

SOUTH AFRICA / JUDGMENT

Botha v Minister of Correctional Services and Others (48708/2007)

[2008] ZAGPHC 367 (16 October 2008)

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COURT
High Courts - Gauteng

BEFORE
Mavundla

CASE / FILE NUMBER
48708/2007

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IN
THE HIGH COURT SOUTH AFRICA
(TRANSCAAL
PROVINCIAL DIVISION)
CASE
NUMBER: 48708/2007
In

the matter between:

ANDRIES
JOHANNES BOTHA APPLICANT
and
THE
MINISTER OF CORRECTIONAL
SERVICES. 1st
RESPONDENTCOMMISSIONER OF CORRECTIONAL
SERVICES 2nd
RESPONDENT
HEAD
OF PRETORIA CENTRAL PRISON 3rd RESPONDENT
CASE
MANAGEMENT COMMITTEE 4th RESPONDENT
CORRECTIONAL
SUPERVISION AND
PAROLE
BOARD 5th RESPONDENT

JUDGMENT

MAVUNDLA J.,

- [1] The applicant approached this court by way of urgency seeking an order that, the decision of the fifth respondent that the applicant be placed on parole only on 19 December 2008. be reviewed and set aside and that such decision be substituted with an order directing the first respondent, second respondent and third respondent to have the applicant immediately released on parole.
- [2] The applicant states that he obtained before this Court under the same case number as herein above an order on 5 May 2008 directing, inter alia, that a profile of the applicant be prepared and that it be placed before the fourth and fifth respondents for the consideration of placing the applicant on parole. Leave was further given to the applicant to supplement his papers in that application, in the event the respondents refuses to place the applicant on parole. The court further granted leave to the applicant to place the matter on the opposed roll.
- [3] The applicant in support of this application stated that he is bringing the application in terms of Rule 53 of the Uniform Rules of the High Court, and in terms of section 6 of PAJA1 after the fifth respondent decided on 3 June 2008 to have him released on 19 December 2008. The applicant alleges further that the decision of the fifth applicant fails within the purview of section 1
- (v) of PAJA.
- [4] The applicant further avers that in compliance with the decision of the order of 5 May 2008, he appeared before Mr. Senekal of the fourth respondent on 29 May 2008 and the latter prepared his profile for purposes of adjudication by the fifth respondent. During the proceedings before the fourth respondent Mr. Senekal informed him that he was satisfied with the applicant's profile and would recommend to fifth respondent that the applicant be placed on parole on 4 June 2008. He further avers that he was informed by Mr. Senekal that the second respondent had given instructions to the case- management-committee and the parole board that prisoners sentenced for economic offences be placed on parole after serving one third of their sentence.
- [5] The applicant further avers that on 3 June 2008 he appeared before fifth respondent who was represented by M, Sepeng in his capacity as chairman, Mr, Mashigo who represented society, and Mr, Shabalala who is in the service of the first respondent for consideration to be placed on parole. He further avers that Mr, Sepeng informed him that: he has a problem with the fact that the applicant has been convicted on so many charges and that he was of the opinion that "they" in prison thought that economic offences are not serious offences. He further stated that the Court order of 5 May 2008 does not oblige him to see the applicant nor to place him on parole and he was not prepared to do so. After a short adjournment he

was then recalled and informed that he would be placed on parole on 19 December 2008.

[6] The applicant further avers that the fifth applicant did not pay attention to the recommendation of the fourth respondent, who had recommended that he be placed on parole on 4 June

2008. He further avers that no reasons were furnished to him why he must only be placed on parole on 19 December 2008 and why it was not agreed with the decision of the fourth respondent.

[7] The applicant further alleges that the decision of the fifth respondent is prejudicial and malicious. He states that the decision was calculated to punish him because, he had taken on review the decision of the fifth respondent of 2007 not to place him on parole. The decision to have him placed on parole only in December 2008 is calculated to deprive him of his rights to fair administrative process and to frustrate his rights. He further alleges that there is no rational reason or explanation why he is not released immediately on parole

[8] The applicant further alleges that the decision of the fifth respondent to delay his release with further six months is tantamount

to refusal to have him placed on parole, and discrimination when regard is had to the fact that other prisoners who have been sentenced to similar offences as he has been, have already been placed on parole although some of those prisoners were sentenced much later than him. He further refers to one D.G. Alexander and Michael Carstens who he says that they obtain parole dates from the fifth respondent, to wit, 31 July 2008. He further states that Alexander was sentenced four months later than himself for fraud of R200M (97 charges). He says that Carsten received 12 years and will only have served his one third sentence on 22 June 2008 but he has already received his parole placement date.

[9] The applicant further states that had the fifth respondent informed him that he would be placed on parole on 31 July 2008 like the other two above mentioned prisoners: he would have accepted that although it would have meant a further unnecessary delay of two months. The applicant contends that his rights in terms of PAJA have been violated by the fifth respondent and that it would be fair and just was this court to order that he be immediately placed on parole.

[10] With regard to urgency, the applicant alleges that the malicious refusal of the fifth respondent to place him on parole amounts to serious violation and encroachment to his right to free movement in circumstances where he has already served thirteen months of his minimum imprisonment term. He says that he has a lawful expectation that he should have been placed on parole on 4 June 2008. He says that there is a reasonable prospect that another objective parole board would arrive at a different decision and agree with the fourth respondent and place him on parole. The applicant states further that he is being seriously prejudiced by being further imprisoned in circumstances where other prisoners who have been sentenced for similar offences as he has been, have already been given dates of their

placement on parole whilst he is being further unnecessary incarcerated. He says that his attorneys have written a letter to the fifth respondent demanding that the applicant should be placed on parole on or before 11 June

2008. He says that he is a suitable candidate to be placed on parole and that there is no other remedy, and that he should be placed on parole.

[11] With regard to the averment of the applicant that his right of free movement has been encroached, it needs mention that the applicant by the very fact that he has been sentenced to a determinate prison term, his right to free movement is therefore by law abridged by the very imprisonment. But besides, the applicant has no right to be released before he has served his imprisonment term in full². It must further be pointed out that, having to be released on parole is not a right but a privilege. The fact that a prisoner at any given instance is being evaluated, it does not necessarily mean that he must automatically be recommended for parole. It is also not the function of the Courts to direct the prison authorities that prisoners must be released and when. The consideration of placing a prisoner on parole is a function of the Parole Board and, in my view the Courts must be slow in assuming the function of the Parole Board.

[12] In the matter of *S v Suliman*³ the Appeal Court stated that "Prison Boards, it seems follow no hard and fast rule as to the time when they proceed to make a recommendation for the release of such prisoner. Each individual case is considered on its merits, and the relevant factors relating to that case determined the attitude and approach of the board." A convicted person has no right to be placed on parole, the parole was a privilege.⁴ In the matter of *Sebe v Minister of Correctional Services and Others*⁵ the Court said that:

"It is of relevance to draw a distinction between parole and remission of sentence.

Historically, parole is a prisoner's promise, of good behaviour in return for release before the expiration of a custodial sentence or, in the modern usage, granting of a convicted prisoner a conditional release on the basis of a promise to adhere to stipulated conditions in return. The phrase on parole' is, therefore, the situation of the prisoner being conditionally released from goal against an undertaking to abide by specific terms and conditions. An example of these terms and conditions is to be found in s.9 of the Parole and Correctional Supervision Amendment Act 87 of 1997 which, in turn, amends s65 of the Correctional Services Act 8 of 1959, as amended. An internal administrative procedure involving the parole board must first take place before the release of a prisoner on parole.

Remission of sentence, on the other hand, is a privilege and not a right, the purpose of which being to serve as an incentive to encourage, if nothing else, good, disciplined behaviour and adherence to prison procedures"

[13] The respondents in opposing the application have filed an affidavit deposed to by Mr. Sepeng. The respondents deny that the application is urgent. According to the respondents the order of 5 May 2008 was granted by agreement between the parties by way of settlement

of the application issued on 19 October 2007, under the same case number as herein above, for the review of the Parole Board's decision initial decision dated 31 May 2007. I find it is disconcerting, to say the least, that the applicant failed to disclose that the order of 5 May 2008 was obtained by agreement. Litigants are expected to at all times make a full disclosure of facts.

[14] The applicant was sentenced on 4 June 2003 to 15 years imprisonment. As I have stated herein above that the applicant does not have a right to be released earlier than the completion of the full term of his imprisonment. With regard to being placed on parole, that is a matter for consideration by the Parole Board, and not by the third respondent. I agree with the submission made on behalf of the respondents that this matter is not urgent at all, having regard to the fact that the applicant was sentenced on 4 June 2003.

[15] The order of 5 May 2008 directed that the applicant can approach the court on the same papers which are supplemented in the event the respondents once more refuse the application of applicants placement on parole,⁶ The respondent did comply with the order granted on 5th May 2008, The consequence thereof is that the question of urgency has fallen away and the papers that formed the basis of the order of 5th May 2008 have fallen off.

[16] On the 3 June 2008 the respondents decided to have the applicant placed on parole on 19 December 2008. In my view, the respondents

have since complied with the order of the 5 May 2008 in the sense that they have reconsidered the case of the applicant and decided that he be placed on parole on 19 December 2008, The relevance of the order of 5 May 2008 has since fallen away. Under those circumstances, I find it not necessary to deal with the papers that served before Mr. Justice Du Plessis on 5 May 2008.

[17] I am of the view that there was no basis at all for the applicant to have brought this application in the form he has chosen, nor was any merit on the application as such. I am of the view that the application must be dismissed.

[18] Where an applicant is unsuccessful in his application, he must be mulcted with costs. There is no reason why this general rule should not apply. Consequently I am of the view that the applicant must be ordered to pay the costs of this application. The respondents have submitted that the applicant must be ordered to pay attorney and client costs. I am disinclined to exercise my discretion to impose punitive costs.

[19] In the result I make the following order:

That the application is dismissed; That the applicant is ordered to pay the costs of the respondents, which costs shall be computed on a party and party.

N.M. MAVUNDLA

JUDGE OF THE COURT

HEARD ON THE: 08 July 2008 DATE OF JUDGEMENT: 16 OCTOBER 2008 APPLICANT'S ATT: MS BREWIS APPLICANT'S ADV: MR J HOLAND-MUTER RESPONDENTS' ATT: STATE ATTORNEY RESPONDENTS' ADV: MR. NEL

HEARD ON THE: 08 July 2008

DATE OF JUDGEMENT: 16 OCTOBER 2008

APPLICANT'S ATT: MS BREWIS

APPLICANT'S ADV: MR J HOLAND-MUTER

RESPONDENTS' ATT: STATE ATTORNEY

RESPONDENTS' ADV: MR. NEL

1 Promotion of Administrative Justice Act 3 of 2000

2 In an unreported judgment of Gerrit Reiner Steenkamp v The Commissioner of Correctional Service Case No: 21018 and the matter of Joseph Sebote Maaga and two Others v The Minister of Correctional Service and Five Others, case no 1614 /03 which both cases were combined, In its judgment which was delivered on 7 February

2005. The Full Court Bench per Van Der Merwe J said that: "Section 32(1) of the Act provides, subject to certain provisions which are not relevant for present purposes, that a sentence of imprisonment shall take effect from the day on which that sentence was passed. Section 65(1) of the Act provides that a prisoner shall be released upon the expiration of the term of imprisonment imposed on him/her. A convicted person is therefore

intended to serve the whole of the sentence imposed. The date of a prisoner's release will therefore be on the expiration of the last day of the term of imprisonment."

3 1968

(3) SA 219 (AD)

4 Combrink v Minister of Correctional Services 2001 SA 338 (D & CLD) at 341 D-F.

5 1999 (1) SACR 244 at 249 e-i.

6 Order of 5 May 2008 provides that: "1. The matter is referred back to the fourth and fifth respondents for compilation of a further profile of the applicant and for the reconsideration of the applicant for his placement or parole within 30 days after the date of this order; The fifth respondent must furnish written reasons to the Court within 14 days after the date of reconsideration of the applicant on parole, in the event the fifth respondent refuses to place the applicant on parole. Leave is granted to the applicant to supplement his papers and to again place the mane on thc opposed roll. In the event the fifth respondent once more turns down the placement of the applicant on parole"

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