

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

Case No: 343/2020

Date Heard: 19 November 2020

Date Delivered: 1 December 2020

In the matter between:

ROBERT ANTHONY JOHN HEWITT

APPLICANT

and

THE MINISTER, DEPARTMENT OF

CORRECTIONAL SERVICES

FIRST RESPONDENT

THE NATIONAL COMMISSIONER, DEPARTMENT OF

SECOND RESPONDENT

CORRECTIONAL SERVICES

CORRECTIONAL SUPERVISION AND PAROLE BOARD

ST ALBANS CORRECTIONAL CENTRE

THIRD RESPONDENT

JUDGMENT

MULLINS AJ:

[1] The Applicant in this matter, Robert Anthony John Hewitt, was charged with and convicted of various counts of rape and sexual assault.¹ He was sentenced to six years imprisonment and at the time of the launching of this application he was still incarcerated in St Albans Prison.

¹ The details of which are not relevant for present purposes

[2] The three Respondents are the Minister of Justice and Correctional Supervision, the National Commissioner of the same department and the Parole Board, St Albans Correctional Centre. (Unless it is necessary to identify a specific Respondent, for the sake of convenience the Respondents will be referred to collectively as “the Department”).

[3] On 7 February 2020 the Applicant launched an application for urgent relief, which may be paraphrased as follows:

- (a) That the Parole Board consider the Applicant for release and placement under community corrections with immediate effect;
Alternatively:
- (b) Declaring the Department’s failure to take appropriate steps to consider him for parole an administrative action in accordance with the Promotion of Administrative Justice Act, 3 of 2000 (PAJA);
- (c) Declaring the Department’s failure to take the relevant administrative action reviewable and set aside accordingly, alternatively declared unlawful;
- (d) Directing the Department to convene a Parole Board hearing in accordance with section 75 of the Correctional Services Act, 111 of 1998 (“the Act”) within seven days of service of the Court Order and to consider his application for parole;
- (e) Ensuring that the Case Management Committee forthwith produce a report in terms of s42 of the Act for the Parole Board’s consideration;

- (f) Ensuring that the complainants² are advised of the hearing so that they may make representations and/or attend the hearing;
- (g) Informing the Applicant's attorney of the date of the Parole Board's hearing to enable him to prepare and make representations;
- (h) Ensuring that the Parole Board convenes urgently in order to consider the Applicant's release on parole and to furnish the Applicant with written reasons for any decision adverse to him.

[4] The Applicant prayed for costs against the First Respondent only.

[5] The Department was given until 3:00 p.m. on 14 February 2020 to deliver answering affidavits, if any. On behalf of the Respondent an answering affidavit was filed on 18 February 2020 by an official of the First Respondent, being the date of the hearing.³ By agreement the matter was postponed to 25 February 2020, costs reserved.

[6] On 24 February 2020, that is, a day before the hearing, the Applicant filed his replying affidavit.

[7] On 25 February 2020 the matter was settled by agreement in the following terms:

- "1. The Respondents are directed to take such administrative or other steps as may be necessary, to cause the relevant Correctional Supervision and Parole Board to convene on a date

² The Applicant's victims, there being three of them

³ The failure to comply with the stipulated time limit does not appear to be an issue

fixed, no later than 40 days from the date of this order, to consider the Applicant's placement on parole under community corrections in terms of section 75 of the Correctional Services Act, 111 of 1998 ("the Act"), such steps to include:

- 1.1. ensuring that the Case Management Committee produce forthwith the necessary report in terms of section 42 of the Act, for the Correctional Supervision and Parole Board's consideration;
- 1.2. ensuring that the National Commissioner has informed the Correctional Supervision and Parole Board immediately thereafter, so as to enable the latter to immediately inform the complainant's when and to whom they may make representations and when and where the Correctional Supervision and Parole Board meeting will take place, in terms of section 75 (4) of the said Act;
- 1.3. ensuring that the Correctional Supervision and Parole Board as is a matter of urgency, informed (sic) the complainant of such rights as may vest in them in terms of section 75 (4) of the said Act, to make representations or to attend the relevant Correctional Supervision and Parole Board meeting;
- 1.4. informing the Applicant's attorney of record forthwith of the date allocated for the Correctional Supervision and Parole Board meeting, to enable him to prepare for appropriate representation of the Applicant thereat; and

1.5. ensuring that the Correctional Supervision and Parole Board convenes urgently (within the period set out in paragraph 1 herein above) in order to consider the Applicant's release on parole under community corrections and in doing so, furnish the Applicant with written reasons for any decision adverse to the Applicant.

2. The cost of the application are reserved."

[8] Although it does not appear from the papers, I was advised from the bar that the Parole Board hearing duly took place and that the outcome thereof was in his favour and Applicant has been released on parole.

[9] The matter comes before me in respect of the costs only. The Applicant contends that he is entitled to the costs of the application, whereas the Department contends that each party should pay their own costs.

[10] In order to decide the question of costs it is necessary to deal with the merits of the matter, which were fully argued before me, Ms *Bands* appearing on behalf of the Applicant and Ms *Pango* on behalf of the Department. I am indebted to counsel for their assistance in the matter.

[11] The chronology of events leading up to the launching of the application is of vital importance. According to the Applicant the matter unfolded as follows:

(a) On 20 September 2016 the Applicant was sentenced to 6 years imprisonment;

- (b) Strictly speaking, after having served one-third of his sentence the Applicant was eligible for parole, but the Department apparently overlooked this and only considered him after he had served one-half of his sentence;⁴
- (c) During August 2019 the Parole Board duly considered the Applicant's case and approved his release on parole, effective from 23 September 2019;
- (d) However, the complainants had not been advised of the hearing, nor of their right to make representations (s 75 (4) of the Act) and when they heard that the Applicant was to be released on parole, they apparently raised objections;
- (e) The First Respondent referred the matter to the Parole Review Board and the Applicant's release on parole was put on hold;
- (f) As a result of this development, on 22 September 2019, and again on 26 September 2019, a family friend, one Adv J Engelbrecht SC,⁵ wrote to the Department requesting copies of the complainant's representations. He received no reply;
- (g) On 2 October 2019 Engelbrecht again wrote to the Department, *inter alia*, complaining of the lack of co-operation;
- (h) The Department responded on 11 October 2019, *inter alia*, explaining why the Applicant's parole had been suspended and that the complainants had been given until 21 October 2019 to make

⁴ The Applicant does not make an issue of this, as it would appear that at the time there was some doubt as to when he qualified for parole.

⁵ Although he is described as a family friend, for all intents and purposes he acted as a legal representative.

submissions, whereafter the Applicant would be given seven days in which to reply;

- (i) On 21 October 2019 the Department sent the complainants' representations to Engelbrecht under cover of an email (which Engelbrecht claims he never received) and inviting the Applicant to make representations for the review, which was to be held on 30 October 2019;
- (j) On the same day Engelbrecht received another email from the Department to the effect that the review was to be held on 25 October 2019;
- (k) Needless to say Engelbrecht was very unhappy with this state of affairs and despite a lengthy written objection as to the change of date, which, it was alleged, was to the prejudice of the Applicant, the review went ahead on 25 October 2019, the decision of the Review Board being as follows:

"At its meeting held on 25 October 2019 the Correctional Supervision and Parole Review Board (CSPRB) decided as follows:

- 1. The decision of the Correctional Supervision and Parole Board (CSPB) to place the offender on parole is reviewed and set aside.*
- 2. The Department is to take immediate steps to pursue Victim Offender Dialogue (VOD).⁶ In the event of a victim being out of the country, the*

⁶ The VOD process is dealt with below.

dialogue should take place per Skype or any other means possible, if the victim so wishes.

3. *Due notice must be given to the victims or their representatives so that the victims be afforded a proper opportunity to participate in the restorative justice process as the law requires.*

4. *The Department must pursue individual psychotherapy for the offender to gain insight into his offences.*

5. *This decision must be communicated forthwith to all the relevant parties.”*

- (l) On 27 November 2019, and apparently at the instigation of the Applicant's wife, the Applicant's legal representative (an attorneys firm) berated the Department's inaction and demanded a parole hearing by 10 December 2019;
- (m) On 8 December 2019 the Applicant's legal representative wrote to the Department recommending that the VOD process be conducted via Skype and again complaining that the delay was prejudicing the Applicant;
- (n) This was followed by a further email, dated 18 December 2019, once again complaining of the lack of action by the Department;
- (o) The Department replied on 19 December 2019 to the effect that one Rev Faleni had advised that the Applicant was finally willing to attend the VOD process, together with his legal representative, and

furthermore inviting the Applicant's legal representative to contact Faleni;

- (p) On 2 January 2020, and again on 9 January 2020, Engelbrecht wrote to the Department yet again complaining of the lack of progress;
- (q) On 15 January 2020 the Applicant's wife, who had apparently been making regular telephone calls to the Department, wrote to the Department complaining of the delay;
- (r) When there was no response from the Department (to any of the above queries), on 7 February 2020 the Applicant launched this application on an urgent basis.

[12] The above chronology of events is gleaned from the Applicant's founding affidavit. The Department does not take issue with the sequence of events, but adds certain developments of its own which, it submits, puts a different slant on the matter.

[13] In the answering affidavit the Area Commissioner of the First Respondent, representing all the Respondents, states as follows:

- (a) At the initial parole hearing the complainants were not consulted because at a previous hearing to convert the Applicant's sentence from custody to house arrest they had shown no interest;
- (b) Shortly after the Parole Review Board's decision the Department "commenced" the VOD process with the assistance of its spiritual adviser, Rev Faleni;

- (c) As the Applicant had persisted in denying the commission of the offences further therapeutic sessions with the Applicant were deemed necessary in order to protect the complainants and prepare the Applicant for the VOD process. A report from a psychologist as to the outcome of the sessions is dated 25 November 2019 (the same day that the Parole Review Board handed down its decision);
- (d) Rev Faleni had meetings with the Applicant, who had apparently initially refused to agree to participate in the VOD process, as a result of which he, Faleni, sought the co-operation of the family priest and the Applicant's family;
- (e) During December 2019 the Applicant's family managed to convince him to take part in the VOD process. However, the Applicant insisted that all the complainants had to be present in person,⁷ which was at odds with paragraph 2 of the Parole Review Board's decision;
- (f) Once the Applicant had finally agreed to participate in the VOD process the Department's legal services was notified (for what reason is not explained);
- (g) On 24 January 2020 the Department addressed a letter to an attorneys firm representing the complainants, inviting them to participate in the VOD process. There does not appear to have been a reply;
- (h) On 7 February 2020 the Department received a letter from another attorneys firm stating that it represented two of the complainants. Accordingly, on the same day a letter in similar terms as the one referred to above, was sent to this firm;

⁷ One of the complainants lives in New Zealand.

- (i) Before any response could be received from either firm of attorneys, on 10 February 2020 the Applicant launched the urgent application;
- (j) Despite this development, on 14 February 2020 the State Attorney sent both of the attorneys firms an email putting them on terms with respect to the VOD process. They were advised that should they not respond within seven days the parole process would be finalised in their absence. There does not appear to have been any response from either firm.

[14] In his replying affidavit the Applicant states that:

- (a) The VOD process is, in effect, a red-herring in that it is not a prerequisite for the holding of a parole hearing;
- (b) Any concession made with respect to the VOD process should not have been construed as an abandonment of his constitutional rights, nor a consent to the relaxation of section 75 of the Act;
- (c) Although he did agree to the VOD process, he was not in agreement with the Skype meeting because he feared that the proceedings would be splashed across social media platforms, which had happened before.

[15] So much for the history of the matter.

[16] A word about the VOD process. This procedure is not provided for in any legislation and it appears to be an informal, voluntary procedure which has been introduced by the Department, presumably as a means of hopefully reconciling the

perpetrator and the victim of a crime, or at least helping them come to terms therewith. The only legislative procedure involving victim participation (that I was referred to) is contained in section 75 (4) of the Act, which allows the victim and/or family of a victim to make representations and to attend a Parole Board hearing, if so advised.

[17] In any event, the Court Order dated 25 February 2020, which was made by agreement, abandoned the VOD process. Whether or not the complainants made representations and/or appeared at the Parole Board hearing is not known and is, in any event, irrelevant for present purposes.

[18] I turn now to consider the legal position. When it comes to an award of costs the **basic rule** was formulated by Innes CJ in **Kruger Bros & Wasserman v Ruskin** 1918 AD 63 at 69:

“The rule of law is that all costs – unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order, without his permission.”

[19] The **general rule** is that costs follow the event, that is, in the absence of special circumstances the successful party **should** be awarded the costs occasioned by having had to approach a court for relief. This is trite law. See **Kathrada v Arbitration Tribunal and Another** 1975 (2) SA 673 (AD).

[20] The general rule is subject to the overriding principle embodied in the basic rule, namely the court's discretion, judicially exercised, is the final say on the matter. Dealing with the question of costs (in respect of an application for an amendment) the following was stated in **Cganga v AA Mutual Insurance Association Ltd** 1979 (3) SA 320 (E) at 330D:

"Each case in my view must depend on its own merits and the discretion of the Court to make an order which is fair in all the circumstances must remain unfettered."

[21] Notwithstanding the pre-eminence of the basic rule, it has been held that the general rule should not be departed from without good grounds. This issue was aptly summed up (albeit on appeal) in **Letsitele Stores (Pty) Ltd v Roets** 1959 (4) SA 579 (T) at 579H 580B:

"In an appeal of this nature the general principles should be observed. The first is that the Court of first instance has a judicial discretion in regard to costs and this Court cannot interfere unless it is satisfied that the discretion was not exercised judicially. The second is that the successful party should as a general rule, have his costs. This is a rule which should not be departed from without the existence of good grounds for doing so. Where a successful party has been deprived of his costs, an appeal Court will enquire whether there would be any grounds for this departure from the general rule, and if there are no such grounds, then ordinarily it will interfere. Any grounds here means any grounds on which a reasonable person could come to the conclusion arrived at. (Merber v Merber 1948 (1) SA 446 (A.D.) at pp 452 – 453 and the cases there cited.)"

The discretion of the Court a quo is therefore not unlimited and this court should interfere if it can be shown, for example, that the Court a quo has exercised its discretion capriciously or upon a wrong principle, that it has not brought an unbiased judgment to bear on the question or has not acted for substantial reason.”⁸

[22] I turn now to the present matter. If one has reference to the founding affidavit, on the face of it a case is definitely made out for the relief sought. All the indications are that the Department was dragging its feet, if not being obstructive. The Applicant goes even further. He alleges that the complainants’ objections, particularly their posts on social media, “... *demonstrates* [their] *vindictive motive which appears to have mesmerised the Parole Board into doing nothing.*”

[23] However, the Department’s answering affidavit paints a somewhat different picture. Not only was the Department dealing with the matter, the Applicant was fully aware thereof, albeit not at a pace to satisfy him.

[24] The date on which the Applicant was to be released on parole was 23 September 2019; the date on which the urgent application was launched was 10 February 2020: a period of approximately 5 ½ months. Can it be said that this was an unreasonable delay in the circumstances?

[25] Given that the Parole Review Board hearing had to take place and thereafter the rulings of this body complied with, the lapse of time does not strike me as

⁸ Although decided on appeal, the principles are applicable to the present matter.

unreasonable, particularly as the Christmas holiday period fell in the middle (when even Engelbrecht fell silent for a while).

[26] The Applicant was also partly responsible for the delay. Although there is some dispute in this regard, initially he refused to take part in the VOD process. He states that it was only a Skype meeting that he objected to. Whatever the reason, some of the delay can be attributed to him.

[27] The matter must be viewed holistically, that is, on the papers as a whole. While the Applicant's founding papers make out a case for urgent relief, the Department's answering papers place the matter in context. The correspondence indicates that it was dealing with the matter and it was not dragging its feet unduly. On the other hand, the Applicant's expectations were too high. He was impatient, which is understandable in the circumstances from his, and his family's, point of view, but not dispositive of the matter.

[28] Ms *Bands* argued that the Court Order that was made by agreement on 25 February 2020 amounts to a victory for the Applicant, or at the very least substantial success. Ms *Bands* points out that, but for the 40 day period in which to hold the hearing (seven days in the notice of motion) the agreement coincides exactly with prayers 2.5 to 2.9 of the notice of motion.⁹

⁹ Paraphrased in paragraphs [7] above

[29] On behalf of the Department Ms *Pango* argued that the agreement merely reflects what the Department was in law obliged to do, and was in any event already in the process of doing.

[30] There is merit in both arguments.

[31] It was put it to Ms *Pango* that the fact that the Department's case was that each party should pay its own costs was an acknowledgement by it that it had been remiss to a certain extent. Her response was that she had no instructions to make this concession. I am, however, of the view that this is precisely the position, and refer to what is stated below.

[32] I am mindful of the Applicant's constitutional rights, particularly section 12(1)(a) of the Constitution, which provides:

“(1) Everyone has the right to freedom and security of the person, that includes the right-

(a) Not to be deprived of freedom arbitrarily or without just cause; ...”

[33] In addition, section 33 of the Constitution, read with PAJA, provides that everyone is entitled to administrative action which is lawful, reasonable and procedurally fair.

[34] Can it be said that the Applicant's continued incarceration was arbitrary and without just cause? I do not believe so. He was not entitled to parole as of right. He merely had the right to be considered for parole. Section 75(1) of the Act states:

*“(1) A Correctional Supervision and Parole Board, having considered the report on any sentenced offender serving a determinate sentence of more than 24 months submitted to it by the Case Management Committee in terms of section 42 and in the light of any other information or argument, **may-***

(a) Subject to the provisions of paragraphs (b) and (c) and subsection (1A)¹⁰ place a sentenced offender under correctional supervision or day parole or grant parole or medical parole and, subject to the provisions of section 52,¹¹ set the conditions of community corrections imposed on the sentenced offender;
...” (my emphasis)

[35] Thus, the Applicant's rights in terms of section 12 of the Constitution were contingent on the outcome of the Parole Board hearing. His incarceration was accordingly not arbitrary and without just cause. It was dependant on the Parole Board finding that he should be released on parole.

[36] Can it be said that the Applicant was subjected to administrative action which was unlawful, unreasonable and procedurally unfair? Section 3 of PAJA provides as follows:

¹⁰ These provisos do not apply.

¹¹ This section provides for conditions under which parole may be granted.

“(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2)(a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4)¹², must give the person referred to in subsection (1)-

- (i) adequate notice of the nature and purpose of the proposed administrative action;*
- (ii) a reasonable opportunity to make representations;*
- (iii) a clear statement of the administrative action;*
- (iv) adequate notice of any right of review on appeal, where applicable; and*
- (v) adequate notice of the right to request reasons in terms of section 5.”*

[37] The Applicant was fully aware of his rights and pursued them aggressively. His complaint that the Department had been mesmerised into doing nothing is without merit. The only basis upon which he might have reason to complain is that the process was taking too long.

[38] Bearing section 3(2)(a) of PAJA in mind, I do not believe that the process was taking an unreasonably long time. In one respect the Department acted with extreme haste and in this regard I refer to the Parole Review Board’s hearing, which

¹² Which does not apply.

was commenced with too much haste for the Applicant's liking. And, as I have already alluded to, given the inertia that inevitably occurs at Christmas time, a certain amount of delay is understandable.

[39] Where the Department was at fault was its failure at the initial Parole Board hearing to notify the complainants in accordance to section 75(4) of the Act. But this omission is explained. It was a *bona fide* error, in my view. There was certainly no wilful disregard for the law.

[40] Insofar as substantial success is concerned, it is so that the relief agreed to embodies some of the terms of the original notice of motion. But what it does not contain is a declaration that the Department's failure to act was an administrative act which stood to be reviewed and set aside¹³. There is thus some merit in Ms *Pango's* submission that what the Department agreed to was what it was in any event obliged to do – and was in the process of doing.

[41] In the circumstances, applying the basic rule, read with the general rule, in the exercise of my discretion I make the following order:

Each party is ordered to pay their own costs.

N J MULLINS

ACTING JUDGE OF THE HIGH COURT

¹³ Paraphrased in paragraphs 3(b) and (c) above.

Appearances:

For Applicant: Adv I Bands instructed by Nolands Law, Port Elizabeth

For Respondents: Adv M Pango instructed by the State Attorney, Port Elizabeth