent contended that the application was initially removed from the urgent roll by the applicant's legal representative as it was not urgent. Indeed once a matter is removed by the applicant from the urgent roll, it invariably loses its urgency.

[8] The respondent denies that it did not apply its mind to all the aspects complained of. According to the second respondent, in arriving at the decision complained of, it had taken into account the rehabilitation programmes the applicant had successfully

attended, the seriousness of the crime, and the length of the sentence and the interest of the community.

[9] It needs mention that from the record provided by the second respondent as annexure "A", it is stated that the applicant "is a B group. He must also provide the CSPB with sentence remarks so that the Parole Board can come to an informed decision. Assessment Tool, Pre-release Programmes and address are outstanding. Further profile approved for 2010-03-04".

[10] In *casu* it has been submitted on behalf of the applicant that the second respondent, in taking its decision, was mindful of the 3 main functions of the correctional system in South Africa, namely rehabilitative function, punitive function and retributive function. On the basis thereof and the other factors referred to herein above it was decided not to place the applicant on parole.

[11] It is further submitted on behalf of the respondents that the second respondent made a just and equitable decision taking

into account the positive and negative factors before coming into its decision.

[12] It has been submitted on behalf of the applicant, *inter alia*, that the applicant was not informed of the contents of the report that the third respondent submitted to the second respondent nor was he given an opportunity to submit written representation to the second respondent, as required in terms of s42 (3)¹ of the Correctional Service Act. It is further contended that the aforesaid failure rendered the proceedings procedurally unfair in terms of section 6(2)(c) of *PAJA*.

[13] It is further submitted that the second respondent acknowledged that the appellant qualifies to be considered to be released on parole. However the reason given for the refusal is indicative that it is not rationally connected to the information that was before the second respondent nor rationally connected to the purposes of the empowering

¹ This subsection reads as follows:

“(3) A prisoner must be informed of the contents of the report submitted by the Case Management Committee to the Correctional Supervision and Parole Board or Area Manager and be afforded the opportunity to submit written representations to the Correctional Supervision and Parole Board or Area Manager, as the case may be.;

provision. In the regard reliance is made on s6(2)(f)(ii)(bb) of PAJA.

[14] It has finally been submitted that the application should succeed with costs.

[15] I deem it not necessary to address the issue of urgency since it is now academic. Besides the matter was fully ventilated on the merits.

[16] In review proceedings, the applicant must satisfy the Court that the tribunal whose decision is sought to be reviewed, failed to discharge its duties honestly and impartially and did so capriciously; vide *Turner v Jockey Club of South Africa*².

[17] In the matter of *Lebotsa v Minister of Correctional Services*³ it was held that the provisions of s42 are peremptory and the Parole Board must furnish the prisoner with the report of the CMC and afford him an opportunity to make written representation. In that case the Parole Board made an adverse

² 1974 (3) SA 633 (A) at 646H

³ 2010 (1) SACR 379 (GNP at 385d-387

decision against the prisoners, namely, refusing to place them on parole, without having afforded them the report of the CMC nor inviting them to furnish written submissions thereon. The decision of the Parole Board was found to have been taken capriciously and was set aside.

- [18] The respondent, besides denying that it had not complied with the provisions of section 42(3) has not demonstrated in what manner it so complied. A bare denial without any substantiation is taken as an admission in motion proceedings. The applicant states that he was not provided with such report nor invited to make written submissions against any such report, if ever same was available. Annexure A which is supposed to be relevant record of the Parole Board does not reveal that the applicant was furnished with the report of the Case Management Committee (CMC), and invited to comment thereon in writing. I am therefore not satisfied that the provisions of s42(3) were complied with by the second respondent.

[19] The respondent has further submitted that it took into consideration; *inter alia*, rehabilitative function, punitive function and retributive function of the correctional system.

[20] The provisions of s42 read as follows, *inter alia*;

“Case Management Committee

- (1) At each prison there must be one or more Case Management Committee composed of correctional officials as prescribed by regulation.
- (2) The Case Management Committee must-
 - (a) ensure that each sentenced prisoner has been assessed, and that for prisoner serving more than twelve months there is a plan specified in section 38(2);
 - (b) interview, at regular intervals, each prisoner sentenced to more than twelve months, review the plan for such prisoners and the progress made and, if necessary, amend such plan;
 - (c) make preliminary arrangements, in consultation with the Head of Community Corrections for possible placement of a prisoner under community corrections;
 - (d) submit a report, together with the relevant documents, to the Correctional Supervision and Parole Board regarding-
 - (i) the offence or offences for which the sentenced prisoner is serving a term of imprisonment together with the judgment on the merits and any remarks made by the court in

- question at the time of imposition of sentence if made available to the Department;
- (ii) the previous record of such prisoner;
 - (iii) the conduct, disciplinary record, adaptation, training, aptitude, industry, physical and mental state of such prisoner;
 - (iv) the likelihood of relapse into crime, the risk posed to the community and the manner in which this risk can be reduced;
 - (v) ...
 - (vi) ...
 - (vii) the possible placement of such prisoner on day parole or parole, and the conditions for such placement; and
 - (viii) such other matters as the Correctional Supervision and Parole Board may request; and
- (e) at the request of Area manager, submit a report contemplated in paragraph (d) to him or her in respect of any prisoner sentenced to 12 months imprisonment."

[21] It is common cause that the applicant has attended rehabilitative programmes. I do accept that the respondent took these into account. However, it is not clear from the record what value did the second respondent place on such factors. The very fact that the applicant has been sentenced to

a long term imprisonment for the serious offence he was convicted for is factual. The purpose of sentencing is not only retributive and punitive, but also rehabilitative. For instance the respondent does not indicate what view it formed regarding the rehabilitation prospect of the applicant. Neither does it opionate on his likelihood of relapse. The second respondent, in my view, must demonstrate how these factors had interplayed against one another when it applied its mind thereon. A lip service that it took them into consideration, is in my mind not satisfactory, to refute the contention of the applicant that the respondent did not apply its mind. In the absence of any indication that the second respondent was furnished with a report that complies with section 42(2) it is hard to envisage how it applied its mind to these three sentencing factors.

[22] The second respondent expects of the applicant to furnish it with the sentencing remarks. I am of the view that this contention is ill founded. It can hardly be expected of the applicant to satisfy this requirement when he is under the

control of the second respondent. Besides, the second respondent is in a better position to obtain such information. This clearly demonstrates that the second respondent did not judiciously apply its mind. It was the duty of the second respondent to obtain the sentencing remarks but it failed to acquit itself thereof.

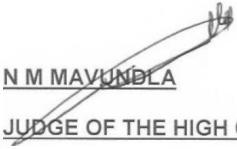
[23] In the circumstances I find that the second respondents failed to discharge its duties honestly and impartially and arrived at its decision capriciously. In the result the decision of the second respondent not to place applicant for possible consideration on parole stands to be set aside.

[24] In the result I make the following order;

1. The decision of the Correctional Services Parole Board Pretoria Central taken in respect of the applicant on 4 March 2008 is reviewed and set aside.
2. The Case Management Committee Pretoria Central is ordered to immediately prepare the report contemplated

in section 42 of Act 111 of 1998 in respect of the applicant, and submit the report to the applicant for written representation, as required by section 42(3) of Act 111 of 1998, so that same can be available for a sitting of the Parole Board Pretoria Central not later than 30 days of this order.

3. The Correctional Services Parole Board Pretoria Central is ordered to convene and consider the applicant's release on parole, as required by section 75(1) of Act 111 of 1998, read with s42 of Act 111 of 1998, not later than 30 days from date of this order.
4. The respondents are ordered to pay the costs of this application.


N M MAVUNDLA

JUDGE OF THE HIGH COURT

Date of delivery: 21 July 2010

APPLICANT'S ATT : MOHAMED SEEDAT ATTORNEYS

APPLICANT'S ADV : ADV P W SPRINGVELDT

RESPONDANT'S ATT : STATE ATTORNEYS

DEFENDANT'S ADV : ADV CGVO SEVENSTER