

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

Case No. 1166/2013

In the matter between:

WILLIAM BHALITHAFA

PLAINTIFF

And

MINISTER OF CORRECTIONAL SERVICES

DEFENDANT

JUDGMENT

PAKADE J:-

[1] The crisp issue in this matter is whether a person serving sentence in a prison has a cause of action for damages if he is re-arrested without a warrant or a court order consequent upon his erroneous release on parole.

[2] The plaintiff was convicted in the Mthatha High Court for culpable homicide and murder. On 9 April 2003 he was sentenced to undergo ten years imprisonment for culpable homicide and twenty years imprisonment for murder. Half of the sentence imposed for culpable homicide was ordered to run concurrently with the sentence imposed for murder and to serve a total of twenty five years imprisonment.

[3] On 10 March 2012, while still serving his term of imprisonment, the Correctional Services Parole Board considered him for placement on parole from 24 April 2012 to 8 October 2027. The decision placing him on parole was provisional and subject to the outcome of a restorative justice program he had to be subjected to by the defendant's officers, the report on which had to be submitted to the Board together with the plaintiff on 23 March 2012. The restorative justice program entails that the victims of the crimes committed by the plaintiff and for which he was serving twenty five years imprisonment should be informed of his release on parole.

[4] However, there was no report submitted to the Board that the requirement of restorative justice had been complied with and the plaintiff was not returned to the Board. He was instead released without the confirmation of the Board that restorative justice requirement had been complied with. The Board was not even informed of his release. This gave rise to problems as the victims of the crimes committed by the plaintiff had to launch a complaint with the defendant upon seeing the plaintiff loitering about and not serving his sentence of twenty five years imprisonment. The Board cancelled his provisional release and

plaintiff was re-arrested on 15 May 2012 and detained up to 2 January 2013 when he was again thereafter released on parole.

[5] The plaintiff claims damages amounting to one million six hundred and fourteen thousand rand for unlawful arrest and detention from 15 May 2012 up to 2 January 2013. The wrongful arrest is founded on the absence of a warrant or court order justifying the arrest. The cause of action for unlawful detention has not been made clear in the pleadings and in evidence the plaintiff relies on the fact that he was not given prison uniform nor admission card and was in civilian attire for five months.

[6] Essentially the defendant's plea raises a defence of non-compliance with the restorative justice process before the release of plaintiff and the fact that he was not presented to the Board for his release on 24 April 2012. This was supported by evidence given by the chairperson of the Board, Mr Maraqana and the head of the centre which keeps sentenced and awaiting trial prisoners, Ms Nozipho Ethel Msongelo. I will revert to their evidence.

[7] The Correctional Services Act , No. 111 of 1998 came into operation on different dates , some sections came into operation on 31 July 2004 and others on 19 February 1999 and first October 2004 (section 138) respectively . The Correctional Act, No.8 of 1959 was wholly repealed by Act 111 of 1998. Mr Bloem , together with Mr Mphahlwa ,counsel for the plaintiff submitted that the repealed Act , and not the current Act applies to the plaintiff . I agree with them

that section 136 of the current Act is explicit that "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 No 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 Parole Boards prior to the commencement of those Chapters". The plaintiff commenced serving a sentence of twenty five years imprisonment on 9 April 2003. In 2003 the applicable provisions of Act no.8 of 1959 to prisoners for the release on parole were those of section 65 which read as follows:

“Release of prisoners and placement of prisoners on parole.

65 (1) A prisoner shall be released upon the expiration of the term of imprisonment imposed upon him.

(2) A prisoner may, in accordance with the provisions of this section after the report submitted by the parole board in terms of section 63 has been studied, be placed on parole before the expiration of his term of imprisonment if he accepts the conditions of such placement.

(3) (a) A placement contemplated in sub-section (2) shall be subject to the conditions mentioned in the warrant for such placement and shall extend for the period between the date of such placement and the expiration of the term of imprisonment".

Section 63 provides for a report which has to be submitted by the parole board

to the Commissioner or to the Minister to sanction the release of a prisoner on parole. It reads as follows:

" 63 (1) A parole board shall , in respect of each prisoner under its jurisdiction servinga sentence of imprisonment in excess of six months.....

(a) submit a report to the Commissioner or to the Minister as the case may be , with regard , inter alia to the conduct , adaptation , training , aptitude , industry and physical and mental state of such prisoner and the possibility of his relapse into crime ;

(b) together with the report on each prisoner submitted in terms of paragraph (a), make recommendations to the Commissioner regarding-

(i)

(ii) the placement of such prisoner on parole in terms of section 65and the period for which , the supervision under which and the conditions on which such prisoner should be so placed ; and

(c) exercise such other powers and perform such other functions and duties as may be prescribed by regulation ".

[8] The parole board dealt with plaintiff ' s parole under the new Correctional Services Act , 1998 whereas it should have dealt with it under the old Correctional Services Act, 1959 section 63 of which requires a report and recommendations of the parole board to be submitted to the Commissioner or the Minister. Thereafter the prisoner is released on parole after the Commissioner or the Minister has read the report and recommendations of the

board. No such report and recommendations were submitted to the Commissioner or the Minister. The chairperson of the board merely compiled a document on the basis of which he released the plaintiff provisionally subject to compliance with the restorative justice program. The provisional release of the plaintiff by the board subject to compliance with restorative justice is not provided for in the regulations issued under the 1959 Act. The board may, in terms of section 63 add a condition of release but that condition must be the one stipulated in the regulations. The document marked " Motivation of the Parole Board " in the bundle of documents is not the report envisaged in section 63(1) (a) of the 1959 Act because it is silent on the matters to be reported on set out in this section. It says nothing about the conduct, adaptation, training, aptitude, industry and physical and mental state of the plaintiff. It does not deal with the substance but states peripheral aspects such as the sentence, six weeks pre-release program, placement on parole from 24 April 2012 to 8 October 2027. It also recommends that the plaintiff be assisted by the defendants' officials in restorative justice program and that he should be returned to the parole board together with that report. No such report was submitted nor was plaintiff returned to the board.

[9] It is, in my view implicit in section 63 and 65 that a prisoner may be released on parole by the Commissioner or the Minister upon being presented with a report and recommendations by the board. The plaintiff was not released by the Commissioner or the Minister but by the officials of the defendant without a report from the board and recommendations having been submitted to the Commissioner or the Minister. That was not a lawful release by an authorised person. The plaintiff had therefore to be re- arrested to continue serving his sentence until the due process of the law is carried out in his release.

This is distinguishable from the case of **Kommissaris Van Korrektiewe Dienste v Malaza**¹ in which the plaintiff had been released by an authorised person (the President) notwithstanding that the procedural requirements of his release had not been complied with. I would have been bound to follow the route of Malaza if the plaintiff in casu was released by an authorised person notwithstanding non compliance with the procedural requirements of the release.

[10] Further, the condition stipulated by the board for the plaintiff's release relating to restorative justice program had not been complied with. According to the testimony of Ms Nozipho Ethel Msongelo of the Department of Correctional Services who took part in the release of the plaintiff, she became satisfied subsequent to the release that the restorative justice program had not been done although the documents presented to her reflected that it had been done. The victims of the crime had not been consulted as they should have been. This surfaced on the complaint of the victims to the higher authorities of the Department. Ms Msongelo conceded that she had made a mistake in releasing the plaintiff without complying with the condition pertaining to restorative justice. Therefore, the premature release of the plaintiff was wrong on two aspects, first, that he was not released by an authorised person and second, that one of the conditions of his release was not complied with.

[11] The plaintiff was not a free man until he finished serving sentence on 8 October 2027 and had to be arrested to complete the term of his imprisonment as he had not appealed against his conviction and sentence. As long as the

¹ 1996 (1) SA 1143 (WPA)

plaintiff had not completed serving his term of imprisonment he had to be confined within the premises of Correctional services until properly and lawfully released either by expiry of his term of imprisonment or on parole . His re-arrest cannot, in my view be construed as illegal as he could not be a free man even if his placement on parole had not been made by mistake. He would be a free man after 10 October 2027 and not before as long as his sentence had not been tampered with by the appeal court. His being out of the prison premises without the due process of the law was unlawful and he had to be brought back to prison. He could be lawfully arrested without a warrant (s.42 (1)(a) of the Criminal Procedure Act,51 of 1977) for having been convicted for a Schedule 1 offence . Murder and Culpable Homicide are mentioned in Schedule 1 to the Criminal Procedure Act, 1977.

[12] In my view, the plaintiff has not established a cause of action and the following order is hereby made:

Order:

That the plaintiff's action is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.



L.P.Pakade

JUDGE OF THE HIGH COURT

For the Plaintiff	:	Adv Bloem SC with Adv Mpahlwa
Instructed by	:	Ximbi Ncolo IncAttorneys Mthatha
For the Defendant	:	Adv Mbenenge SC with Adv Ntsaluba
Instructed by	:	State Attorney Mthatha
Dates heard	:	31 July; 01 August and 19 August 2014
Date delivered	:	09 April 2015