

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Date: 2009-10-29

Case Number: 6478/2009

In the matter between:

LETSEPE FIX LEBOTSA
JACK LESIBA THUPANA

First Applicant
Second Applicant

and

MINISTER OF CORRECTIONAL SERVICES
COMMISSIONER OF CORRECTIONAL SERVICES
CHAIRPERSON, CSPB PRETORIA CENTRAL CC
CHAIRPERSON, CMC PRETORIA CENTRAL CC

First Respondent
Second Respondent
Third Respondent
Fourth Respondent

JUDGMENT

SOUTHWOOD J

- [1] The applicants seek to review and set aside the decisions of the Correctional Supervision and Parole Board, Pretoria Central (Parole Board) that each applicant not be placed on parole and that a further profile should be submitted for each applicant and an order that the respondents release the applicants on parole within 30 days of the

grant of this order, alternatively, that the respondents reconsider the applicants for possible placement on parole within 30 days of the grant of this order.

- [2] The respondents oppose the application and have filed comprehensive affidavits setting out the relevant facts on which they rely and the reasons for the decisions taken as well as the record of the proceedings. The allegations set out in the respondents' answering affidavits cannot be disputed and the issue is whether on the respondents' version together with the facts appearing from the records of the proceedings the applicants are entitled to the relief sought. See ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)*** at 634G-635C and ***National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)*** para 26; ***Wightman t/a J.W. Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)*** paras 12 and 13.
- [3] The first applicant was convicted of murder, robbery with aggravating circumstances, unlawful possession of a firearm and unlawful possession of ammunition. On 8 October 1995 he was sentenced to an effective term of imprisonment of 40 years. He is presently serving his sentence in the Pretoria Central Correctional Centre.
- [4] The second applicant was convicted of murder, robbery, unlawful possession of a firearm, unlawful possession of ammunition and

unlawful dealing in precious stones. On 10 October 1997 he was sentenced to an effective term of imprisonment of 30 years. He is presently serving his sentence in the Pretoria Central Correctional Centre.

[5] Both applicants have received general Presidential amnesties. The first applicant has received 3 six month Presidential amnesties which have reduced his sentence to 38¹/₂ years. The second applicant has received 2 six month amnesties which have reduced his sentence to 29 years.

[6] The first applicant has completed more than 14 years of his sentence and the second applicant has served more than 11 years of his sentence. While serving their sentences the applicants have participated in their rehabilitation. The first applicant has completed the following rehabilitation courses: an Anger Management Programme; a Life Skills Programme; an HIV/Aids Programme; a Drug Awareness Programme; Recreational Activities; a Campaign against Women and Child Abuse; Music Theory Grade 4 at Unisa; Music Theory Grade 5 at Unisa.

The first applicant has also received the following: a letter of commendation from the Educationist; a letter from the National Coordinator of the Prisoner Consciousness Movement; a certificate from the Prisoner Consciousness Movement; a letter from his family

committing their support and monitoring; a letter of employment; a letter from the Church.

The second applicant has completed the following rehabilitation courses: an Anger Management Programme; a Life Skills Programme; an HIV/Aids Programme; a Stress Management & Rehabilitative Training Programme; Recreational Activities; and Pretoria Central FET College.

The second applicant has also received the following: a letter of commendation from the Community; a letter from the Chiefs FC Management; a letter from his family; a letter of employment; a letter from the Church.

- [7] On 17 September 2008 the first applicant attended a Parole Board hearing. The Parole Board decided not to place the first applicant on parole and that a further profile for reconsideration of the first applicant for placement on parole should be submitted on 17 September 2010. This decision effectively extended the first applicant's incarceration by two years. On 17 September 2008 the second applicant attended a Parole Board hearing. The Parole Board decided not to place the second applicant on parole and decided that a further profile for reconsideration of the second applicant for placement on parole should be submitted on 30 June 2010. This decision effectively extended the second applicant's incarceration by 19 months.

[8] Both applicants were sentenced before 1 October 2004 and in terms of the relevant provisions of the Correctional Services Act 11 of 1998 (the Act) all prisoners who were sentenced before 1 October 2004 may be considered for possible placement on parole after they have served $\frac{1}{3}$ of their determinate sentences. The applicants are therefore eligible for consideration for possible placement on parole. According to the respondents parole is first considered by the Correctional Services Case Management Committee (CMC) which makes a recommendation to the Parole Board regarding the prisoner's placement on parole. The prisoner then appears before the Parole Board which has a discretion in terms of the Act to approve, amend or disapprove the recommendation made by the CMC. The Parole Board exercises this discretion after hearing representations by or on behalf of the prisoner and the prisoner's case has been considered after taking all relevant facts into consideration. The third respondent notifies the prisoner once it has exercised its discretion and made its decision.

[9] The applicants are aggrieved by the decisions not to place them on parole and contend that the third respondent's decisions should be reviewed on the following grounds (the formulation is theirs):

- (1) They were not given a copy of the profile report contemplated by section 42 of the Act;

- (2) They were not informed of the contents of the profile submission or given an opportunity to comment thereon in writing;
- (3) The third respondent did not fairly consider their possible placement on parole as the reasons provided for not considering them or not placing them on parole were all (or mostly) due to negligence on the part of the respondents;
- (4) Due to the negligence of the respondents and their non-compliance with the law they were subjected to a decision based on unfair and/or arbitrary decision making on the part of the third respondent; and
- (5) The decision that a further profile date be set so far in the future clearly indicates that the decision was taken arbitrarily because relevant issues were not considered and because irrelevant issues (such as a half sentence policy) were applied.

[10] The respondents state that in accordance with the prescribed procedure the first applicant appeared before the CMC on 26 August 2008 and the CMC recommended that a further placement on parole should be submitted for the first applicant on 30 October 2010 and that on 17 September 2008 the first applicant appeared before the Parole Board and the Parole Board decided that the first applicant should not

be placed on parole and that a further profile for reconsideration of the first applicant for possible placement on parole should be submitted on 17 September 2010. The third respondent testifies that the third respondent took this decision after properly considering the first applicant's case, taking into consideration the CMC's recommendations and considering the representations made by or on behalf of the first applicant (both in writing and orally). The Parole Board's reasons for the decision which it says it communicated to the first applicant on 17 September 2008 are as follows:

“The offender is serving forty (40) years for multiple aggressive offences. Address is outstanding. He is not a first offender. Due to the length of sentence and seriousness of the offences he must undergo both social worker and psychological intervention in order to address the offending behaviour. The detailed report about his progress will be needed during the next consideration. Sentence remarks will also be needed during the next consideration.” (My emphasis)

- [11] The third respondent states that the Parole Board took into account *inter alia* the seriousness of the crimes of murder, robbery with aggravating circumstances, unlawful possession of a firearm and unlawful possession of ammunition; the state of rehabilitation reached by the first applicant “in as far as it could have been determined” the release of the first applicant back into the community taking into account the nature of the crimes; thus the sentence remarks would also need to be obtained. The fact that no address was provided by the first applicant for monitoring was also taken into account. The

Parole Board would also have taken into account the recommendation made by the CMC in which it set out all the programmes which the first applicant has attended as well as his achievements and certificates. It is clear from the Parole Board's reasons that it is of the opinion that the first applicant should be referred to a social worker or psychologist for individual therapy and that a report should be supplied, that a detailed report about the first applicant's progress must be provided and that the court's sentence remarks must be furnished.

- [12] The third respondent chairman gives similar evidence regarding the second applicant. He furnishes the following reasons for the decision taken in respect of the second applicant on 17 September 2008:

He is serving 30 years for aggressive crimes. He has already served 11 years 1 month and 1 day of his sentence to date. He has attended some rehabilitation programmes. However the CSPB has taken into account the seriousness of the crimes, the interests of the community and the length of the sentence in coming to its decision. Sentence remarks and SAPS 69 must be provided so that the CSPB can know as to whether he has previous convictions and how the crimes were committed. He must also provide a report about his prognosis. Further profile is approved for 2010-06-30. (My emphasis)

- [13] The applicants, who appeared in person, addressed the court on their applications. Both are lay persons with limited education and their insight into legal matters in general and review procedure in particular is extremely limited. Both applicants conveyed to the court their

dissatisfaction at not being granted parole. This dissatisfaction is at least partially based on a misunderstanding of their legal position: both referred to the fact that other prisoners who had served $\frac{1}{3}$ of their sentences had been granted parole and they clearly expect to be granted parole simply because they have served $\frac{1}{3}$ of their sentences. A prisoner sentenced before 1 October 2004 qualifies for consideration for parole after serving $\frac{1}{3}$ of his or her sentence but that is a far cry from being entitled to be released on parole. The Parole Board decides in its discretion whether or not to grant parole and in exercising that discretion must take into account all the relevant circumstances which obviously must include, when the prisoner was convicted of a crime of violence, whether there is a likelihood that the prisoner will repeat the offence if released into society. If not satisfied on that issue the Parole Board will obviously not grant parole. There may be other considerations which will lead to a similar decision.

- [14] The respondents' counsel contends that the answering affidavit effectively rebuts the applicants' complaints and that the respondents' reasons for its decisions to refuse parole and require further profiles for reconsideration of the applicants' parole in 2010 demonstrate a rational connection between the decisions and the information before the Parole Board. At first blush the Parole Board's answering affidavit seems to provide a foundation for the argument but on closer consideration of the affidavit and the record of the parole proceedings I am not persuaded that all the relevant information which the Act

prescribes was before the Parole Board and accordingly that the decision taken was in accordance with the Act. It also appears that certain important procedural requirements were not satisfied.

- [15] Although not formulated with a lawyer's precision the applicant's case is that the Parole Board did not have all the relevant information when it took the decisions and the decisions were therefore arbitrary or capricious (see section 6(2)(e)(vi) of Act 3 of 2000) or that relevant considerations were not considered (see section 6(2)(e)(iii) of Act 3 of 2000). The respondents have not taken heed of the comments made in the unreported judgment in the case of **Petrus J. Lombard v The Minister of Correctional Services and Others** TPD Case No 40298/07 delivered on 7 March 2008. There, like now, it was necessary to consider the information which must be available to the Case Management Committee and the Parole Board when parole is considered and the procedure to be followed in considering parole. The relevant provisions of the Act are sections 38, 42 and 75.

- [16] The relevant provisions of section 42 read as follows:

Case Management Committee

- (1) At each prison there must be one or more Case Management Committees composed of correctional officials as prescribed by regulation.
- (2) The Case Management Committee must ñ

- (a) ensure that each sentenced prisoner has been assessed, and that for prisoners serving more than 12 months there is a plan specified in section 38(2);
- (b) interview, at regular intervals, each prisoner sentenced to more than 12 months, review the plan for such prisoners and the progress made and, if necessary, amend such plan;
- (c) make preliminary arrangements, in consultation with the Head of Community Corrections for possible placement of a prisoner under community corrections;
- (d) submit a report, together with the relevant documents, to the Correctional Supervision and Parole Board regarding ñ
 - (i) the offence or offences for which the sentenced prisoner is serving a term of imprisonment together with the judgment on the merits and any remarks made by the court in question at the time of the imposition of sentence if made available to the Department;
 - (ii) the previous criminal record of such prisoner;
 - (iii) the conduct, disciplinary record, adaptation, training, aptitude, industry, physical and mental state of such prisoner;

- (iv) the likelihood of a relapse into crime, the risk posed to the community and the manner in which this risk can be reduced;
- (v) Æ
- (vi) Æ
- (vii) the possible placement of such prisoner on day parole or on parole, and the conditions for such placement; and
- (viii) such other matters as the Correctional Supervision and Parole Board may request; and
- (e) at the request of the Area Manager, submit a report contemplated in paragraph (d) to him or her in respect of any prisoner sentenced to 12 months imprisonment or less.
- (3) A prisoner must be informed of the contents of the report submitted by the Case Management Committee to the Correctional Supervision and Parole Board or the Area Manager and be afforded the opportunity to submit written representations to the Correctional Supervision and Parole Board or Area Manager, as the case may be.ö

[17] Section 38, which is peremptory, reads as follows:

Assessment

- (1) As soon as possible after admission as a sentenced prisoner, such prisoner must be assessed to determine his or her ñ
 - (a) security classification for purposes of safe custody;
 - (b) health needs;
 - (c) educational needs;
 - (d) social and psychological needs;
 - (e) religious needs;
 - (f) specific development programme needs;
 - (g) work allocation;
 - (h) allocation to a specific prison; and
 - (i) needs regarding reintegration into the community.
- (2) In the case of a sentence of imprisonment of 12 months or more, the manner in which the sentence should be served must be planned in the light of this assessment and any comments by the sentencing court.ö (My emphasis)

[18] The relevant provisions of section 75, which deals with the powers of, the functions and duties of Correctional Supervision and Parole Boards, read as follows:

§1) A Correctional Supervision and Parole Board, having considered the report on any prisoner serving a determinate sentence exceeding 12 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 ñ

(a) subject to the provisions of paragraphs (b) and (c) and subsection (1A) place a prisoner under correctional supervision or day parole or grant parole and, subject to the provisions of section 52, set the conditions of community corrections imposed on the prisoner.ö

[19] Both applicants are subject to these provisions. It is noteworthy that the information in the record of the parole proceedings does not show that a CMC has assessed either applicant and prepared a plan as required by section 38(2); that a CMC has interviewed the applicants at regular intervals and reviewed the plans and the progress made and, where necessary, amended the plans; and that a CMC has submitted to the Parole Board a judgment on the merits and the remarks made by the court when imposing the sentence and dealt with the likelihood of the applicantsörelapsing into crime, the risk posed to the community and the manner in which the risk can be reduced. The existence of the section 38(2) plan and the progress made by the prisoners in serving the sentence in accordance with the plan and any special therapy received and still required are obviously essential to the question of the likelihood of a relapse into crime, the risk posed to the community and the manner in which this risk can be reduced. In the absence of this

information the Parole Board's consideration of the applicants for parole of necessity is not only superficial but arbitrary and capricious. This appears from the reasons for the decision which do not deal with any of the relevant issues which proper compliance with section 38 would have revealed. The reasons also show that all the relevant information was not available.

[20] The record also does not establish that the CMC submitted a proper report (i.e. one complying with section 42(2)(d)) to the Parole Board or that the applicants were informed of the contents of the report submitted by the CMC to the Parole Board and that the applicants were given the opportunity to submit written representations thereon to the Parole Board. The applicants allege that there was no compliance with section 42 in this regard and this is not denied by the respondents. There are also no facts to show that the CMC and/or the Parole Board complied with the section.

[21] Finally, it is striking that the record of the proceedings contains no minute of what transpired at the hearing or any indication of what the Parole Board considered important. On the face of the record the applicants were not heard or given an opportunity to explain why they should be released on parole.

[22] The Parole Board's decision was taken without all the prescribed information being available and it was therefore arbitrary and

capricious. It is significant that the applicants were not aware of the fact that they must have counselling from a social worker and/or a psychologist – something they would have known if the Case Management Committee had prepared the section 38(2) plan and reviewed the applicants' progress in the light of the plan – and that the Parole Board now says that the reasons for sentence must be available when the applicants' parole is reconsidered in 2010. The Parole Board also failed to comply with the Act in important respects – it failed to advise the applicants of the contents of the Case Management report and give the applicants an opportunity to comment on the contents. The applicants are therefore entitled to an order reviewing and setting aside the decision of the Parole Board not to grant parole and to require a further profile for reconsideration of the applicants' parole late in 2010. There is no reason why the applicants must wait so long before parole is properly considered.

Order

- [23] I The decisions of the Correctional Services Parole Board Pretoria Central taken in respect of the applicants on 17 September 2008 are reviewed and set aside;
- II The Case Management Committee Pretoria Central is ordered to immediately prepare the report contemplated in section 42 of Act 111 of 1998 in respect of the applicants and submit the

reports to the applicants for their written representations as required by section 42(3) of Act 111 of 1998 so that both can be available for a sitting of the Parole Board Pretoria Central not later than 31 January 2010;

- III The Correctional Services Parole Board Pretoria Central is ordered to convene and consider the applicants' release on parole as required by section 75(1) of Act 111 of 1998 read with section 42 of Act 111 of 1998 not later than 31 January 2010.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 6478/2009

HEARD ON: 14 October 2009

FOR THE APPLICANTS: In person

FOR THE RESPONDENTS: ADV. J. ROUX

INSTRUCTED BY: State Attorney

DATE OF JUDGMENT: 29 October 2009