

Case no.: 29765/08

HIGH

RANSVAAL

BOTHA, RIAAN Applicant

and

THE MINISTER OF CORRECTIONAL SERVICES First Respondent

THE NATIONAL COMMISSIONER
DEPARTMENT OF CORRECTIONAL

SERVICES Second Respondent

THE PROVINCIAL COMMISSIONER OF

CORRECTIONAL SERVICES (GAUTENG) Third Respondent

THE CHAIRMAN OF THE CASE MANAGEMENT
COMMITTEE, ZONDERWATER MEDIUM PRISON Fourth Respondent

THE CHAIRPERSON OF THE PAROLE BOARD,
ZONDERWATER MEDIUM A
PRISON Fifth Respondent

THE HEAD OF PRISON, ZONDERWATER

CORRECTIONAL FACILITY Sixth Respondent

JUDGMENT HANDED DOWN ON HEARD ON 5/3/2009

JUDGMENT

EBERSOHN AJ.

[1] In this matter the applicant applied for the review of the decision of the Parole Board not to release him on parole after he duly served the required one-third of his sentence. The application is opposed.

[2] In terms of the provisions of Rule 53 the respondents duly filed the record of the proceedings of the Parole Board and an answering affidavit and also certain further reports regarding the suitability of the applicant to be released on parole.

[3] The applicant was sentenced on the 1st May 2002 to 18 years imprisonment on a charge of murder and the trial judge recommended that the applicant first has to serve 2/3rds of his sentence before he may be considered for parole.

[4] The matter went on appeal to the Supreme Court of Appeal and the judgment, wherein the Court deals in detail with the facts of the matter, was reported as S v Botha 2006 (2) SACR 110 (SCA). This Court will therefore not rehash the facts of the case in this judgment.

[5] In the answering affidavit deposed to by the chairperson of the 5th respondent, a Mr. J. Setshedi, he stated that the applicant received a Presidential Amnesty of 6 months, granted

during May 2005, with the result that the applicant's sentence was reduced to 17 1/2 years imprisonment.

[6] Mr. Setshedi stated in paragraph 5.1 of his affidavit that a person serving a determinate sentence becomes eligible for consideration of placement on parole after having served 1/3rd of his sentence.

[7] The explanation as to why it is 1/3rd and not 1/2 was provided in an affidavit deposed to by one Sarel Johannes Wilkins, the Regional Co-ordinator: Corrections Gauteng, being a Deputy - Director position in the office of the Regional Commissioner: Gauteng.

[8] With regard to the provisions of the applicable act, namely Act 8 of 1959, he stated the following:

"4.1 Section 65(c) of Act 8 of 1959 is to the effect that a prisoner shall not be considered for placement on parole before he has served 1/2 of his term of imprisonment. This, however, is subject to the proviso that the date on which consideration may be given to whether a prisoner may be placed on parole may be brought forward by the number of credits earned by the prisoner (the so-called 'credits system').

4.2 Section 22 A of Act 8 of 1959 prescribes that a prisoner may earn credits to be awarded by the Case Management Committee (previously known as the 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.....'.

In this respect, a prisoner may not earn credits amounting to more than half of the period of imprisonment which he has served.

2. In terms of the 'credits system', a prisoner, subject to good behaviour, earns credits up to a maximum of 1 day for every 2 days' imprisonment served by him. The practical effect thereof is that a prisoner becomes eligible for consideration for placement on parole after serving 1/3rd of his sentence. This is irrespective of the crime for which a prisoner was sentenced.
3. Whether or not a prisoner is in fact placed on parole depends on the consideration of various factors, by way of weighing up positive factors in his favour against negative factors which militate against his placement on parole. Certain criteria with regard to the placement of prisoners on parole are contained in the applicable Correctional Services Orders, read together with the Manual for the Parole Board. Such criteria are not, however, intended to be the Alpha and Omega with regard to whether or not to place a prisoner on parole. Rather, they are guidelines only which find application in the exercise of the discretion which vests in delegated officials in this regard, given that the decision whether or not to place a prisoner on parole (involving as it does, the exercise of a discretion) does not entail a simple mechanical comparison of the guidelines laid down in this regard. Rather, it requires a process of consideration and assessment of each case on its own merits.
4. It is so that since April 1999, prisoners who were sentenced before 1 October 2004 (when the parole provisions of Act 111 of 1998 came into operation), were allocated the full quota of credits for which they may qualify, in advance, upon admission to prison. This was so by reason thereof that the provisions of Act 111 of 1998 with regard to the placement of prisoners on parole make no provision for the credit's system. In the light of the then imminent coming into operation on 1 October 2004, of Act 111 of 1998, prisoners were upon admission to prison allocated the full quota of credits for which

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they may qualify. This was for purely administrative reasons. In particular, the fact that prisoners were after April 1999 allocated their full quota of credits, in advance upon admission to prison, does not mean that the credits system was at any stage abandoned. On the contrary, the credits system has throughout applied (and will continue to apply, for reasons dealt with in paragraph 6 below) to prisoners who were sentenced prior to the coming into operation of the parole

provisions of Act 111 of 1998 (i.e. prisoners who were sentenced prior to 1 October 2004).

[9] With regard to the policy directive he stated the following:

"5.1 On 23 April 1998, the Commissioner of Correctional Services issued the policy directive in terms of which certain categories of prisoners should serve a minimum period of their sentences before being placed on parole. The intention behind the policy directive was to ensure uniformity on the part of the parole boards countrywide with regard to the placement of prisoners on parole. This was as a consequence of criticisms levelled against the Department that there was a lack of consistency from parole board to parole board in this regard. Suffice it only to add in this regard that the policy was intended to be used as a guideline only when considering the placement of the relevant categories of prisoners on parole

5.2 After several judgments in which criticism was levelled at the policy (see Combrink and Another v Minister of Correctional Services and Others 2001 (3) SA 338 (D); Saunders v Minister of Correctional Services and Others (unreported) TPD case no., 14015/2000; Mohammed v Minister of Correctional Services and Others 2003 (6) SA 169 (SE); Ngenya and Others v Minister of Correctional Services and Others (unreported) WLD Case no. 29540/2003) the Parole Boards were to disregard the policy directive when considering prisoners for placement on parole. (My underlining)

[10] In the answering affidavit filed it was conceded that the applicant became eligible for consideration for placement on parole on 1 March 2008, after having served 1/3rd of his sentence and stated that for that reason the applicant was considered for placement on parole on the 25th March 2008.

[11] The Supreme Court of Appeal in its judgment referred to the recommendation of the trial judge that the applicant first has to serve 2/3rds of his sentence before

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being considered for parole and paragraphs [25], [26] and [27] of the judgment of Ponnán AJA (as he then was) read as follows:

"[25] One final aspect merits mention. The trial judge recommended that the appellant serve at least two thirds of his sentence before being considered for parole. The function of a sentencing court is to determine the term of imprisonment that a person, who has been convicted of an offence, should serve. A court has no control over the minimum period of the sentence that ought to be served by such a person. A recommendation of that kind encountered here is an undesirable incursion into the domain of another arm of State, which is bound to cause tension between the judiciary and the executive. Courts are not entitled to prescribe to the executive branch of Government how long a convicted person should be detained, thereby usurping the function of the executive. (See S v Mhlakaza 1997 (1) SACR 515 at 521(f)-(i)

[26] Albeit, just a recommendation, its persuasive force is not to be underestimated. It no doubt, was intended to be acted upon. In making the recommendation, which he did, the trial judge may have imposed, by a different route, a punishment which in truth and in fact was more severe than originally intended. Such a practice is not only undesirable but also unfair to both an accused person as well as the correctional services authorities.

[27] In the result, for the reasons given, the appeal must fail and it is accordingly dismissed. The Registrar has been instructed to forward a copy of this judgment to the Department of Correctional Services with a request that the remarks in paragraph 26 be taken in account of in relation to the present case."

[12] It must be observed that a sentence of 18 years imprisonment on a first offender whose intent was dolus eventualis is a very severe sentence.

[13] It appears that the remarks of Ponnán AJA (as he then was) were not heeded by the Prison Authorities. In the first part of page 5 of the proceedings before the Parole Board (record p.

117), it being a portion of the parole application form, appears a report filed by the Chairperson: Case Management Committee, for the assistance and guidance of the Parole Board wherein the Chairperson objectively reports on the applicant and lauds the applicant as showing signs of rehabilitation. The last two sentences thereof, however, read as follows:

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"Due to the seriousness of his crime and length of sentence the court has ordered that the offender serves 2\3rds of his sentence before placement on parole could be considered. Further profile is recommended."

It appears that the Parole Board was under the impression that the trial judge ordered that the applicant first has to serve 2\3rds of his sentence before he could be considered for parole. The applicant signed this form with a qualification namely "Under duress"

[14] It is clear that the Case Management Committee in a gross manner misdirected itself prejudicing the applicant irreparably.

[15] Annexure "B" to the papers that were before the 5th respondent is a document with the heading "Sentence". Therein appears the following:

"SENTENCE:

MURDER: 18 YEARS IMPRISONMENT - The Court recommends that at least 2\3 of the period be served in prison before being considered for release on parole"

[16] One would have expected from the Prison Authorities that they would have heeded the remarks by Ponnann AJA, as he then was, but they did not and placed the tainted documents before the Parole Board who obviously read it and acted in terms of the remarks of the trial judge.

[17] The Social Worker of the Prison Authorities, who dealt with the applicant, and whose report is to be found on pages 147-149 of the record, stated on page 148, where she reports on the applicant's social work involvement:

"No further needs for involvement in therapeutic programs could be identified."

[18] Under the heading SUPPORT SYSTEM on page 148 of the record appears the following:

"The offender indicates that he will stay with his mother in Naboomspruit after release. His parents were divorced in 2005. The offender owns two houses which are currently rented out. He also still has shares in businesses which make him financially independent after release. Offender improved his qualifications during 2003: N2 - Fitter and Turner, Investing and trading course and A-Plus Computer course. This will also improve his ability to be a productive member of society. He will also be able to provide much needed employment for some of his previous employees after release. The offender has a very large support system. He receives regular visits from his mother, other family members and friends. He is in a relationship with a woman since 2005 and she also visits him. His Pastor also provides the needed support and acts as a link between offender and his family."

[19] Under RECOMMENDATION the social worker stated the following:

"Although recidivism can never be ruled out, the feeling is that his sentence served its purpose and that he should be given a chance to proof (sic) himself in society."

[20] On page 227 of the record appears a copy of a letter addressed by the applicant to a Mrs. Delia Nation, apparently a person in the employ of the res[pondents, wherein he requests her to facilitate correspondences between himself and the family of the deceased.

[21] On pages 230-235 of the record appears a psychological report compiled by one W. van den Berg, a clinical psychologist in the employ of the Prison Services. In the report it is related that during the trial of the applicant the prosecutor stated that the case was racially motivated. Despite this remark the trial court could not find any supporting evidence for the prosecutor's remark. After dealing at length with all the relevant aspects regarding the applicant he concludes his report as follows on page 235 of the record:

"From my professional judgment, there is very little he can still do to 'rehabilitate' himself within a maximum security facility. The limitations a maximum facility places on his rehabilitation, could be frustrating and could create a negative attitude in general. This could nullify the progress he has achieved up to now."

[22] The matter was heard by the Parole Board and a day after the hearing the following appears to have been written on the page with the heading **ADDITIONAL PAGE FOR MOTIVATED REASON FOR DECISION IN RESPECT OF 1 TO 5 ON THE PREVIOUS PAGE:**

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"CSPB will acknowledge and appreciate progress already registered by the offender in relation to his rehabilitation processes. The offender's efforts were also recognised and he was classified as being amongst those offenders who are seriously en route to be brought back into the community. The offender was successfully subjected to various bible studies, self-development, anger management, key rings & cards making, woodwork, drug awareness, corrections week and sports and Arts. Offender's crime was highly publicised during his trial and it therefore attracted national and international interest. His half of the sentence period is 01.02.2011. The offender will have to serve more of his sentence. The offender must still be subjected to Pre-release programme and his address must be confirmed. Social work services must also be activated again whereby another social work report need to be submitted. Restorative justice was also highly recommended by CSPB. CSPB will thereafter approve a further profile report to be submitted on 01.01.2010."

(my underlining).

[23] It is clear that the Parole Board in the quoted reasons again grossly misdirected itself to the detriment of the applicant.

[24] **Firstly**, the reason for the decision that the applicant "will have to serve more of his sentence" is clearly based on the irrelevant ground that "the applicant's case was highly publicised during his trial and it therefore attracted national and international interest."

[25] To use that as a norm for deciding whether an offender may be released on parole or not based on whether an offender's case was highlighted and attracted national and international interest is totally wrong, is a misdirection and must not happen again. The Parole Board is to objectively consider a parole application and divorce from its mind the measure of publicity a case has received or not. To not divorce its mind therefrom is to abdicate the obligations it owes the applicant in terms of section 33(1) of the Constitution of the Republic of South Africa, 1996, which reads as follows:

"Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

[26] **Secondly**, it appears that the Parole Board further misdirected itself by ignoring the reports, favourable to the applicant, compiled by its own experts.

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[27] **Thirdly**, the Parole Board erred by unilaterally, and at the stage the applicant, on the face of it, was entitled to parole, insisting on a process of "restorative justice", which appears not to be compulsory, whereas on the papers it is clear that the applicant could not attend to a restorative process whilst being incarcerated in prison. It also begs the question why, only at the stage of the hearing of the parole application, the process of "restorative justice" was pulled out of the hat like a rabbit and why the Prison Authorities did not implement the "process"

sooner, so as to have the report regarding the restorative process also before the Parole Board.

[28] With regard to "restorative justice" a proposed programme appears on page 287 of the record. It consists of 5 paragraphs with the following headings:

5. FAMILY GROUP CONFERENCE;
6. VICTIM/OFFENDER MEDIATION;
7. VICTIM-OFFENDER DIRECT CONFERENCE;
8. COMMUNITY CONFERENCE;
9. COMMUNITY-OFFENDER MEDIATION.

[29] Of these 2 and 3 fall away because the victim is dead.

[30] Paragraph 1 requires counselling of the relatives of the offender and the victim twice a month for two consecutive months. The applicant is detained in Cullinan. His mother stays in Naboomspruit and the relatives of the victim stay near Dendron. During argument before me Mr. Bester, who appeared for the respondents, admitted that to give effect to these proposals would be costly and it was not clear who was to pay for the expenses incurred to have the said meetings held. In this regard already on the 1st February 2007, the applicant addressed a letter to a Me. Plaatjies (record p. 226) at the Head Office of the Prison Services wherein he refers to restorative justice and stated the following:

"Ek is ook meegedeel dat D.K.D. nog slyp aan hulle beleid random restorative justice en dat fondse "n problem is en ek dus net tot hier gehelp kan word. Ek aanvaar dit so. Ek het gedoen wat ek kan."

This statement by the applicant was not gainsaid by the respondents.

[31] Paragraph 4, which deals with community conferences once a month for two

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consecutive months, creates the same problems set out above with regard to paragraph 1 but just on a larger scale..

[32] Paragraph 5, which deals with community-offender mediation, calls for meetings once a month for two consecutive months. Mr. Bester, with regard to these meetings, conceded that these meetings could be politicised and have a detrimental and negative impact on the parole process, prejudicing the applicant irreparably.

[33] The question arises, once more, why, if the Prison Authorities were sincere, and they could and should have implemented the process long ago especially in the light of the contents of the applicant's letter to them, referred to in paragraph [30] supra, they did not. No reasons were furnished as to why, only at this late stage, the process be insisted with. In other parole matters, which I have heard in the past in this court, no mention was ever made by the Prison Authorities of a "restorative justice programme" which has to be complied with before parole could be granted. One gets the uncomfortable feeling that the "restorative justice programme" is used in this matter as a ploy to frustrate and stall the applicant's parole process.

[34] The implementation of the "restorative justice process", would open up possible and probable opportunities to abuse the process.

[35] The applicant already expressed a desire to communicate with the relatives of the deceased and one wonders why the reasonable and suitable aspects of the "restorative justice programme" could not be implemented in the parole conditions to be imposed on the applicant to comply with after he is released on parole.

[36] There are too many unanswered questions in the parole process followed with regard to the applicant and there is the clear evidence of misdirection on the part of the respondents compelling this Court to interfere. Mr. Bester submitted in conclusion that this Court should

not substitute its own decision for that of the Parole Board, but to refer the matter back to the Parole Board for reconsideration. I am prepared to accede to that request.

[37] Costs must follow the event.

[38] I accordingly make the following order:

1. The decision of the respondents not to release the applicant on parole
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- is set aside on review and the matter is referred back to the respondents for reconsideration, which reconsideration must be completed on or before the 14th May 2009, during which reconsideration the respondents must divorce their minds from the fact that the trial judge recommended that the applicant serve 2\3rds of his sentence before being considered for parole.
10. The respondents must pay the costs of the application.
11. The matter is postponed to the 27th May 2009 to be further heard by Ebersohn AJ and leave is granted to the parties to file supplementary affidavits, if necessary, on or before the 22nd May 2009.

Applicant's counsel
Applicant's attorney
Respondents' counsel
Respondents' attorney

Adv. H.P. Joubert Julian Knight
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Bester State Attorney