

SOUTH AFRICA / JUDGMENT

Ehrlich v Minister of Correctional Services and Others (2004/2016) [2016] ZAECHGHC 100 (6 October 2016) [2016] ZAECHGHC 100

COURT

Eastern Cape High Court, Grahamstown

BEFORE

N G Beshe

CASE / FILE NUMBER

2004/2016

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IN THE HIGH

COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO.: 2004/2016

In

the matter between:

BRUCE

EHRlich

Applicant

And

MINISTER OF CORRECTIONAL

SERVICES

1st Respondent

HEAD: COMMUNITY

CORRECTIONS

2nd Respondent

CORRECTIONAL

SUPERVISION & PAROLE BOARD

3rd

Respondent

JUDGMENT

BESHE J:

[1] This is an application wherein the applicant seeks an order in the following terms, as it would appear from his substituted notice of motion:

1. Condoning the Applicant's non-compliance of the Rules of Court relating to the forms and services of the application on the Respondents and allowing the matter to be heard as a matter of urgency as set down.
2. Reviewing and setting aside the 3rd Respondent's decision to revoke the Applicant's parole.
3. Reviewing and setting aside the 3rd Respondent's decision, taken on 30th June 2016, to deny the Applicant parole.
4. That the Applicant be immediately released from detention to continue serving his parole.
5. That the Respondents are to file, within 24 hours of date of the Order, the full record of the investigation ordered by the 3rd Respondent on 19th April 2016.
6. That such record is to be served on the Applicant simultaneously therewith.
7. That the Respondents are to formulate appropriate parole conditions for the Applicant to properly accommodate his business and personal interests and in such a manner that properly reflects progress made by the Applicant in realizing the objectives of parole.
8. That the Respondents are to submit, within 48 hours of date of the Order, such parole conditions for scrutiny by this Honourable Court.
9. That the Respondents are to regularly assess and report on the Applicant's progress in realizing the objectives of parole as provided for in s. 58 (3) of Act 111 of 1998 as amended.
10. Granting the Applicant alternative and / or other relief.
11. That costs of this application be paid by the 1st Respondent.

[2] The applicant is currently an inmate at the Mdantsane Correctional Centre and is conducting his case in person.

[3] The following background facts appear to be common cause:

Applicant was sentenced to fifteen (15) years imprisonment in 2003 in respect of acts of indecent assault involving minor boys. He was released on parole in January 2010. It also appears to be common cause that the said parole was revoked on the 19 April

2016. Essentially, it would seem, it is the decision to revoke applicant's parole that is sought to be reviewed and set aside with other ancillary relief.

- [4] Applicant contends that his parole was revoked on the ground that he violated his parole conditions by leaving the East London Magisterial District (ELMD) and by consuming alcohol.
- [5] The second respondent who is the head of Community Corrections at the East London correctional facility is Mr Lindile Patrick Ndarala (Ndarala). Ndarala confirms that the revocation of applicant's parole was recommended by second respondent to third respondent. He alleges that the recommendation was based on two violations on part of the applicant. At paragraph 3 of his affidavit he states as follows:

"We had in our possession the statement of the Parole Supervision Officer which is part "A" the statement avers in particular that:

- (a) Applicant left the Magisterial District of East London without informing Mr Sibali or Head of Community Corrections.
- (b) That he consumed liquor or present (sic) in the place where liquor is sold."

Later at paragraph 5 he states:

"On the whole it regarded both violations in a serious light and recommended that revocation of parole be implemented."

- [6] It is common cause that conditions which the applicant was required to comply with the following conditions whilst under correctional

supervision: He must–

1.

- (a) Conduct himself properly at all times.
- (b) Not commit crime or offence of any kind.
- (c) Allow officials of the Department of Correctional Services access to his property / residence for monitoring purposes.
- (d) Obey all orders to report at places and times agreed upon with Correctional Supervision Official / Chairperson: Supervision / Committee EAST LONDON COMMCORP.
- (e) Not resign from his work or change his residential address without prior notice and consent of the Correctional Supervision Official / Chairperson: Supervision Committee in charge of your case.
- (f) Not leave the Magisterial District of East London without the approval of the Head: Community Corrections / Chairperson: Supervision Committee.

2. He may not visit any places where alcohol beverages are consumed.

3. He may not use any drugs or alcohol.

[7] Whilst there is a dispute as to whether applicant admitted to consuming alcohol at the Cambridge Sports Club, there seems to be no dispute that he did leave the East London Magisterial District as alleged. The only dispute in this regard is whether applicant had obtained permission to leave the East London Magisterial District.

[8] The relevant part of applicant's founding affidavit contains the following:

7. Some months after my release I had cause to effect some handyman work in Mdantsane, the main township of East London. I did not seek permission from ELCC as I was under the impression that the area I was working in was part of the East London magisterial district as it is within ten kilometres of the centre of East London.

(a) I was subsequently called to account for this breach of my parole conditions.

(b) Despite my explanation as canvased in paragraph (6) supra, I received some sanction that I cannot now recall.

8. From February 2010 to mid-2014 I duly applied for and received permission to travel outside of the East London Magisterial District

(hereinafter referred to as "ELMD")

(a) This resulted in many wasted work hours and resultant loss of income as I was obliged to travel to ELCC up to four times a day prior to working in Mdantsane.

9. In 2013 I opened a new business called KwikPave, a paving contractor in East London.

(a) This business grew fast with the decision to franchise it throughout the Eastern Cape

(b) Branches were soon opened in Mdantsane and King William's Town.

10. In 2004 I realized that I would not be able to comply to the letter with my parole condition, relating to movement outside of the ELMD, if my business continued to expand and grow.

(a) Accordingly, on 7th March 2014 I submitted a written request to the 2nd Respondent requesting the relaxation of this parole condition (attached hereto per annexure "A")

(b) After receiving no response whatsoever from ELCC I met with the 2nd Respondent personally some weeks later. At that meeting she informed me that I need not apply for permission each time I leave the ELMD, but that I should inform my parole officer if and when requested to do so.

11. From April 2014 to date I have thus been operating my business outside of the ELMD on this basis, informing my parole officer only when requested to do so.

(a) Not once during this period was this modus operandi called into question.

[9] The Chairperson of the Correctional Supervision and Parole Board (3rd respondent) Ms Kazeka Patience Somhlahlo, deposed to an opposing affidavit on behalf of the third respondent. Her affidavit reveals that:

The applicant was brought before the parole board on the 19 April 2016 it being alleged that he had committed two violations of his parole conditions. Those being that he left the East London Magisterial District without the knowledge and permission of the office of Community Corrections and that he visited a place where alcohol beverages are consumed.

It further reveals that applicant having been heard by means of both written and verbal submissions, the parole board took a decision to revoke his parole.

Somhlahlo also asserts that by leaving the East London Magisterial District without permission, applicant committed a serious violation of his conditions of parole or correctional supervision. In addition thereto they (as the parole board) also had at their disposal a statement from a member of the public that applicant repeatedly consumed alcohol at the Cambridge Sports Club / Pub and having been in the company / presence of minor boys. As well as statement wherein applicant is alleged to have admitted consuming alcohol at the said pub. Applicant however denied he admitted to consuming alcohol at the pub in question. A statement from the Head of Community Corrections which was to the effect that applicant left the East London Magisterial District without informing him or obtaining his permission to do so. Somhlahlo further asserts that they considered both violations as being serious and found their way clear to approve revocation of applicant's parole. And further that, this they did after applying their minds.

[10] It is common cause that second respondent issued warrants for the arrest of the applicant in respect of each of the alleged

transgressions as provided for in Section 70 of the Correctional Services Act[1] which provides that:

70 Non-compliance

- (1) If the National Commissioner is satisfied that a person subject to community corrections has failed to comply with any aspect of the conditions imposed on him or her, or any duty placed upon him or her in terms of any section of this Chapter, the National Commissioner—
 - (a) may, depending on the nature and seriousness of the noncompliance—
 - (i);
 - (ii);
 - (iii) issue a warrant for the arrest of such person.

- [11] Applicant contends that second respondent failed to properly apply his mind in sanctioning both warrants for his arrest. That his actions were irrational, unprocedural, unlawful and malicious in the extreme. He contends further that second respondent failed to properly consider all the merits and thus failed to properly apply his mind when recommending the revocation of his parole to the parole board (third respondent).[2]
- [12] As far as third respondent is concerned, applicant contends that the decision of the board falls to be reviewed and set aside because in revoking his parole, the board simply “rubber stamped” second respondent’s defective recommendation.[3]
- [13] In his substituted notice of motion, applicant in addition to seeking an order to be released from custody to continue serving his parole, he is seeking an order directing the respondents to assess him, his current business and to formulate appropriate conditions.
- [14] During the hearing of this application on the 1 September 2016 I was advised that the matter had previously been postponed pending the outcome of a parole board sitting where there was a possibility that the board would make a further decision regarding applicant’s position. This was to have taken place on or before the 31 August
2016. It later turned out that the parole board will only see applicant on the 5 September 2016. Applicant insisted on the matter proceeding on the 1 September 2016 even though the Parole Board had not yet sat to deal with the matter.
- [15] Section 33 (1) and
- (2) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. To give effect to the abovementioned right, the Promotion of the Administrative Justice Act (PAJA)[4] found its way into our statute books.
- [16] Judicial review of administrative action is governed by Section 6 of the Promotion of Administrative Justice Act. The Act stipulates the reasons / grounds that will give a court or tribunal the power to review an administrative action.[5]
- [17] It is on the basis of some of the grounds that are listed in Section 6 (2) that applicant seeks the review of the decisions that culminated in the revocation of his parole. Namely that second and third respondents did not apply their minds with third respondent merely “rubber stamping” second respondent’s recommendations. That second respondent’s actions were irrational, unprocedural, unlawful and malicious in the extreme.
- [18] Administrative action that led to the decision to revoke applicant’s parole was prompted by the fact that he had left the East London Magisterial District (a fact that is not in dispute). That he had not obtained permission to do so. That this resulted in a failure to comply with one of the conditions of his parole.
- [19] I do not understand applicant’s case to be that he sought and obtained permission to leave the East London Magisterial District.

[20] It is necessary to again quote copiously from the relevant part of his founding affidavit in this regard:

(a) Not once during this period was this *modus operandi* called into question.

[21] Needless to say the contents of these paragraphs are denied by the second respondent.

[22] Applicant alleges that in keeping with the agreement with second respondent he addressed a letter to his parole officer Mr Sibali advising him of his travel plans during March and April this year. The letter which is annexed to the founding affidavit as Annexure B reads as follows:

Dear Mr Sibali

RE: TRAVEL PLANS – MARCH / APRIL

We are opening new franchise branches in Port Elizabeth and Cape Town in late March and early April 2016. I will have to travel repeatedly to both centres during this period and advise as such as requested by you.

I will advise further when I am sure of the dates I will be away but I will be leaving East London on Thursday 31st March.

Please contact me if there is anything further you require of me.

Yours sincerely

Bruce Ehrlich

CEO KwikPave SA

[23] He further alleges that he left the letter with the security officers as the correctional facility concerned because he would not be allowed in. He also tried to call Mr Sibali on his cellular phone in vain.

[24] In argument before me, applicant submitted that he had permission to leave the East London Magisterial District because there was a “sort of an arrangement” that is supported / evidenced by the fact that he moved in and out of the East London Magisterial District without any complaint. He submitted that logic dictates that he had permission to move out of East London Magisterial District.

[25] I am not persuaded that this is proof that applicant sought and obtained permission to leave the East London Magisterial District as required by the conditions of his parole. That is, not to leave the East London Magisterial District without the approval of the Head: Community Corrections / Chairperson: Supervision Committee.

[26] It is trite that the objectives community corrections are *inter alia* to afford sentenced offenders an opportunity to serve their sentences in a non-custodial manner, to enable persons subject to community

corrections to lead a socially responsible and crime free life during the period of their sentence and in future.[6]

[27] It is also trite that the immediate aim of the Community Corrections is to ensure that persons subject to community corrections abide by the conditions imposed upon them in order to protect the community from offences which such persons may commit.[7] I cannot imagine how the objectives of the community corrections, in particular, the one envisaged in Section 50 (2) would be achieved if a sentenced offender would be given free reign to move in and out of the district they are required to seek permission / approval to leave. In my view, this is a serious violation that will no doubt stifle or frustrate supervision / monitoring of the offender. How will monitoring of the applicant be possible? The letter does not specify how long he will be away – where exactly he will be travelling to and when.

[28] I have alluded to the steps that may be taken in the event of non-compliance with any aspect of the conditions imposed on him / her as provided for in Section 70 of the Act. Section 75 sets out the powers, functions and duties of the Correctional Supervision and Parole Boards. In my view, the Board acted in terms

of the provisions of Section 75.

[29] I am unable to find that respondents did not apply their minds to applicant's submissions or that the decision taken by the second respondent was not taken in a procedurally fair manner or was unreasonable. His application for the setting aside of the decision to revoke his parole falls to be dismissed.

[30] Applicant does however succeed in making a case for non-compliance by Correctional Services in particular the Supervision Committee, with the provisions of Section 58 (2) – (6) of the Act, which reads thus:

- (2) The Supervision Committee must determine the level of supervision for each person subject to community corrections and must review its determination at regular interval.
- (3) The Supervision Committee must review at regular intervals the extent to which the objectives of community corrections are being achieved in respect of each person subject to community corrections.
- (4) An additional review may be held at the request of the person subject to community corrections or of the correctional official directly responsible for the supervision of such person.
- (5) A person subject to community corrections must be informed of a meeting where his or her case will be discussed, the issues which will be raised and that he or she may make written submissions to be considered by the Supervision Committee.

- (6) After having reviewed the extent to which the objectives of community corrections are being achieved in respect of a person subject to community corrections, the Supervision Committee must—
- (a) decide whether the means and level of supervision applied to such person should be modified; and
 - (b) submit a report and advise the Correctional Supervision and Parole Board or the National Commissioner, as the case may be, on the desirability of—
 - (i) applying for a change in the conditions of the community corrections imposed on such person; or
 - (ii) applying for or issuing a warrant for the arrest of such a person.
- [31] Applicant contends that according to his knowledge, he has never been assessed in the past four years.
- [32] In view of the fact that applicant has succeeded partially – it will be appropriate to order that each party pays its own costs.
- [33] Accordingly the following order will issue:
- (a) Applicant's non-compliance with the rules of this court relating to the forms and service of the application on the respondents is condoned.
 - (b) The application to review and set aside third respondent's decision to revoke applicant's parole is dismissed.
 - (c) The application to review and set side third respondent's decision to deny applicant parole is dismissed.
 - (d) The respondents are ordered to determine the level of supervision required for the applicant within thirty (30) days of this order and thereafter to make a determination in this regard at regular intervals.

Each party is to pay its own costs.

N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant : Mr Bruce Ehrlich

Instructed by :

APPLICANT IN PERSON

A - Unit

Mdantsane Prison

Ref.: Mr Ehrlich

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For the Respondents : Adv: M Mpahlwa

Instructed by :

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GRAHAMSTOWN

Ref.: Mr Mgangatho

Tel.: 073 761 7751

Date Heard : 1 September 2016

Date Reserved : 1 September 2016

Date Delivered : 6 October 2016

[1] Act 111 of 1998.

[2] Paragraphs 24 and 26 of the founding affidavit.

[3] Paragraph 31 of the founding affidavit.

[4] 3 of 2000.

[5] Section 6 (2) of PAJA.

[6] Section 50 of the Correctional Services Act.

[7] Section 50 (2) of the Correctional Services Act.

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