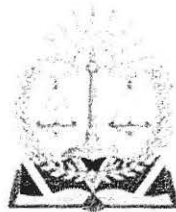


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG



CASE NO: 2021/30167

(1) Reportable No
(2) Of interest to other Judges No
(3) Revised: Yes - *correcting spelling of applicant's name*
Date: 13/09/2021

Signature.....

In the matter between:

MBULELO ZITHA

Applicant

and

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

1st Respondent

THE ACTING AREA COMMISSIONER CORRECTIONAL SERVICES

2nd Respondent

(Mr Henry Makhubela, Boksburg Management Area)

THE HEAD OF CORRECTIONAL CENTRE

3rd Respondent

(Mr Lucky Mabhena, Boksburg Correctional Services Centre A)

THE CHAIRPERSON OF THE CASE MANAGEMENT COMMITTEE

4th Respondent

(Mrs Thokozile Lekker, Boksburg Correctional Services Centre A)

J U D G M E N T

MAIER-FRAWLEY J***Introduction***

1. This is an application wherein the applicant seeks an order in the following terms:
 - "1. That the application be heard as a normal application and that Rule 5 of the uniform rules of court be applied and that the normal form[s] and service provided for in the uniform rules may be abridged to that extent as set forth hereunder.
 2. That the applicable normal procedure is dispensed for the purpose of the application.
 3. That the court declares the decision made by the respondents in dismissing the applicant's application to have his sentence converted into Correctional Supervision and to be considered for placement on Correctional supervision based on the notion that the applicant doesn't qualify because of the violent and aggressive nature of the crimes(s) he was convicted for to be a contravention of the provisions made in section 73 (7) (d) and (e) of the Correctional Matters Amendment act 5 of 2011 read together with sections 276 (1)(b) and 276A (3)(a) of the Criminal Procedure Act and thus unfairly discriminatory unlawful invalid and inconsistent with the Constitution.
 4. That the court narrowly clarifies and simplifies the contextual interpretation of the provisions made in terms of section 276A (3) a) (ii) of the criminal procedure Act 51 of 1977.
 5. That the court orders the respondents to process the applicant's application to have his sentence converted into correctional Supervision and be considered by placement on Correctional supervision and adhere fully to the to the provisions made (sic) in section 73 (7) (d) and (e) of the Correctional Matters Amendment act 5 of 2011 read together with section 276(1)(b) and 276A(3) of the Criminal Procedure Act [the CPA] within 24 hours upon the issuing of this order.
 6. Costs of the matter.

7. Further and /or alternative relief. "
2. The applicant appeared in person at the High Court, Johannesburg, in order to access the virtual hearing conducted on 6 August 2021. He was previously represented by Adv. J. Magayi (Legal Aid South Africa) but on the morning of the hearing, the applicant informed the court that he had terminated the services of his Legal Aid representative due to an irreconcilable difference of opinion that had arisen between them. Mr Magayi requested permission to withdraw from the matter in the circumstances, which request I granted upon being assured by the applicant that he was both prepared and well equipped to argue the matter himself. Although Mr Magayi had prepared and filed written heads of argument on behalf of the applicant, the latter disavowed any reliance thereon. The applicant requested leave to submit new heads of argument that he had specially prepared shortly prior to the hearing. I allowed the applicant's new heads to be received into the record, given that there was no opposition to such request since the respondents were in default of appearance at the hearing, an aspect to which I return later in the judgment.

Background

3. The applicant is currently serving a 28 year sentence in the Boksburg Correctional centre. He was convicted on the 20th September 2011 of two counts of attempted murder, one count of pointing a firearm and two counts of robbery. He was also convicted of one count of murder and possession of an unlicensed firearm as well as possession of ammunition. He was sentenced to 30 years imprisonment. This sentence was subsequently reduced to 28 years on appeal.
4. Up to the time that this application was launched, the applicant has served 9 years and 10 months of his sentence. The applicant alleges that he was

granted a period of 6 months of 'special remission' on the 27 April 2012 by the former President of the country, thereby reducing his sentence to 27 years and six months. Assuming the correctness thereof (albeit in the absence of substantiating evidence) it means that if the period of remission is taken into account, the applicant will have served 10 years and four months of his 28 year sentence thus far.

5. The applicant alleges that his earliest date of release is 19 June 2025, being the date on which he would become eligible for consideration on parole.
6. Whilst serving his sentence, the applicant has improved his academic qualifications and presently he is a third year law student, studying through the University of South Africa (Unisa).
7. On 2 March 2021, the applicant submitted an application to the Case Management Committee for his sentence to be converted to correctional supervision and to be considered for placement under correctional supervision. This application was lodged in terms of section 73(7)(d) and (e) of the Correctional Services Act ('CSA'), read together with section 276(1)(b) and 276A(3)(a) of the CPA.¹
8. It is alleged that the fourth respondent refused to entertain the application in the following circumstances: On the 5 March 2021 the applicant was taken to the office of the fourth respondent, who spent approximately 3 minutes with the applicant and merely informed him that:
 - (i) he (the applicant) was serving a thirty year sentence (*which was clearly wrong*);
 - (ii) he had killed a person;

¹ Criminal Procedure Act, 51 of 1977, as amended.

- (iii) in her experience, the Department of Correctional Services has never been approached to process an application to convert a lengthy sentence such as the applicant's sentence to one of correctional supervision, such procedure usually applying to prisoners serving 5 years or less.
9. On 9 March 2021, in response to the fourth Respondent's utterances, the applicant lodged a formal complaint with the third Respondent, (Head of Correctional Centre), Mr Lucky Mabhena.²
 10. The applicant met with the third respondent who informed him that he does meet some of the conditions for his sentence to be converted, however such an application could only be brought in 2034, given that his sentence would only expire in 2039.
 11. On 30 March 2021, the applicant was furnished with formal written reasons as to why his application for conversion was declined. Reasons cited included:
 - (i) The applicant does not qualify due to the aggressive nature of the crimes for which he was convicted, namely, murder, attempted murder and armed robbery, and for which he is serving a term of imprisonment of 28 years. In this regard, the third respondent stated that *'all these crimes are regarded as aggressive crimes in terms of B order 1 Ch 26 subsection 12.1.(a) of the Correctional Services'*;
 - (ii) The applicant's sentence expiry date is 19 September 2039 and not 19 June 2025;
 - (iii) Having regard to the provisions of s 276A(3) of the CPA, the applicant did not meet the criteria for his application to be referred to a court as

² See Annexure 'MZ5'.

the remainder of his sentence until expiry date *'exceeds 5 years in line with section 73(7)(e) of the Correctional Services Act 111 of 1998.'*
(own emphasis)

12. On 31 March 2021, Ms Maseko, acting for the applicant, sent an e-mail to the second respondent in terms of s 21 of the Correctional Service Act 11 of 1998, seeking a review of the third respondent's decision and giving the latter 7 days to respond. Up to the time of the lodging of the present application, the second respondent has not replied to the correspondence addressed to him.
13. On 21 April 2021 the applicant submitted a letter (dated 19 April 2021) to the second respondent, seeking a review of the third respondent's decision, which application for review was submitted to the Acting Head of the Correctional Centre on the day, (Mr Radebe), for onward submission to the second respondent.³ Mr Radebe instructed the applicant to amend his application as he (Mr Radebe) was not pleased with the tone of the content recorded in paragraphs 16 to 18 thereof.
14. On 5 May 2021, the applicant submitted an amended application, which was received by Ms Bontle Matsebula, who handed same to the third respondent.
15. The present application was lodged on 15 June 2021 after the applicant had exhausted all internal remedies, however, to no avail. His attempts at reviewing the third respondent's decision were met with no response from the second respondent, both prior to and after his submission of an amended application for review.

³ See Annexure 'MZ8A.'

16. On 23 June 2021, the Judge President of this division issued a directive requiring the respondents to deliver their answering affidavit/s on or before 14 July 2021 with the applicant being directed to deliver his replying affidavit, if any, on or before 23 July 2021, by uploading same onto the CaseLines electronic platform.
17. The respondents, who were represented in the matter by the State Attorney, failed to comply with the aforesaid directive and notwithstanding being called upon to do so by service of a Notice of bar. Instead, on 3 August 2021, the State Attorney merely addressed correspondence to the applicant's Legal Aid representative, who was at that stage still representing him, in which the following was said: *"Please be advised that we've since requested instructions from our client and to date the same has not been forthcoming. In the premises, we've not been able to file the requisite answering affidavit herein."*
18. The respondents were invited in correspondence addressed by the registrar of the presiding Judge to the parties (including the State Attorney) to attend a virtual hearing of the matter on 6 August 2021, despite which the respondents all remained in default of appearance on that date.

Discussion

19. The grounds on which an internal review of the third respondent's decision was sought, is encapsulated in paragraphs 12- 14 of annexure 'MZ8A', where the following was stated:

" 12. It is of paramount importance for you to note that I am scheduled to be released parole on the 13th of March 2025 upon reaching my half sentence, minus the 6 months' special remission of sentence that I benefited from on the 27th of April 2012, which was granted by the former President Jacob Zuma and therefore, meet the criteria of not more than 5 years until my release date in future.

13. Furthermore, I have already served over a quarter of my sentence and therefore meet the requirements stipulated in section 73 (7) (e) of the Correctional Matters Amendment Act 5 of 2011.

14. I find it illogical that according to Mr. Mabheba I can only apply or qualify to have my sentence converted into correctional supervision and be placed on correctional supervision on the 19th of September 2034, when I will be left with 5 years until the expiry of my sentence, I mean at that time I would have been released on parole already. Which then begs the question, why would I apply for correctional supervision when I would have been on parole for almost 10 years? "

20. The Correctional Services Act of 1959 was repealed and replaced by the Correctional Services Act 111 of 1998 ('the CSA). It is the latter Act that is applicable in this case.

21. Section 73(7)(d) of the CSA provides that:

" A person sentenced to incarceration for a definite period in terms of section 276(1)(b) of the Criminal Procedure Act may not be placed in correctional supervision unless such sentence has been converted into correctional supervision in accordance with section 276A (3) of the said Act."

Section 73(7)(e) of the CSA provides that:

" A person sentence to incarceration for a definite period under section 276(1)(b) of the Criminal Procedure Act, may be referred to a court in accordance with section 276A(3)(a) of that Act, if the offender has completed at least a quarter of the effective sentence and the remainder of the sentence until sentence expiry does not exceed five years."

22. Section 276A (3)(a) in turn provides, in relevant part, as follows:

" Where a person has been sentence by a court to imprisonment for a period-

(i)...

(ii) exceeding five years, but his date of release in terms of the provisions of the Correctional Services Act, 1959 (Act 8 of 1959), and the regulations made thereunder is not more than five years in the future,

and such a person has already been admitted to a prison, the Commissioner or a parole board may, if he or it is of the opinion that such a person is fit to be subjected to

correctional supervision, apply to the clerk or registrar of the court, as the case may be, to have that person appear before the court *a quo* in order to reconsider the said sentence."

23. The applicant submits that the provisions of section 73(7)(d) and (e) of the CSA, read together with section 276(1)(b) and 276A(3)(A) of the CPA, strictly or narrowly stipulate that any person who has been convicted and sentenced by a court and who has served a quarter of his or her sentence and is left with five (5) years before his or her future release date, may submit an application for conversion of the remainder of his or her sentence into correctional supervision.
24. To this end, the applicant contends that he satisfies the requirements for conversion of his sentence, in that he has served more than a quarter of his sentence and he is left with less than four (4) years to reach half of his sentence and thus he thereby becomes illegible to be released on parole within the next five years.
25. The applicant relies on the case of *Price v Minister of Correctional Services* 2008 (2) SACR 64 (SCA) at para 14,⁴ where Scott JA stated:
 " It follows from the foregoing that, in my view, the *Steenkamp* case was wrongly decided. The 'date release' referred to in section 276A(3)(ii) of CP Act means, for the purpose of a prisoner subject to the provisions of the 1959 Act relating to his or her placement under community corrections, the date on which the prisoner may be released upon the expiration of his sentence, whichever occurs first. The appellant is accordingly entitled to a declaratory to this effect."

⁴ In *Price*, however, the Correctional Services Act 8 of 1959 was still in force and the interpretation of the words 'date of release' in s 267A(3)(a)(ii) was determined by the SCA in reference to the (old) Correctional Services Act of 1959, which contained a deeming provision in s 63(1)(b)(i) thereof which read as follows:

"Provided that for the purposes of such recommendations a prisoner's date of release contemplated in s276A(3)(a)(ii) of the CPA, 1977, shall be deemed to be the earliest date on which a prisoner may, in terms of this Act, be considered for placement on parole or the date on which the prisoner may be released upon the expiration of the sentence, whichever occurs first."

26. In *Minister of Correctional Services v Johnson* NO 2013 (2) SACR 565 (a Full Court decision of the High Court, Gauteng division) Fabricius J dealt with the interpretation of the 'date of release' as stipulated in s 276A(3)(ii) of the CPA, which were determined with reference to the relevant provisions of the Correction Services Act of 1998, as they existed at the relevant time, namely, when the sentences of imprisonment of the third and fourth respondents in that case were being considered for conversion into correctional supervision.
27. The court in *Johnson* supra concluded that it was clear from the CPA that an application for conversion of a sentence of imprisonment could not be brought or granted where the prisoner's date of release, being the date upon which the term of the sentence imposed on the particular offender has expired, was more than five years in future. The learned judge agreed with the reasoning of the Full Bench in *The Minister of Correctional Services and Others v Mario Roos* (Case no. A629/12 dated 21 May 2013) ('Roos'),⁵ namely, that the relevant date of release must be interpreted to mean the date upon which the sentence relating to the period of imprisonment expires, regard being had to the provisions of s 276 A(3)(a)(ii) of the CPA and s 73 of the Correctional Services Act 111 of 1998. Such interpretation was also consistent with the decision in *Swart v Minister of Correctional Services and others* 2011 (2) SACR 217 (WCC), which was affirmed and approved of in *Johnson* supra. Suffice it to say that I am in agreement with the reasoning of the courts in each of the cases cited above. In accordance with the principle of *stare decisis*, I am in any event bound by the decision of the Full Court in *Johnson* supra.⁶

⁵ *Roos* was in fact a decision of the Full Court (three judges) in the Western Cape Division of the High court, and not the full Bench (two judges)..

⁶ *Stare decisis* is Latin phrase for "to stand by things decided." In short, it is the doctrine of precedent. Courts cite *stare decisis* when an issue has been previously brought to the court and a ruling already issued. Decisions of higher courts (such as a Full court of three judges) are binding on lower courts (such as a court comprising of a single Judge).

28. The argument that an interpretation that an offender would only be eligible for conversion of his/her sentence if he/she is within five years of the sentence expiry date would lead to the absurdity than an offender sentenced to imprisonment for a long term, might be considered and released on parole much earlier than he/she may have been considered for conversion of his/her sentence into correctional supervision, was dealt with and dismissed by the court in *Swart supra*, at paragraphs 14 to 28 of the judgment. In para 27 of the judgment, the learned judge concluded that:

"...if an inmate has served more than a quarter of his/her effective sentence, he/she will not be prejudiced, because he/she may be considered to be placed on parole after he/she has served half of his/her sentence. He is therefore entitled to either benefit, whichever occurs first, provided that he/she is found to be suitable. If due to the length of a sentence, it may be more beneficial for an inmate, who qualifies to be considered or even released on parole, rather [than] to be considered for correctional supervision, then that may be the proper course of action to follow."

29. In *Johnson's matter, supra*, the third and fourth respondents, together with others, were convicted of murder and assault with the intent to commit grievous bodily harm. This is relevant, as the applicant was informed that he was not entitled to bring an application for his prison sentence to be converted into correctional supervision, *inter alia*, because of the violent nature of the crimes he was convicted of.
30. There is no provision in the CSA or the CPA which prohibits any person who is convicted and sentenced for aggressive and/or violent offence(s), from seeking to have his or her sentence converted for placement under correctional supervision. In so far as the third respondent relied on, *inter alia*, the provisions of the 'B order' for refusing the applicant's application to initiate the conversion process, the applicant submitted during his oral address that such order is considered to be 'confidential' by Correctional

Services, thus he has not been afforded access thereto, and he has, as a result, been precluded from placing it before court. This is an untenable state of affairs, more so by virtue of the fact that the respondents have not taken the trouble to place their version before court. I am, however, cognizant of the fact that that the conversion application was ultimately refused for failing to meet the required criteria to permit a reconsideration of the applicant's sentence in terms of the relevant legislative framework as set out above. Based on the authorities cited above, it seems clear that the present application cannot succeed.

31. The applicant alleges that the respondents failed to consider that he has empowered himself academically whilst incarcerated and that he has also behaved himself exceptionally whilst serving his sentence. To this end, he was elected by his fellow inmates to represent them in the Sport Recreation Arts Culture and Library (SRACL), where he serves as the treasurer of the committee, a position imbued with trust and which involves the use and application of financial resources in the facility. These are however facts that will be considered by the parole board or sentencing court in due course. They are not relevant to the present debate.
32. The applicant also improved his level of education and this is an important achievement, one which will undoubtedly not go to waste and will inure to his benefit when the time arrives for a consideration of his placement on parole. After all, education is one of the vehicles that will enable the applicant to fully re-integrate into society in general. These are important strides which the applicant has achieved by empowering himself and they bode well for his future reintegration into society at the appropriate time.

33. The applicant submitted in his papers that the respondents' 'modus operandi' is such that they simply ignore letters sent to them by prisoners, thereby failing (dismally, I should add) to take responsibility and accountability for such overt inaction. This conduct is exacerbated by the failure on the part of the respondents to furnish any (let alone proper) instructions to the state attorney in this matter for purposes of filing an answering affidavit. One wonders, do they even care about the fact that proceedings such as the present, as lawfully initiated by prisoners such as the applicant, are brought, or indeed the outcome of such proceedings? In this regard, a complaint was addressed to the head of the CMC regarding the manner in which Ms Thokozile Lekker attended to the applicant's application for the conversion of his sentence, as referred to above. The applicant was ultimately persuaded to withdraw the complaint in order to have his application processed. This, in my view, amounts to nothing other than undue manipulation, which is to be deprecated in the strongest terms. For this reason, a copy of this judgment is to be furnished to the respondents in the hope and expectation that such conduct will not be perpetuated in the future.
34. The applicant submits that he has followed all prison protocols to have his application for the conversion of his sentence properly considered, including having exhausted all internal remedies available to him, albeit that same ultimately met with no success. For this reason, he approached the court, which he submits, is vested with the authority to either grant or dismiss his application.
35. The applicant has, however, impermissibly sought to raise a constitutional challenge to the provisions of ss 73(7)(e) of the CSA, read with 267A(3)(a)(ii) of the CPA in his new heads of argument, on a basis other than that which

was sought in the notice of motion or pleaded in the founding affidavit, in circumstances where the new heads were not served upon the respondents and where they chose ultimately not to oppose the application at the hearing of the matter on the narrow basis of the challenge as brought in the application, as delineated in the Notice of Motion. In *Public Servants Association obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng and Others* [2017] ZACC 45, para [50], the Constitutional court endorsed the cautionary remarks expressed by Jaftha J (albeit in the minority judgment) in *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (Garvas) at para 114, where the learned judge emphasised the need for accuracy in the pleadings when stating as follows: *"Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet."*⁷

⁷ See too: *Khumalo v Member of the Executive Council for Education, KwaZulu Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC). para 90: (per Zondo J, minority judgment), where the following was said:

"[90] ...In *Gcaba* [*Gcaba v Minister of Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC). para 75] this Court rejected the notion that, if pleaded facts sustain a claim not relied on by an applicant, a court may adjudicate such claim. The Court said:

"While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court."

See too:

Minister of Cooperative Governance and Traditional Affairs v De Beer and Another (538/2020) [2021] ZASCA 95 (1 July 2021), para 87, where the following was said:

"Likewise, in *Fischer v Ramahlele*, it was stated:

"Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even

36. From the authorities cited, it seems clear that a challenge to the constitutionality of legislative provisions must be properly pleaded with all interested persons joined to the proceedings. The fact that the applicant is a lay person does not in my view detract from adherence to the substantive requirement of the law, as set out above.

Concluding remarks

37. It is rare that one encounters lay litigants, such as the applicant, who has exhibited a special flair for the law, both in his understanding and articulation thereof, not least of all, with the degree of aptitude displayed by him during oral argument presented at the hearing of the matter. If he continues along his chosen path in pursuing his legal studies, his future appears promising.

where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "it is impermissible for a party to rely on a constitutional complaint that was not pleaded." There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

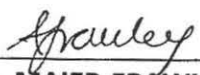
It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.

This last point is of great importance because it calls for judicial restraint. . . ." (footnotes omitted)

38. In the circumstances and for all the reasons given, the following order is made:

ORDER

1. The application is dismissed.


A. MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 6 August 2021
Judgment delivered 13 September 2021

This judgment was handed down electronically by circulation to the applicant at his nominated email address and to the respondents' legal representatives by email, and publication on Caselines. The date and time for hand-down is deemed to be have been at 10h00 on 13 September 2021.

APPEARANCES:

Applicant:	In person
First to fourth Respondents:	No appearance at the hearing.
Attorneys for Respondents:	The State Attorney, Johannesburg.