

SOUTH AFRICA / JUDGMENT

**Minister of Correctional Services and
Another v Johnson and Others
(16515/2012) [2013] ZAGPPHC 152;
2013 (2) SACR 565 (GNP) (12 June 2013)
[2013] ZAGPPHC 152**

COURT

North Gauteng High Court, Pretoria

BEFORE

H J Fabricius, E M Makgoba, W Hughes

CASE / FILE NUMBER

16515/2012

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REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG HIGH COURT)

FULL

BENCH

Case

Number: 16515/2012

DATE:12/06/2013

In

the matter between:

MINISTER
OF CORRECTIONAL SERVICES.....1st
APPLICANT
NATIONAL
COMMISSIONER
OF
2nd APPLICANT
CORRECTIONAL
SERVICES
And
MR
P J JOHNSON: REGIONAL MAGISTRATE,
.....1st
RESPONDENT

NORTH
GAUTENG DIVISION, PRETORIA
ZONDERWATER
CORRECTIONAL
.....2nd
RESPONDENT
SUPERVISION
AND PAROLE BOARD
TIEDT,
FREDERICK
REINACH.....3rd
RESPONDENT
VAN
SCHALKWYK, GERT
MATHYS.....4th
RESPONDENT
AUGUSTYN

JUDGMENT

Fabricsius J,

1.

Relief sought:

This is a review application, opposed only by the Third and Fourth Respondents, in which the Applicants seek an order in the following

terms:

1.1 That the decisions and orders of the First Respondent of 15 December 2011, in terms whereof the sentences of imprisonment of the Third and Fourth Respondents were converted into correctional supervision, be reviewed and set aside;

1.2 That the warrants for the release of the Third and Fourth Respondents, signed by the First Respondent on 15 December 2011, be set aside;

1.3 That the decisions and orders of the First Respondent of 10 February 2012, in terms whereof the appeal of the Second Applicant against the decisions and orders described in par. 1.1 above was dismissed with costs, be set aside;

2. That the Third and Fourth Respondents be ordered and directed to return to the Zonderwater Correctional Centre in order to continue

serving the periods of imprisonment imposed upon them by the Regional Court, Pretoria, which they commenced serving on 11 August 2008;

3. ...

4. That the Applicants' costs of the application, including the costs of two counsel be paid, jointly and severally, by any

Respondents that oppose the application.

2.

Before I deal with the history of the matter it may be convenient to briefly elaborate on the grounds for the relief sought as per the Applicants' founding affidavit:

2.1 the decisions and orders of the First Respondent referred to in par. 1.1 above were purportedly made in terms of s276 A(3) of the Criminal Procedure Act, 51 of 1977 (the "CPA"). In terms of this section, the power of the First Respondent to order the conversion of a sentence of imprisonment into correctional supervision only arises where the "date of release", as contemplated in s276 A(3)(a)(ii), is "not more than 5 years in the future". Upon a proper interpretation and application of this section, the date of release of each of the Third and Fourth Respondents was more than five years in the future. Accordingly, the First Respondent had no power or jurisdiction to make such decisions and orders, which were, in the circumstances, unlawful.

2.2 Such decisions and orders, and the proceedings in respect of them, were in any event grossly irregular, in that-

2.2.2 the First Respondent misconstrued the nature of the proceedings and enquiry which he was required to conduct in terms of s276 A(3) of the Criminal Procedure Act;

2.2.4 the decisions and orders were unreasonable and shockingly inappropriate.

2.3 The further decisions and orders of the First Respondent referred to in par 1.2 and 1.3 above, had as their factual and legal basis the decisions and orders referred to in par 1.1 above. In the circumstances, the consequence of a finding of unlawfulness and invalidity in respect of such decision would be that they are likewise unlawful and invalid, and should be set aside.

3.

History:

The Third and Fourth Respondents and two others (who are not part of these proceedings) were convicted by the Regional Court Pretoria of the crimes of murder and assault with intent to do grievous bodily harm. On 18 January 2005 they were sentenced to a term of

imprisonment of twelve years in respect of the murder charge, and a sentence of 2 months imprisonment in respect of the assault charge. It was ordered that both sentences were to run concurrently.

The Third and Fourth Respondents, acting with a common purpose together with the other accused person, and with the intention to do so, murdered an unidentified man in a park in Pretoria late at night. The accused persons kicked and stamped on the man while he was lying on the ground. The Fourth Respondent stabbed him with a knife. The Third Respondent hit the man on the head with a hammer. Having left their weapons at the scene, they later returned in order to retrieve them. On their return, they found the man bleeding, groaning and asking for medical assistance. One of the accused Respondents kicked him in the face. The man died of the wounds inflicted upon him. All four accused were found guilty of murder, and the Third and Fourth Respondents, as well as another accused person, were found guilty of assault with intent to commit grievous bodily harm committed earlier that evening. The Regional Court took all relevant circumstances into account in sentencing the four accused, including their youth at the time. The Third Respondent was 15 years old (but almost 16) when the crime was committed, and 22 years old when he was sentenced. The Fourth Respondent was 16 years old at the time of the crime. The cruelty and brutality of their actions were also taken into account.

Having obtained leave to appeal, all of the accused appealed to the High Court against their convictions and sentences. This appeal was dismissed. The High Court ruled that the Regional Court had acted correctly in taking all relevant circumstances into account in respect of sentencing. It noted, not surprisingly, that murder is a serious offence, that the deceased had died in a cruel manner, and that none of the accused had shown any remorse. As a result the Third and Fourth Respondents commenced serving their sentences on 11 August 2008.

On 18 November 2011, while the Third and Fourth Respondents were serving their sentences at the Zonderwater Correctional Centre, the Parole Board (the Second Respondent herein) delivered a written application to the Regional Court Pretoria. Each application involved a request by the Parole Board for each Respondent to appear before such Court for reconsideration of his sentence in terms of s276 A(3) of the Criminal Procedure Act.>

The applications were heard on 15 December 2011 by a magistrate who had not dealt with the trial, being the First Respondent in these proceedings. The First Respondent ordered that the sentences of imprisonment previously imposed be converted into correctional

supervision. On the same day, the First Respondent accordingly signed warrants for the release of the Respondents. The founding affidavit herein was made by the Second Applicant, the National Commissioner of Correctional Services. The First Applicant, the Minister of Correctional Services, made a supporting affidavit. The Second Applicant alleges in the founding affidavit that neither he nor the Minister were aware of the fact that the Parole Board had brought these applications, or that they were due to be dealt with by the First Respondent, or of the fact that decisions and orders referred to in par 1.1 and 1.2 above had been granted.

The Third and Fourth Respondents were however not immediately released from the Zonderwater Correctional Centre, which resulted in an urgent application being launched on their behalf for their release, and for an order convicting the particular respondents therein of contempt of court. Pursuant to an order of this court, The Third and Fourth Respondent were released, but soon after this release they were “returned” to the Zonderwater Correctional Centre. This in turn, resulted in a further urgent application for their release, and for an order convicting certain of the Respondents of contempt of court. The Respondents were thereafter released from custody, and have since been out of custody pursuant to the decision of the First Respondent referred to in par 1.1 above. The Applicants herein are of the view that the facts and circumstances relating to the urgent applications are not relevant to the present proceedings.

Based on legal advice, an application for leave to appeal against the decision of the First Respondent referred to par 1.1 was brought on Applicants’ behalf. The application was heard on 10 February 2012 by the First Respondent who dismissed the application with costs. I might as well add at this stage that this is also not surprising, The absurdity of those proceedings is glaringly obvious from the fact that the Second Respondent was the Applicant in the proceedings to convert the term of imprisonment into correctional supervision. Having succeeded in that endeavour, they, by way of their political and administrative superiors, namely the Applicants, then sought leave to appeal against the fact that their own request had been granted. The less one says about those proceedings the better. The Magistrate, the First Respondent, can certainly not be criticized for expressing his amazement at the nature of the proceedings and Counsel’s argument.

4.

The Proceedings Before The First Respondent;

I intend to refer briefly to certain allegations and facts that were made on behalf of the Second Respondent to the First Respondent in the application placed before him for reconsideration of the sentences in terms of s276 A(3) of the CPA. The Zonderwater Correctional Supervision and Parole Board (“CSPB”) noted that the Third Respondent had served more than a quarter of his effective sentence and was deemed by it to qualify for, and be fit to be subjected to correctional supervision in terms of the mentioned section of the CPA. The founding affidavit in those proceedings was made by the Board’s Chairman, Adv. H. Theron. He had scrutinised the relevant profile report of the Case Management Committee of the prison, and had considered written submissions made by his legal representative. (The same reasoning applies to the Fourth Respondent as well). The Respondents made submissions to the Board, and he states that the Board was unanimous in its decision to refer both of the Respondents for reconsideration of their sentences. Both of the Respondents had received 6 months special remission of their sentence, and half of the sentence would have been served on 10 May 2014, and the actual sentence expiry date was 10 February 2020. It was noted that the Third Respondent regretted what had happened on that particular day, and in the context of “likelihood of further criminality” it was stated that according to the offender the offence was committed because of peer pressure. The

Second Respondent by way of its Chairman gave written reasons for the decision taken, part of which contains legal argument relating to the competency or otherwise of such a referral for reconsideration of the sentence. It was however also noted that the Third Respondent had served more than a quarter of his effective sentence, and was within two years and seven months from his earliest possible future consideration for placement on parole. He was 15 years old when he committed the offence, and by definition was still a mere child. He had to endure a lengthy protected period of prosecution, both in court and through the media. He fully complied at the time with his bail conditions, and there was no reason to believe that he would not honour and comply with his conditions of correctional supervisions. He was now 25 years old. Of the sentence he served a period of incarceration of more than 24 months in maximum centres, one being the high security C-max. Despite all this he reportedly excelled in prison, and used every opportunity of rehabilitation to his advantage. At the time he was busy with his final exam for B.com studies, and I note that this degree was achieved. A firm of Chartered Accountants indicated that he could complete his learner-ship with the firm in order to register as a Chartered Financial Analyst. The last part of the Chairman's reasoning is as follows: "The offender has lost 10 years of his life, punishment should not destroy but be meted out to allow for rehabilitation and ultimate re-integration back into the society. The parole board is of the opinion that further lengthy incarceration will have no meaningful purpose, neither for the individual nor the society at large, hence the unanimous decision of the Parole Board." This written reason was dated 11 November

2011. Various affidavits of support were filed by a number of persons, including family and friends. The Third Respondent himself said in his affidavit of 2 November 2011: "I declare that I feel remorse for the crime that I committed against the community, and I commit myself to a responsible and crime free life in the future. During my present imprisonment I came to realise that I have a responsibility towards the community. In the future I will contribute towards an orderly community life by positive behaviour and a responsible lifestyle." A clinical psychologist of the Zonderwater management area, Ms. M. Dreyer filed a report on 6 June

2011. She set out the incarceration history in some detail, made clinical observations, and came to the following conclusions: "There are however various positive points that can be highlighted, including:

- He is a first time offender with no previous criminal record, and a clean prison record.
- He is a young man and will still be able to work hard and build a future for himself outside,
- He has been dedicated to his studies while being imprisoned and has achieved brilliant results.
- He has a good family support system, and a confirmed residential address outside.
- He was co-operative during therapy and motivated to work hard towards the goals that he has set for himself.

- He also displayed the ability to deal effectively with personal and interpersonal issues.

It is my opinion that he has positively contributed to his own rehabilitation whiles being incarcerated. He displayed the ability to clearly express his needs and emotions, and believes that he has enough discipline to make a success of his life outside. He did a lot of introspection, and has actively contributed to his self-development. He appears to be matured and taking charge of his life.

From a professional point of view, I cannot motivate reasons why he cannot be granted correctional supervision if he qualifies according to the DCS Policy.” There was a further report filed by Ms. Y. van Schalkwyk, a social worker, dated 28 March 2011. She consulted with the Third Respondent, his parents, his sister, a number of friends, a religious worker and his girlfriend. The crux of her opinion was the following: “It is the opinion of the undersigned that the prisoner shows a definite change into his insight and attitude towards his criminal behaviour. He accepts responsibility. The prisoner is not a threat to society, and will rather contribute by his positive attitude. He is very driven and goal orientated. There is a good chance that he will make a success of his future.” Accordingly, her recommendation was that the Third Respondent would be a suitable candidate for the conversion of his sentence into correctional supervision.

As far as the Fourth Respondent’s application for reconsideration was concerned, similar positive allegations were made. He had also shown remorse. The comments made by Second Respondent in respect of the Third Respondent, applied to him as well. He also declared by way of an affidavit that he felt remorseful exactly in the same terms as did the Third Respondent. A social worker, Ms. S Maree, presented a “profile report” dated 15 June 2011. She stated that he “admits guilt to assault but not to murder. He still

claims that the victim was not the same person as the one they assaulted.” (I may mention that such seemed to be the main defence during the trial of all of the four accused). A “psychological report” was again drawn by Ms. M. Dreyer dated 6 June 2011. She mentioned that the Fourth Respondent had enrolled for an LLB degree with UNISA and started working as a gym instructor. He later obtained a job in the construction industry, and there after worked as a personal trainer. He also commenced with his articles at a law firm, but because of the constant sense of uncertainty regarding his trial, he could never really settle down or stay focussed on his studies. I deem it necessary to quote one of her comments which is relevant having regard to her conclusions: “Even though the offender has been in prison for a relatively short period, he has had sufficient time to think about his life and earlier decisions made. The case has been ongoing since 2003. when he was still an adolescent, and a lot has changed in his personal life since then. The case received a lot of publicity and media coverage, and he was affected by this lengthy process. What further complicated matters, is the fact that they were four-accused in the case, and were treated as a group, without considering their individual circumstances and positive traits. He decided early in his sentence to distance himself from 2 of his co-accused, as he realised that they had very little in common, and viewed the prison sentences in a totally different manner. He felt that he needed to focus on his individual needs and own rehabilitation process.” Further she states that Fourth Respondent takes responsibility for playing a role in

assaulting the particular individual deceased during that night, but that he struggles to accept the fact that he was charged with murder. The positive points that she mentions about him are the following:

- He was a first time offender with no previous criminal record, and a clean prison record.
- During the individual sessions, he displayed the ability to deal effectively with the personal and interpersonal problems.
- He has completed a diploma in sport management in 2010, and is currently busy with a diploma in marketing, as well as computer studies.
- He has a good family support system, and has employment opportunities outside.
- He is still a young man and will still be able to work and provide for himself outside.
- He was co-operative during therapy and motivated to work hard towards the goals that he has set for himself.”

From a professional point of view therefore she could not motivate reasons why he should not be released on correctional supervisions if he qualifies according to the DCS Policy. The unit manager of the Zonderwater Prison wrote on 28 June 2010, that it was with delight and the utmost confidence, that he could state that he had changed his life for the better and would be an asset to society as whole. There are other letters both from the prison and from family and friends that support the views of the more professional people in this context. The Mpumalanga Rugby union also wrote on 12 April 2011 that they would give him the opportunity to further his rugby career, and to be part of their rugby development program. He apparently played for the Pumas during the 2008 season. His own written request states the following that I deem relevant: “I regret and am contrite, that as a young boy of 16, I was involved in such a shameful incident that ended in my imprisonment and I am fully aware of the consequences of my crime. However, now as matured man, at the age of 26, I am proud that I have been rehabilitated and grateful for the assistance and opportunity given to me by the department of correctional services.” He continued as follows: “I was 16 when this most regrettable incident took place. I was 18 when I was arrested. The court case stretched over a 4 year period before we were sentenced. During the court case I had to adhere to strict bail conditions, which I religiously did. To continue my professional rugby career special arrangements were made when we played an away game and I complied with and behaved as was expected of me.” Lastly he said the following: “I would once again like to express my sincere remorse for committing such an awful deed and I am fully aware of and have contrition for my appalling behaviour at the time. I see myself as a rehabilitated offender who poses no danger to society and I promise to exhibit continues good behaviour, conduct and adaptation.”

All the relevant documents relating to both Respondents were placed before the First Respondent when he reconsidered the sentence. It must be remembered that the Applicant in those proceedings was the Second Respondent itself. The State was represented by Adv. J. Kruger, who had also been the prosecuting counsel in the trial proceedings. The Respondents were

represented by their Advocate and Attorney. The defence's counsel submitted that the application was properly before the court within the ambit of the provisions of s276 A of the CPA. The magistrate then stated that he had considered the documentation placed before him, the fact that 10 years had gone by since the offence was committed, that the department had presented well motivated considerations and testimonials, and then came to the conclusion that it was in the interest of the present Respondents, as well as society, that the application for reconsideration be granted. The conditions of such correctional supervision were then imposed by him, which basically amounted to house arrest if the Respondents were not in employment, and he also imposed certain community service that had to be performed by them.

I have already mentioned that the department, by way of the Applicants herein, applied for leave to appeal against an order that their own officials had sought, it is no wonder that the presiding Magistrate classified this being "a very weird application". The facts relating to the department not obeying court orders, that [have referred to, was also noted by the Magistrate, and although I do not deem that these particular proceedings are of any further relevance before me, I need to say that the learned Magistrate was quite correct in observing that if the Government defied court orders, how could one expect members of the public to obey them? in any event, the application for leave to appeal was dismissed on good grounds and, the relevant urgent applications and the resulting

accusations of contempt of court by certain officials were settled between the parties. I will deal with this topic again hereunder,

inasmuch as Respondents contend that as a result of such settlement, the present proceedings are incompetent. Before leaving this topic at present I need to add that it is regretful that the contempt of court proceedings were "settled", inasmuch as it is a cornerstone of our constitutional dispensation that court orders be obeyed. One can only hope that the relevant officials were disciplined appropriately by their superiors, and by that I mean the First and Second Applicants.

5.

Unlawfulness, and Lack of Jurisdiction: Section 276 A(3) of the Criminal Procedure Act.

5.2 The Correctional Services Act of 1959 was repealed and replaced by the Correctional Services Act 111 of 1998, which came into operation on 31 July 2004. In the circumstances, the reference to the Correctional Services Act, 1959, in s276

A(3)(a)(ii) of the CPA must be construed as a reference to the new Correctional Services Act 111 of 1998. This must be so in terms of the provisions of s12 of the Interpretation Act 33 of 1957 which states that "where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provisions so repealed shall, unless the contrary intention appears, be construed as reference to the provisions so re-enacted." In the circumstances, what is contemplated by the date of release in s276 A(3)(a)(ii) of the CPA, must be determined with reference to the relevant provisions of the Correctional Services Act of 1998 as

they existed at the relevant time, namely 15 December 2011, when the sentences of imprisonment of the Third and Fourth Respondents were converted into correctional supervision.

5. 3 In this context s73 of the Correctional Services Act 1998 is important for a number of reasons: It makes a clear distinction between the placement under correctional supervision and parole, and makes it clear by way of s73(3) that a sentenced offender must be released from a correctional centre, and from any form of community corrections imposed in lieu of part of a sentence of incarceration, when the term of incarceration has expired. Accordingly, it is Applicants' submission that the "date of release" contemplated in s276 A(3)(a)(ii) of the CPA, that "in terms of the provisions of the Correctional Services Act", is the date upon which the term of the sentence imposed on the particular offender has expired. This interpretation is consistent with, and supported by two decisions of the Western Cape High Court, namely *Goodwin v Minister of Justice and Minister Correctional Services* (unreported decision under case no:22537/2010 delivered on 24 March 2011), and *Swart v Minister of Correctional Services and Others* 2011
- (2) SACR 217 (WCC) The result is of course that at the time when the First Respondent made his orders, the Third and Fourth Respondents had served slightly less than three and a half years of the sentences imposed on them. Their sentences were due to expire on 10 February 2020, which was an excess of 9 years in the future, and more than the 5 year period contemplated in s276 A(3)(a)(ii) of the CPA. It is clear from the provisions of s50, s53 and s39 of the Correctional Services Act that correctional supervision is regarded as forming part of the period of the offender's sentence. This is very relevant when any placement on parole is considered.

5.4 After counsel for the Applicants and Third and Fourth Respondents had filed their heads of argument, we were provided with a judgment of the Cape of Good Hope Provincial Division of the High Court, in the matter between *The Minister of Correctional Services and Others v Mario Roos*. (Case no. A629/12 dated 21 May 2013). This was an appeal against the judgment and order handed down by Blignaut J on 18 June

2012. This is a judgment of the Full Bench of the Court, written by Traverso DJP, who in her usual concise manner analysed the mentioned

provisions of the CPA read with s73 of the Correctional Services Act of 1998. Her conclusion was that where the legislature in the new Correctional Services Act has consciously removed the deeming provision in s73 of the new Act, the relevant date of release must be interpreted to mean the date upon which the period of imprisonment expires. It is clear from the CPA, that an application for conversion of a sentence of imprisonment to correctional supervision cannot be brought, and can certainly not be granted, where the prisoner's date of release is more than 5 years in the future.

I respectfully agree with the reasoning of the Full Bench, and it is clear that the judgment of Blignault J was clearly wrong. The result is that the First and Second Respondents acted unlawfully. The legal opinion upon which the First and Second Respondents relied, which forms part of the application papers, was also wrong. It is clear that the exercise of all public power is subject to the principle of legality. It is clear that the First Respondent did not have the jurisdiction to entertain the application for conversion of the sentence. See: *Affordable Medicines Trust and Others v Minister of Health and Others*

[2005] ZACC 3; 2006 (3) SA 247 (CC) at 272 par. 49, and *Fedsure Life Assurance Limited and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA

374 (CC). Absence of jurisdiction, in this context means, that the subject-matter of the action is beyond the jurisdiction of the Court.

See. Erasmus, Superior Court Practice, Farlam Fichardt Van Loggerenberg, at A1-69. Mr. Cilliers SC, on behalf of the Respondents,

argued that the First Respondent did have jurisdiction, but that his order could possibly be wrong.

This cannot be so. The presence or absence of jurisdiction is an objective fact, and, where particular statutory provisions apply, they will determine the question of jurisdiction. The question remains one of substantive law, and is certainly not a mere procedural point. See: *S v Absalom* 1989 (3) SA 154 (A) at 164 and *Safatsa v Attorney-General Transvaal* 1989 (1) 821 (A).

It is clear that in any event a judgment by a Court that does not have jurisdiction in respect of the cause, or subject matter, is a nullity, and can have no legal effect.

5.5 The result is that prayer 1.1 of Applicants' Notice of Motion must be granted together with 1.2 thereof. The order of the First Respondent on 15 December 2011 in terms whereof the sentences of imprisonment of the Third and Fourth Respondents were converted into correctional supervision, and the relevant warrants for their release signed on that day, are accordingly set aside.

6.

This Court is also obliged to act according to the Rule of Law. It is certainly not a matter of our discretion, as Mr. Cilliers SC suggested. We have no discretion in this context. We must interpret the law and apply it. The Regional Court was also obviously so obliged, but it was confronted with an application by the Correctional Supervision and Parole Board which was not opposed, and which was fully motivated. It however made an error in law, which we must correct. This ordinarily would be the end of the matter, but because of the particular circumstances, and the public interest aspect, it is my view that certain observations remain relevant:

6.1 Neither the Applicants nor the Respondents, in their written heads of argument, made any suggestion as to when my order should be implemented. It would be grossly unfair and inhumane to order that the Third and Fourth Respondents immediately return to a prison designated by the authorities. It is obvious from the reports placed before the Parole Board, that they are in present employment, and obviously have all types of responsibilities, not only in relation thereto, but otherwise of a financial nature, and most likely and hopefully, commitments to their families and friends. In my view therefore they should be given time to arrange their affairs so as to cause the least possible disruption and inconvenience to other institutions or persons who are affected by the court order. The fact that a court has to act according to law does not mean that it cannot act with humanity and compassion. It is accordingly my view that this part of our order should come into effect on 10 July 2013.

7.

Having regard to the facts referred to, and the relevant legal principles involved, which gave rise to much debate and uncertainty, it is my view that it would not be fair to the Third and Fourth Respondents that they be ordered to pay the cost of this review application. It must be remembered at the very least that the Applicants' own Parole Board was the Applicant before the Regional Court. The Third and Fourth Respondents are certainly not to blame for what happened subsequently, and the fact that the law was misconstrued by the First and Second Respondents and, by their legal representatives. Accordingly no order as to costs is made.

8.

It is not necessary to deal with prayer 1.3 of the notice of motion any further. I have made remarks that I deemed relevant.

As far as the second part of the Applicants' grounds upon which they sought the relevant relief is concerned, I do not agree that the conversion of the sentence by the First Respondent was grossly irregular in the sense that conversion was "shockingly

inappropriate" or "arbitrary" or "unreasonable". The First Respondent, as ought to be clear from the above mentioned facts, was presented with a well-motivated application for conversion by the Second Respondent. It was not opposed by the Advocate for the State, who also appeared during the trial proceedings. It is clear that although the sentence that the Respondents had served is relatively short, that their whole young life was totally disrupted and turned upside-down for a period of about 10 years at

least (The crime was committed in 2001). It is indeed so that the crime was cruel, and that I have difficulty in understanding what went on in their young minds that evening. Their actions were those of young offenders which resulted in the death of a man who could not defend himself. The attack was indeed repulsive. The question that must be answered is the following however: a sentence of 12 years of imprisonment was imposed and the appeal against such was dismissed. What is the purpose of sentencing? This of course depends on the nature of the crime and its consequences. It also depends on the personality and character and age of an offender. It also

depends on the interest of the community at large. The court must do its best to strike a balance between these considerations, some of which may be in conflict with each other. This is never an easy task. See: S. Terblanche, *Guides to Sentencing in South Africa*, Lexis Nexis, 2007 at 132 par. 5.3.3. Where it appears, as it does herein, even according to the departments own social workers and psychologists, that the Third and Fourth Respondents either have been rehabilitated, or will be rehabilitated while serving out their sentence under correctional supervision, is it appropriate merely to repeatedly and solely refer to the brutality of the offence? In my view the answer must be a firm: no. All relevant considerations must be taken into account, and a fair and humane balance must be sought which takes account of all the interests that I have mentioned. It is not my duty in these proceedings to prescribe to the Department of Correctional Services how to further deal with the Third and Fourth Respondents in the context of parole. I am however at liberty to place my view on record. Taking the totality of all the mentioned circumstances into account, I would say to the Department, if I were asked, and if my view was relevant and legally competent: The Third and Fourth Respondents are suitable candidates for a conversion of their sentence to correctional supervision at the date which is not longer than 5 years prior to their date of release. When however they become eligible for parole before that, in terms of time served according to the relevant statutory provisions, they ought to be favourably considered. The First Respondent can in my view therefore not be

blamed for making the order that he did, apart from not having the necessary jurisdiction. He certainly did not act grossly irregular in the context of what was put before him, and in the sense that he did not properly apply his mind to the facts of the case or the purpose of sentencing. I do not agree that he did not properly consider, or at all, the brutality of the offence. In his judgment the learned Magistrate stated that he had read and considered the judgement of the trial Court, amongst others. There was no need to be more explicit.

9.

One of the defences of Third and Fourth Respondents to the application was, that the whole of the matter had become settled in the context of the urgent applications that were brought, and the contempt of court that was committed by officials of the Correctional Services Department. The Attorney on behalf of Applicants made an affidavit denying that he had any such intention at all, and that what was settled were merely the urgent applications for the Respondents' release, and the contempt of court committed by the officials of the Department in ignoring the particular orders of the Court which had ordered their release from the prison. The First and Second applicants also made affidavits and said that no such instructions had been given to their

Attorney to "settle" the question of jurisdiction of the Regional Court to hear the relevant application. It is clear that although counsel has full authority to conduct litigation as he deems fit, he must be properly instructed. It is however also clear that a client is not bound by an action of his legal representative, be it an Attorney or Counsel, where such representative exceeded his mandate, and achieved an object that had not even been intended by the principal. It is also clear from the present facts, that the lis between the parties, during the urgent application process and the resultant contempt of court prayers, was exactly that. By no means of the imagination, having

regard to those proceedings, could it be said that the parties sought to “settle” the aspect of the jurisdiction of the First Respondent. See: *Transvaal Canoe Union v Butgereit* 1990 (3) SA 398 (T) at 405 and 409, a decision of the Full Bench of this Court, and *Ras v Liquor Licensing Board* 1966 (2) SA 232 (C), also a Full Bench decision of the Cape High Court. Furthermore, one cannot “settle” a matter that relates to the

applicability of law, or the principle of legality or the powers of judicial and public authorities. This is an objective fact that either exists, or it does not exist. Relevant legislation will be decisive. One cannot by way of a concession either take away or grant such a jurisdiction. This would not be competent in law. See by way of an example *R v Papangelis* 1960 (2) SA 309 (O) at 311. It is clear from the *Ras* supra decision that one can also ask the following question: what is the object of this suit? In this case it was the urgent application on the one hand, and the contempt of court proceedings arising there from on the other hand. Any material alteration outside the object of the suit, would require the authorisation of Counsel’s client, if such was legally competent in any event.

It is therefore my opinion that this part of the Respondents defence is without any merit.

10.

The following order is therefore made:

10.1 The decisions and orders of the First Respondent of 15 December 2011, in terms whereof the sentences of imprisonment of the Third and Fourth Respondents were converted into correctional supervision, is hereby reviewed and set aside;

10.2 the warrants for the release of the Third and Fourth Respondents, signed by the First Respondent on 15 December 2011 are hereby set aside;

10.3 the Third and Fourth Respondents are ordered and directed to return to the Zonderwater Correctional Centre in order to continue serving the periods of imprisonment imposed upon them by the Regional Court, Pretoria, which they commenced serving on 11 August 2008;

10.4 this order is to take effect on 10 July 2013;

10.5 no order as to costs is made.

10.6 It is noted that the time served under the relevant correctional supervision orders, is time that was served as part of the original sentence.

JUDGE H J FABRICIUS

JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree:

JUDGE E M MAKGOBA

ACTING JUDGE W HUGHES

Case number : 16515/2012

Counsel for the Plaintiff: Adv J A Newdigate SC

Adv T Masuku

Instructed by: State Attorney

Pretoria

Counsel for the First Defendant: Adv. J G Cilliers SC

Instructed by: J Brewis Attorneys

Heard on: 29 May 2013

Date of Judgment: 12 June 2013

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