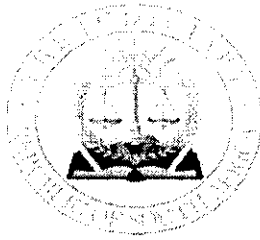


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

Case No.: 62118/2014

|                                 |                                              |
|---------------------------------|----------------------------------------------|
| (1)                             | REPORTABLE: YES / <u>NO</u>                  |
| (2)                             | OF INTEREST TO OTHER JUDGES: YES / <u>NO</u> |
| (3)                             | REVISED.                                     |
| <u>13/12/16</u><br>DATE         |                                              |
| <u>[Signature]</u><br>SIGNATURE |                                              |

13/12/2016

**LESOLANG JOHANNES BOGOSHI**

Applicant

and

**THE MINISTER OF CORRECTIONAL  
SERVICES**

1<sup>st</sup> Respondent

**COMMISSIONER OF THE NATIONAL COUNCIL  
FOR CORRECTIONAL SERVICES**

2<sup>nd</sup> Respondent

---

**JUDGMENT**

---

**MNGQIBISA-THUSI, J**

[1] The applicant seeks an order on the following terms:

- 1.1 that the decision of the first respondent of 16 January 2014 refusing applicant's application for parole be reviewed and set aside; or
- 1.2 that the respondents be ordered to release the applicant on day parole; and
- 1.3 costs.

[2] The applicant, Mr Lesolang Johannes Bogoshi ("Mr Bogoshi") was charged and convicted of robbery with aggravating circumstances, kidnapping, murder, attempted murder, and unlawful possession of a firearm and ammunition. On 08 July 1999, Mr Bogoshi was effectively sentenced to life imprisonment<sup>1</sup>. Mr Bogoshi is currently incarcerated at the Kgosi Mampuru II Correctional Centre.

[3] At the time Mr Bogoshi was sentenced, his imprisonment fell under the purview of the Correctional Services Act<sup>2</sup> ("the 1959 Act"). In 1998 the 1959 Act was repealed and replaced by the Correctional Services Act<sup>3</sup> ("the 1998 Act"). However, Chapters IV, VI and VII of the 1998 Act only came into effect in 2004.

[4] On 18 September 2013 the local Parole Board recommended that Mr Bogoshi be placed on day parole. At the time Mr Bogoshi had already served a period of 14 years and two months of his life sentence<sup>4</sup>. On 22 November 2013, second respondent, the National Council for Correctional Services ("the NCCS") resolved not to recommend Mr Bogoshi for placement on parole. Instead the NCCS decided that Mr Bogoshi's application for parole should be postponed and be reconsidered in 24 months. The reasons provided by the NCCS for not recommending Mr Bogoshi for placement on parole were that Mr Bogoshi requires to be involved in further rehabilitation programmes and

---

<sup>1</sup> In effect Mr Bogoshi was sentenced as follows: Robbery with aggravating circumstances (25 years); kidnapping (15 years); murder (life imprisonment); attempted murder (10 years); unlawful possession of a firearm (three years) and unlawful possession of ammunition (1 year). The court further recommended that Mr Bogoshi should not be considered for parole until he has served a period of 50 years of his sentence.

<sup>2</sup> Act 8 of 1959.

<sup>3</sup> 111 of 1998.

<sup>4</sup> The minimum period of imprisonment for lifers to qualify to be considered for placement on parole is 13 years and four months.

psychological interventions as may be prescribed by a social worker and a psychologist<sup>5</sup>. Further, the NCCS intimated that it was not satisfied that 'sufficient steps had been taken to further restorative justice'.

[5] On 16 January 2014, the first respondent, the Minister of Correctional Services ("the Minister") exercised his discretion in terms of section 136(3)(c)<sup>6</sup> of the 1998 Act read with sections 65(5)<sup>7</sup> and 65(6)<sup>8</sup> of the 1959 Act not to place Mr Bogoshi either on day parole or on parole. The exercise of public power must be exercised lawfully and is reviewable.

[6] Mr Bogoshi seeks the reviewing and setting aside of the respondents' decision not to release him on parole and for the respondents to be ordered to release him on parole on the following grounds:

- 6.1 that the respondents failed to calculate his credits in order to advance his date of placement on parole;
- 6.2 that he has met the requirements for placement on parole and should be released on parole;
- 6.3 that since the policy dealing with restorative justice only applied from 2004, restorative justice does not apply to him.

---

<sup>5</sup> In its report, the psychologist has alluded to the fact that it does not appear that Mr Bogoshi has accepted full responsibility for the harm his actions have caused to his victims in that he still blames others even though he associated himself with the actions of the group he was involved with after the killing.

<sup>6</sup> Section 136(3) of the 1998 Act reads as follows: "(a) Any sentenced offender serving a sentence of life incarceration immediately before the commencement of Chapters IV, VI and VII is entitled to be considered for day parole and parole after he or she has served 20 years of the sentence. (b) The case of a sentenced offender contemplated in paragraph (a) must be submitted to the National Council which must make a recommendation to the Minister regarding the placement of the sentenced offender under day parole or parole. (c) If the recommendation of the National Council is favourable, the Minister may order that the sentenced offender be placed under day parole or parole, as the case may be".

<sup>7</sup> Section 65(5) of the 1959 Act reads as follows: "Upon receipt of a report from a parole board regarding a prisoner who has been sentenced to life imprisonment, the Minister shall refer the matter to the National Advisory Council, which, after considering the report of the parole board, and having regard to the interests of the community, shall make a recommendation to the Minister regarding the placement of the prisoner on parole".

<sup>8</sup> Section 65(6) of the 1959 Act reads as follows: "The Minister may, after considering such recommendation, authorise the placement of the prisoner on parole subject to any conditions he may determine and as from a date determined by him up to the date of such prisoners".

- [7] It was contended on behalf of Mr Bogoshi that since he has completed his minimum detention period and has undergone various rehabilitation programmes, including obtaining some educational qualifications<sup>9</sup>, he has satisfied all the requirements set out in the Act and qualifies to be released on parole.
- [8] It was further submitted that the NCSS's reasons that Mr Bogoshi should first undergo restorative justice was unfair. It was contended that under the 1959 Act restorative justice was not required and that even if it was required, the respondents took no steps to institute the restorative justice process or assist in that regard. Further, it was argued that Mr Bogoshi's behaviour and adaptation while in prison had not been taken into consideration.
- [9] It was argued on behalf of Mr Bogoshi that the NCSS's reasons for refusing to recommend him for parole were objectively irrational and unreasonable in that it does not state what further rehabilitative training Mr Bogoshi still needs to undergo. That the only inference to be drawn is that the respondents have failed to properly apply their mind to the matter.
- [10] On behalf of the respondents it was submitted that even if Mr Bogoshi had served the minimum detention period, he did not have the right to be released on parole. It was submitted that in terms of section 136(3) Mr Bogoshi was to be considered for release only when he has satisfied the requirements considered for releasing an imprisoned offender in terms of the standing policy and guidelines applicable to the parole regime under the 1959 Act. It was further contended that with regard to whether Mr Bogoshi has completed the necessary rehabilitation programmes the *Plascon-Evans* rule<sup>10</sup> should be applied and the court should accept the respondents' version on this issue.

---

<sup>9</sup> As appears from Mr Bogoshi's founding affidavit, he has attended the following rehabilitation programmes:

<sup>10</sup> *Plascon -Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A). In terms of the *Plascon-Evans* rule, where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such order.

- [11] On the issue of whether the court should order the release of Mr Bogoshi on parole, it was submitted, with reference to the matter of *Von Abo v President of the Republic of South Africa*<sup>11</sup>, that the primary responsibility for the execution of a department rests with the Minister to whom the executive powers and functions concerning that department have been assigned.
- [12] It was further submitted that in terms of the doctrine of separation of powers a clear distinction is made between the powers of the judiciary, the legislature and the executive. That it is imperative for the courts not interfere with the power and processes of the other and therefore that the decision made by the Minister was not reviewable.
- [13] It is common cause at the time Mr Bogoshi was considered for parole he had served almost 15 years of his sentence and that he had attended some rehabilitation programmes available in prison and other training. From the argument on behalf of Mr Bogoshi it appears that Mr Bogoshi had an expectation to be released on parole once the credits he had accumulated had been factored in. As appears from the respondents' answering affidavit, the credits<sup>12</sup> which Mr Bogoshi acquired, were, as required by section 22A,<sup>13</sup> of the 1998 Act taken into account when he was considered by the NCCS for parole.
- [14] The question whether the rehabilitation programmes Mr Bogoshi underwent while in prison are sufficient to justify a conclusion by the correctional services personnel that he is ready to be released on parole, can only be made by the experts trained to draw such conclusions. This court, although it would not necessarily be obliged to make a decision as recommended by experts, needs

---

<sup>11</sup> 2009 (5) SA 345 (C).

<sup>12</sup> As set out in the answering (which is not disputed), Mr Bogoshi was allocated the maximum number of credits (six years and eight months) and six months in terms of a Presidential amnesty.

<sup>13</sup> This section read as follows: (1) A prisoner may earn credits to be awarded by an institutional committee, by observing the rules which apply in the prison and by actively taking part in the programmes which are aimed at his treatment, training and rehabilitation: Provided that- (a) a prisoner may not earn credits amounting to more than half of the period of imprisonment which he has served; ... (2) The number of days and months earned by a prisoner as credits may be taken into account in determining the date on which a parole board may consider the placement of such a prisoner on parole".

guidance from such experts. In the absence of such evidence and in the light of this court lacking the skills to determine the parole readiness of any prisoner, it has no choice but to defer to the decision of those capable of reaching such a conclusion.

[15] Mr Bogoshi's expectation that once he has served the minimum period of detention and has participated in rehabilitation programmes he has a right to be placed on parole, appears to be misplaced. All what Mr Bogoshi could have legitimately expected is that, having reached the required years to qualify for parole, he would be considered for parole and not that he would be released on parole merely based on the passage of time. It is within the Minister's discretion, after considering the recommendation by the NCCS, whether to grant or refuse him parole.

[16] In *Winckler and Others v Minister of Correctional Services and Another*<sup>14</sup> the court held that:

"Applicants, when they were admitted to prison, could not have had a legitimate expectation that they would qualify for release once they had served half of their sentence less the credits. The only legitimate expectation they could have had was that their case would be fairly considered and decided in accordance with whatever lawful policy was in place at the time when their case fell to be decided".

[17] In considering whether a prisoner should be placed on parole, the relevant information, including, *inter alia*, whether the prisoner has rehabilitated and will not re-offend are taken into account. In terms of section 299A of the Criminal Procedure Act<sup>15</sup> (as amended) when a court sentences a person to imprisonment for, *inter alia*, murder, it shall inform any immediate relative of the deceased, if he or she is present, that he or she has a right to make representations when placement of the prisoner on parole is considered.

---

<sup>14</sup> 2001(2) SA 747 (C) at 756G.

<sup>15</sup> Act 51 of 1977.

According to the NCCS, there is a need for Mr Bogoshi to go through the restorative justice process as part of his rehabilitation. I am of the view that the restorative justice process may assist Mr Bogoshi in accepting responsibility for offences he has committed. This process could also bring some form of healing to his victims and/or relatives. Mr Bogoshi's assertion that the process would not help as the victims live in an area other than which he would live, is of no consequence.

[18] Mr Bogoshi is also seeking an order to compel the correctional services authorities to release him on parole. As indicated in paragraph 5 above, the Minister is vested with the discretion to authorise the placement of a prisoner on parole subject to any conditions he may determine. However, this discretion is not unfettered in that in its exercise, all relevant factors and circumstances have to be taken into account. Consideration of irrelevant factors and disregarding of relevant ones could render the decision reviewable.

[19] *In Gauteng Gambling Board v Silverstar Development Ltd and Others*<sup>16</sup> where the court stated that:

"The power of a court on review to substitute or vary administrative action or correct a defect arising from such action depends upon a determination that a case is 'exceptional': s8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000. Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair".

---

<sup>16</sup> 2005 (4) SA 67 (SCA) at [28].

[20] Furthermore, in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*<sup>17</sup> the Constitutional Court stated that:

"In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often the power will identify goal to be achieved, but we do not dictate which will vote should be followed to achieve that goal. In such circumstances it can't should page you respect to the root by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, of which is not reasonably supported on the facts of not a reasonable in the light of the reasons given for it, a court may not review that decision. Import should not rubberstamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker."

[21] The issue is whether, looking at the reasons given by the respondents for not placing Mr Bogoshi on any form of parole, objectively speaking, it can be said that the decision was rationally related to the purpose for which the power was given and that an order be granted ordering the respondents to release Mr Bogoshi on parole. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*<sup>18</sup> the court in dealing with the test to be applied in determining whether for exceptional circumstances exist

---

<sup>17</sup> 2004 (4) SA 490 (CC) at para 48.

<sup>18</sup> 2015 (5) SA 245 (CC) at [47].



justifying the substitution of an administrator's decision with a n order of court, stated that:

"[47] To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inadvertently hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of the administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances".

[22] I am of the view that no exceptional circumstances exist for this court to substitute the respondents' decision not to place Mr Bogoshi on parole. I am of the view that the first respondent's decision to refuse Mr Bogoshi's parole was objectively rational and reasonable leading to the conclusion that she had applied her mind when she took account of all the relevant facts and circumstances and it appears that the decision taken was taken in good faith. It does not appear that the first respondent was influenced by any external factors. The first respondent has given an explanation for the decision taken and there appears to be justification for it. Whether Mr Bogoshi would re-offend after his release was a pertinent to her in the interests of the public, the victim and Mr Bogoshi himself. The first respondent was justified to choose to err on the side of caution if there is a possibility of recidivism on the part of Mr Bogoshi.

[23] I am satisfied that the respondents' decision to refuse the applicant's parole was objectively rational and reasonable leading to the conclusion that the Minister had applied his mind when he took account of all the relevant facts and circumstances and it appears that the decision taken was taken in good faith. One has to bear in mind that the Minister exercises his discretion to place an

offender on parole on the recommendation of the NCCS. In this case the NCCS did not recommend Mr Bogoshi for placement on parole. On a perusal of the record of his application for parole, it appears that the psychologist who assessed Mr Bogoshi rated his potential to re-offend with that to violent crime as low but medium to high for general crime. The NCCS has given an explanation for the decision taken and there appears to be justification for it. Whether Mr Bogoshi would re-offend after his release was a pertinent to the Minister in the interests of the public, the victims and the applicant himself. Since Mr Bogoshi appears to have an element of recidivism, the respondents in not placing him on parole must have acted out of caution.

[24] On the issue of costs, even though the respondents are substantially successful, I am of the view that it would be in the interests of justice not to make a cost order. Mr Bogoshi was merely pursuing what he considered to be a legitimate right and should not be punished for doing so.

[25] In the result the following order is granted:

'The application is dismissed'.

  
**NP MNGQIBISA-THUSI J**  
**Judge of the High Court**

Appearances:

For Applicant: Adv L Butow-Dutoit

Instructed by: Pretoria Justice Centre

For Respondents: Adv MTK Moerane SC assisted Adv EB Ndebele

Instructed by: State Attorney