

Steenkamp v Commissioner of Correctional Services , Maaga and Others v Minister of Correctional Services and Others (21018/03 , 1614/03) [2005] ZAGPHC 14 (7 February 2005)
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should not be "more than five years in the future" when consideration is given to the conversion of the unexpired period of imprisonment into correctional supervision. The matter was referred to this court because of conflicting judgments in this division on the interpretation of the section. I will later refer to those judgments. The concept of correctional supervision was introduced into the CPA by section 41(a) of Act 122 of 1991 which amended section 276 of the CPA by inserting subsections (1)(h) and (i) into that section. Section 276(1)(h) of the CPA authorises a court to sentence a convicted person to correctional supervision while section 276(1)(i) authorises a court to sentence such a person to imprisonment from which he/she may be placed under correctional supervision in the discretion of the Commissioner of Correctional Services ("the Commissioner"). Sections 276(h) and (i) of the CPA are amplified by section 276A(1) and (2) thereof which provides as follows: "(1) Punishment shall only be imposed under section 276(1)(h)-(a) after a report of a probation officer or a correctional official has been placed before the court; and (b) for a fixed period not exceeding three years. (2) Punishment shall only be imposed under section 276(1)(i)-(a) if the court is of the opinion that the offence justifies the imposing of imprisonment, with or without the option of a fine, for a period not exceeding five years; and (b) for a fixed period not exceeding five years." A court of first instance may therefore sentence a person to correctional supervision for a maximum period of three years. Where a court of first instance sentences a person to direct imprisonment not exceeding five years, such court may, through the provisions of section 276(1)(i), authorise the Commissioner to convert the sentence of imprisonment to correctional supervision. In each instance the sentencing court takes the initiative to either impose a sentence of correctional supervision itself or leaves it to the discretion of the Commissioner to convert the initial sentence of imprisonment to correctional supervision. Once a sentencing court has acted in terms of the provisions of section 276(1)(i) of the CPA it is only the Commissioner who can then convert the original sentence of imprisonment to correctional supervision. Section 276A(3) deals with a situation where the trial court did not follow any one of the two options in sections 276(1)(h) or (i) of the CPA but merely imposed a sentence of direct imprisonment. Section 276A(3) creates the machinery for the conversion of such a term of imprisonment to correctional supervision. It provides as follows: "(3)(a) Where a person has been sentenced by a court to imprisonment for a period-(i) not exceeding five years; or (ii) exceeding five years, but his date of release in terms of the provisions of the Correctional Services Act, 1959 (Act 8 of 1959), and the regulations made thereunder is not more than five years in the future, the Commissioner may, if he is of the opinion that such a person

is fit to be subjected to correctional supervision, apply to the clerk or registrar of the court, as the case may be, to have that person appear before the court a quo in order to reconsider the said sentence."The period of imprisonment not exceeding five years referred to in section 276A(3)(a)(i) of the CPA corresponds with the period of imprisonment referred to in section 276(1)(i) read with section 276A(2) of the CPA. In such a case the Commissioner may act in terms of this subsection for the conversion of the sentence of imprisonment to that of correctional supervision. In terms of section 276A(3)(a)(ii), ie where the period of imprisonment exceeds a period of five years, the Commissioner may only act if the prisoner's date of release in terms of the provisions of the Correctional Services Act 1959 (Act 8 of 1959) ("the Act") "and the regulations made thereunder is not more than five years in the future".The Act was repealed by the Correctional Services Act, 111 of 1998 ("the Correctional Services Act").Section 136 of the Correctional Services Act contains transitional provisions. Subsection (1) of section 136 provides as follows:"136.Transitional provisions. – (1) Any person serving a sentence of imprisonment immediately before the commencement of Chapters IV, VI and VII is subject to the provisions of the Correctional Services Act, 1959 (Act No 8 of 1959), relating to his or her placement under community corrections, and is to be considered for such release and placement by the Correctional Supervision and Parole Board in terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of those Chapters."Chapter V of the Correctional Services Act commenced on 31 July 2004 whilst chapters VI and VII commenced on 1 October 2004. See Proclamation R38, 2004, Government Gazette 26626 dated 30 July 2004.The provisions of the Act is therefore still applicable for purposes of this judgment.The phrase "date of release" in section 276A(3)(a)(ii) of the CPA was interpreted differently by different courts in this division. Because of the conflicting judgments the matter was referred to this court.The "date of release" is not defined in the CPA nor in the Act. 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.The concept of parole attracted much attention in the conflicting judgments as well as in the arguments before us. It is therefore necessary to consider the question of parole.The Act provides for the placement of a prisoner on parole before the expiration of his/her term of imprisonment. For that purpose parole boards were created in terms of section 5C of the Act. The powers, functions and duties of parole boards are set out in section 63 of the Act. I will later return to certain specific provisions of section 63 of the Act. In general it makes provision for the submission of a report by the Parole Board to the Commissioner.

After having studied the report the Commissioner may in terms of section 65 of the Act decide to place the prisoner on parole before the expiration of his/her term of imprisonment. Conditions are attached to such placement on parole and must be accepted by the prisoner. The period of placement on parole extends between the date of placement on parole and the expiration of the term of imprisonment. A prisoner who has been placed on parole is not released from the control of the prison authorities. His/her term of imprisonment has therefore not expired. The Commissioner may, subject to the provisions of section 65 of the Act, amend the conditions of parole, withdraw the parole and may cause the prisoner to be arrested and detained for the unexpired period of imprisonment. The Act also provides for the placement of prisoners on parole under other circumstances. The State President may authorise the placement of a prisoner on parole (section 66). As a special measure to reduce the prison population, the Minister of Correctional Services may advance the date of placement of prisoners on parole (section 67). Prisoners may also be placed on parole on medical grounds (section 69). The date of release of a prisoner is not affected by his/her placement on parole. Remission of sentence does, however. Such remission vests in the State President (sections 66 and 70). A limited power of remission is also granted to the Commissioner (section 68). The State President may also authorise the unconditional release of a prisoner (sections 66 and 70). In the papers reference was made to the earning of so-called "credits". In terms of section 1 of the Act "credits" mean the days and months contemplated in section 22A(2) of the Act. In general, credits are awarded for good behaviour. Section 22A(2) further provides that credits may be taken into account in determining the date on which a Parole Board may consider the placement of a prisoner on parole. Credits therefore only affect the date on which a prisoner may be considered for and placed on parole. It does not affect the date of release of the prisoner. In terms of section 63 of the Act the Parole Board shall, in respect of certain categories of prisoners, or in respect of prisoners of whom a special report is required by the Minister of Correctional Services or the Commissioner, submit a report with regard to, inter alia, the conduct, adaptation, training, aptitude, industry and physical and mental state of such prisoner and the possibility of his/her relapse into crime, to the Commissioner or Minister. That is the report referred to in section 65 of the Act which is required and need be studied before a prisoner is placed on parole. Section 63(1)(b) of the Act requires that together with the report required for inter alia placement of the prisoner on parole, the Parole Board shall make recommendations to the Commissioner regarding: "(i) the placement of such prisoner under correctional supervision by virtue of a sentence contemplated in section 276(1)(i) or 287(4)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977), or by virtue of the conversion of such prisoner's sentence into correctional supervision under section 276A(3)(e)(ii) or 287(4)(b) of the said Act and the period for which and the

conditions on which such prisoner may be so subjected to correctional supervision: Provided that for the purposes of such recommendations a prisoner's date of release contemplated in section 276A(3)(a)(ii) of the Criminal Procedure Act, 1977, shall be deemed to be the earliest date on which a prisoner may, in terms of this Act, be considered for placement on parole or the date on which the prisoner may be released upon the expiration of his sentence, whichever occurs first; or (ii) the placement of such prisoner on parole in terms of section 65 or on daily parole in terms of section 92A and the period for which, the supervision under which and the conditions on which such prisoner should be so placed; and ... "Sections 287(4)(a) and (b) of the CPA deal with a situation where a trial court imposed a period of imprisonment as an alternative to a fine. In such a case the Commissioner may in his discretion at the commencement of the period of imprisonment or at any point thereafter "if it does not exceed five years" act as provided for in sections 276(1)(i) or 276A(3) of the CPA. The question is: does the deeming provision in the proviso of section 63(1)(b)(i) of the Act determine the date of release referred to in section 276A(3)(a)(ii) of the CPA. The conflicting judgments in this division, referred to earlier, are *Charl Gregoire Fourie v Minister van Korrektiewe Dienste en Andere*, unreported judgment of SWART, J, case no 18605/97, delivered 4 November 1998; *Jacobus Marthinus Koen v Minister van Korrektiewe Dienste NO en Andere*, unreported judgment by BERTELSMANN, J, case no 3446/2000, delivered 20 June 2000; and *Gertruida M Giani v Commissioner of Correctional Services*, unreported judgment by WEBSTER, J, case no 18141/2001, delivered some time during 2002. In the *Fourie* matters *supra* SWART, J concluded as follows on the meaning of the phrase "date of release" in section 276A(3)(a)(ii) of the CPA: "Op die basis van die beredenering tot dusver volg dit dat die vrylatingsdatum in subartikel (3)(a)(ii) *supra* vermeld, die werklike vrylatingsdatum is en dat dit nie die bedoeling van die wetgewer kon gewees het om die vrylatingsdatum in artikel 63(1)(b)(i) daarmee gelyk te stel nie. Hierdie afleiding word versterk deur die feit dat laasgenoemde bepaling 'n voorbehoudsbepaling is 'vir die doeleindes van sodanige aanbevelings'. Sodanige aanbevelings kan ongetwyfeld by meerdere geleenthede ter sprake kom soos bv deur die minister vereis of deur die kommissaris spesifiek aangevra of gelas. Daarbenewens moet onthou word dat dit hier gaan slegs om die aanbevelings van die Paroolraad. Daardie aanbevelings is nie gelyk te stel met 'n beslissing deur die kommissaris of 'n aansoek deur hom vir die inwerkingstelling van die bepaling van die Strafproseswet met die oog op die omskepping van 'n vonnis nie." (See pp 32 and 33 of the judgment.) See also pp 3637 of the judgment where the learned judge states the following: "Ek herhaal dat, weens redes hierbo uiteengesit, dit vir my ondenkbaar is dat uit hoofde van artikel 63(1)(b)(i), *supra*, in artikel 276A(3)(a)(ii) enigiets anders beoog word as die werklike vrylatingsdatum. Artikel 63(1)(b)(i) kan dus slegs beteken dat op die stadium waarop die Paroolraad om 'n verslag en aanbeveling gevra word, die Paroolraad met 'n vermeende vrylatingsdatum moet werk wat ten tye van 'n beoogde aansoek hoogstens vyf jaar in die toekoms sal wees. Die letterlike vertolking van artikel 63(1)(b)(i) kan tot absurde gevolge aanleiding gee." I will later briefly refer to the absurd

consequences referred to by the learned judge. BERTELSMANN, J followed SWART, J's reasoning in the Koenmatters *supra*. At p1415 of the judgment BERTELSMANN, J states as follows: "In hierdie verband kan ek niks byvoeg tot wat SWART R in die Fouriebeslissing waarna hierbo verwys is, geset nie. Dit is duidelik dat die bepalings van artikel 63(1)(b)(i) van die Wet op Korrektiewe Dienste, indien dit letterlik toegepas word, tot 'n geheel en al anomaliese situasie aanleiding kan gee. Deur die aanwending van die bepalings van artikel 276A(3)(a)(ii), sou mens dan by die resultaat kan uitkom dat, omdat die parooldatum van 'n gevangene na die uitdienting van helfte van sy vonnis deur die Kommissaris oorweeg kan word (dit wil swaar 'n gevangene tot sestig jaar gevangenisstraf gevonnis is, na dertig jaar), terselfdertyd egter vanwiedie bepalings van artikel 63(1)(b)(i) van Wet 8 van 1959 dieselfde datum, wat nie 'n vrylatingsdatum is nie maar 'n uitplasingsdatum, kan gebruik om 'n vonnis wat nog dertig jaar het om te loop in korrektiewe toesig te omskep. Dit is duidelik dat korrektiewe toesig deur die wetgewer slegs beoog is vir vonnisse wat vyf jaar ab initio te bowe gaan nie, f waarvan daar slegs vyf jaar oorbly. Die vyf jaar wat oorbly word bereken met verwysing na die werklike vrylatingsdatum, met ander woorde die vonnis wat inderdaad opgelis met inagneming van amnesties, en nie met inagneming van krediete of ander maatstawwe soos deur die Departement van Korrektiewe Dienste van tyd tot tyd vir die berekening van 'n uitplasingsdatum op parool oorweeg word nie." In the Gianimatters *supra* WEBSTER, J considered both the Fourie and Koenmatters *supra* and came to a different conclusion. After having referred to both the Fourie and Koenmatters WEBSTER, J concludes as follows at p11 of the judgment: "There is no definition of 'the date of release' in the Act. Section 63(1)(b)(i) provides that definition. There is no conflict between the two statutory provisions. It should be so. The CPA provides for the sentencing and the Correctional Services Act provides for giving effect to that process. The sections are, to my mind, complimentary, they are compatible and could only have been intended to accelerate the release by way of conversion of the sentence of a prisoner whose conduct and behaviour since being sentenced have justified his being placed on parole. I see no absurdity or incongruity in extending to such a prisoner the same privilege as the one whose date of release is five years in the future and to bring him before a court for a conversion of his sentence if the court is satisfied that it is appropriate to do so. That is the ordinary and grammatical meaning of the two sections." I cannot agree with the conclusion reached by WEBSTER, J in the Gianimatters *supra*. I am satisfied that the conclusion reached by SWART and BERTELSMANN, JJ is correct for the following reasons. A sentence of correctional supervision for a fixed period not exceeding three years can be imposed by a trial court. [Section 276(1)(h) read with section 276A(1) of the CPA.] A trial court can impose a sentence of imprisonment which the Commissioner may convert into correctional supervision provided the imprisonment does not exceed a period of five years. [Section 276(1)(i) read with section 276A(2) of the CPA.] The Commissioner may convert a period of imprisonment as an alternative to payment of a fine into correctional supervision or apply that it so be converted provided the term of imprisonment

does not exceed a period of five years. [Section 287(4) of the CPA.] On the whole structure of the CPA regarding correctional supervision it is clear that the legislature regarded five years of the total sentence imposed as the maximum period that a prisoner should be under correctional supervision. Section 63 of the Act requires a Parole Board to compile and submit a report to the Commissioner for consideration of a prisoner's placement on parole. Together with such a report a recommendation regarding the placement of such prisoner under correctional supervision is required. For purposes of such recommendation a deeming provision is contained in section 63(1)(b)(i) of the Act. The deeming provision provides for the earliest of two dates, ie either the prisoner's date of release on the expiration of his sentence, or the date on which the prisoner may be considered for placement on parole. If the deeming provision in the Act is read with the provisions of section 276A(3)(a)(ii), the earliest of the two dates must be no more than five years in the future. That means that if the earliest of the two dates is the date on which a prisoner can be placed on parole, that prisoner can be considered for placement under correctional supervision five years before he/she can be placed on parole. Both SWART and BERTELSMANN, JJ considered such an interpretation as making a mockery of section 276A(3)(a)(ii) of the CPA and sentences imposed by trial courts. Such an interpretation can also lead to absurdities. In terms of the Act a prisoner can be considered for placement on parole after having served one half of the sentence. On the interpretation of section 276A(3)(a)(ii) by WEBSTER, J, that means that if a prisoner was sentenced to say fifty years imprisonment with no credits or amnesty granted to him/her, he/she can be considered for parole after twenty five years. That same prisoner can be considered for placement under correctional supervision five years before he/she can be considered for parole, ie after having served twenty years imprisonment. That means thirty years before the actual expiration date of the sentence. As stated above, the whole tenor of the CPA regarding correctional supervision is that it should not endure for more than five years of the total sentence. The absurdity referred to above becomes even clearer when a prisoner is sentenced to a shorter period of imprisonment. If a prisoner was sentenced to seven years imprisonment on 1 January 1998 his date of release would be 31 December 2004. If such a prisoner receives no credits and no amnesty he/she can be placed on parole after having served half of the sentence, ie on 30 June 2001. On the reasoning of WEBSTER, J a prisoner can be considered for the conversion of his sentence of imprisonment to that of correctional supervision five years prior to the date of 30 June 2001, ie 30 June 1996, ie prior to the date on which he was convicted and sentenced namely 1 January 1998. On behalf of the applicants it was submitted that the "service order" referred to by the applicant Steenkamp in his replying affidavit shows that prisoners in the position of the applicants are obliged to serve at least one quarter of their sentences before a conversion of such sentences can be considered. The "service order" does, however, not help

with the interpretation of section 276A(3)(a)(ii) of the CPA. No deeming provision similar to that contained in section 63(1)(b)(i) of the Act is to be found in the Correctional Services Act. Section 73 of the Correctional Services Act deals with the length and form of sentences and makes provision, inter alia, for different terms of imprisonment that must be served before consideration can be given for the conversion of such sentence of imprisonment. The period of imprisonment to be served is now contained in the Correctional Services Act itself and not in any "service order". Section 73(7)(d) of the Correctional Services Act then provides as follows: "A person sentenced to imprisonment for a definite period in terms of section 276(1)(b) of the said Act may not be placed under correctional supervision unless such sentence has been converted into correctional supervision in accordance with section 276A(3) of the said Act." This provision leaves no doubt that the five year period referred to in section 276A(3)(a)(ii) of the CPA refers to five years before the actual date of release and has nothing to do with parole or a period of five years before a prisoner can be placed on parole. It is clear that the "date of release" referred to in section 276A(3)(a)(ii) of the CPA refers to the expiry date of the sentence less any remission of sentence by the State President (section 66 of the Act) or special remission by the Commissioner (section 68 of the Act). The dates for the consideration of and/or for the actual placement of the prisoner on parole have nothing to do with the "date of release" in section 276A(3)(a)(ii) of the CPA. The date deemed to be the date of release referred to in section 63(1)(b)(ii) of the Act is only for purposes of recommendation referred to in that section. In my judgment it is therefore not necessary to deal with any of the judgments dealing with parole to which reference was made in the heads of argument. (See for example *Winckler & Others v Minister of Correctional Services and Others* 2001 2 SA 747(C); *Combrink & Another v Minister of Correctional Services & Another* 2001 3 SA 338(D&CLD); and *Mohammed v Minister of Correctional Services & Others* 2003 6 SA 169(SECLD). In my judgment there is no merit in the applicant's application. There is no reason why the costs of the applications should not follow the results thereof. The applications are dismissed with costs. W J VAN DER MERWE JUDGE OF THE HIGH COURT I agree J B SHONGWE JUDGE OF THE HIGH COURT I agree N M MAVUNDLA ACTING JUDGE OF THE HIGH COURT 21018-2003 CASE NO: 21018/03 HEARD ON: 19/8/2003 APPLICANT IN PERSON FOR THE RESPONDENT: ADV I P NGOBESE INSTRUCTED BY: STATE ATTORNEY, PRETORIA CASE NO: 1614/2003 HEARD ON: 25/3/2003 APPLICANTS IN PERSON FOR THE RESPONDENTS: ADV B R TOKOTA INSTRUCTED BY: STATE ATTORNEY, PRETORIA IN THE HIGH COURT OF SOUTH AFRICA /ES (TRANVAAL PROVINCIAL DIVISION) TRANVAAL PROVINCIAL DIVISION IN THE MATTER BETWEEN ST ND

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JUDGMENT

VAN DER MERWE, J

This judgment deals with the interpretation of section 276A(3)(a)(ii) of the Criminal Procedure Act, 51 of 1977, ("the CPA") more in particular where it refers to a prisoner's date of release which should not be "more than five years in the future" when consideration is given to the conversion of the unexpired period of imprisonment into correctional supervision. The matter was referred to this court because of conflicting judgments in this division on the interpretation of the section. I will later refer to those judgments. The concept of correctional supervision was introduced into the CPA by section 41(a) of Act 122 of 1991 which amended section 276 of the CPA by inserting subsections (1)(h) and (i) into that section. Section 276(1)(h) of the CPA authorises a court to sentence a convicted person to correctional supervision while section 276(1)(i) authorises a court to sentence such a person to imprisonment from which he/she may be placed under correctional supervision in the discretion of the Commissioner of Correctional Services ("the Commissioner"). Sections 276(h) and (i) of the CPA are amplified by section 276A(1) and (2) thereof which provides as follows: "(1) Punishment shall only be imposed under section 276(1)(h)-
inter alia

- (a) after a report of a probation officer or a correctional official has been placed before the court; and (b) for a fixed period not exceeding three years.
- (2) Punishment shall only be imposed under section 276(1)(i)-
 - (a) if the court is of the opinion that the offence justifies the imposing of imprisonment, with or without the option of a fine, for a period not exceeding five years; and (b) for a fixed period not exceeding five years."

A court of first instance may therefore sentence a person to correctional supervision for a maximum period of three years. Where a court of first instance sentences a person to direct imprisonment not exceeding five years, such court may, through the provisions of section 276(1)(i), authorise the Commissioner to convert the sentence of imprisonment to correctional supervision. In each instance the sentencing court takes the initiative to either impose a sentence of correctional supervision itself or leaves it to the discretion of the Commissioner to convert the initial sentence of imprisonment to correctional supervision. Once a sentencing court has acted in terms of the provisions of section 276(1)(i) of the CPA it is only the Commissioner who can then convert the original sentence of imprisonment to correctional supervision. Section 276A(3) deals with a situation where the trial court did not follow any one of the two options in sections 276(1)(h) or (i) of the CPA but merely imposed a sentence of direct imprisonment. Section 276A(3) creates the machinery for the conversion of such a term of imprisonment to correctional supervision. It provides as follows:

"(3)(a) Where a person has been sentenced by a court to imprisonment for a period-(i) not exceeding five years; or

(ii) exceeding five years, but his date of release in terms of the provisions of the Correctional Services Act, 1959 (Act 8 of 1959), and the regulations made thereunder is not more than five years in the future,

the Commissioner may, if he is of the opinion that such a person is fit to be subjected to correctional supervision, apply to the clerk or registrar of the court, as the case may be, to have that person appear before the court a quo in order to reconsider the said sentence."

a quo

The period of imprisonment not exceeding five years referred to in section 276A(3)(a)(i) of the CPA corresponds with the period of imprisonment referred to in section 276(1)(i) read with section 276A(2) of the CPA. In such a case the Commissioner may act in terms of this subsection for the conversion of the sentence of imprisonment to that of correctional supervision. In terms of section 276A(3)(a)(ii), ie where the period of imprisonment exceeds a period of five years, the Commissioner may only act if the prisoner's date of release in terms of the provisions of the Correctional Services Act 1959 (Act 8 of 1959) ("the Act") "and the regulations made thereunder is not more than five years in the future". The Act was repealed by the Correctional Services Act, 111 of 1998 ("the Correctional Services Act"). Section 136 of the Correctional Services Act contains transitional provisions. Subsection (1) of section 136 provides as follows:

Correctional Services Act

Section 136

Correctional Services Act contains

section 136

"136. Transitional provisions. – (1) Any person serving a sentence of imprisonment immediately before the commencement of Chapters IV, VI and VII is subject to the provisions of the Correctional Services Act, 1959 (Act No 8 of 1959), relating to his or her placement under community corrections, and is to be considered for such release and placement by the Correctional Supervision and Parole Board in terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of those Chapters."

Transitional provisions

Chapter V of the Correctional Services Act commenced on 31 July 2004 whilst chapters VI and VII commenced on 1 October 2004. See Proclamation R38, 2004, Government Gazette 26626 dated 30 July 2004.

Government Gazette

The provisions of the Act is therefore still applicable for purposes of this judgment.

The phrase "date of release" in section 276A(3)(a)(ii) of the CPA was interpreted differently by different courts in this division. Because of the conflicting judgments the matter was referred to this court. The "date of release" is not defined in the CPA nor in the Act. 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. The concept of parole attracted much attention in the conflicting judgments as well as in the arguments before us. It is therefore necessary to consider the question of parole. The Act provides for the placement of a prisoner on parole before the expiration of his/her term of imprisonment. For that purpose parole boards were created in terms of section 5C of the Act. The powers, functions and duties of parole boards are set out in section 63 of the Act. I will later return to certain specific provisions of section 63 of the Act. In general it makes provision for the submission of a report by the Parole Board to the Commissioner. After having studied the report the Commissioner may in terms of section 65 of the Act decide to place the prisoner on parole before the expiration of his/her term of imprisonment. Conditions are attached to such placement on parole and must be accepted by the prisoner. The period of placement on parole extends between the date of placement on parole and the expiration of the term of imprisonment. A prisoner who has been placed on parole is not released from the control of the prison authorities. His/her term of imprisonment has therefore not expired. The Commissioner may, subject to the provisions of section 65 of the Act, amend the conditions of parole, withdraw the parole and may cause the prisoner to be arrested and detained for the unexpired period of imprisonment. The Act also provides for the placement of prisoners on parole under other circumstances. The State President may authorise the placement of a prisoner on parole (section 66). As a special measure to reduce the prison population, the Minister of Correctional Services may advance the date of placement of prisoners on parole (section 67). Prisoners may also be placed on parole on medical grounds (section 69). The date of release of a prisoner is not affected by his/her placement on parole. Remission of sentence does, however. Such remission vests in the State President (sections 66 and 70). A limited power of remission is also granted to the Commissioner (section 68). The State President may also authorise the unconditional release of a prisoner (sections 66 and 70). In the papers reference was made to the earning of so-called "credits". In terms of section 1 of the Act "credits" mean the days and months contemplated in section 22A(2) of the Act. In general, credits are awarded for good behaviour. Section 22A(2) further provides that credits may be taken into account in determining the date on which a Parole Board may consider the placement of a prisoner on parole. Credits therefore only affect the date on which a prisoner may be considered for and placed on parole. It does not affect the date of release of the prisoner. In terms of section 63 of the Act the Parole Board shall, in respect of certain categories of prisoners, or in respect of prisoners of whom a special report is required by the Minister of Correctional Services or the Commissioner, submit a report with regard to, inter alia, the conduct, adaptation, training, aptitude, industry and physical and mental state of such prisoner and the possibility of his/her relapse into crime, to the

Commissioner or Minister. That is the report referred to in section 65 of the Act which is required and need be studied before a prisoner is placed on parole. Section 63(1)(b) of the Act requires that together with the report required for inter alia placement of the prisoner on parole, the Parole Board shall make recommendations to the Commissioner regarding:

inter alia

"(i) the placement of such prisoner under correctional supervision by virtue of a sentence contemplated in section 276(1)(i) or 287(4)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977), or by virtue of the conversion of such prisoner's sentence into correctional supervision under section 276A(3)(e)(ii) or 287(4)(b) of the said Act and the period for which and the conditions on which such prisoner may be so subjected to correctional supervision: Provided that for the purposes of such recommendations a prisoner's date of release contemplated in section 276A(3)(a)(ii) of the Criminal Procedure Act, 1977, shall be deemed to be the earliest date on which a prisoner may, in terms of this Act, be considered for placement on parole or the date on which the prisoner may be released upon the expiration of his sentence, whichever occurs first; or (ii) the placement of such prisoner on parole in terms of section 65 or on daily parole in terms of section 92A and the period for which, the supervision under which and the conditions on which such prisoner should be so placed; and ..."

section 276A(3)(a)(ii)

Criminal Procedure Act, 1977

Sections 287(4)(a) and (b) of the CPA deal with a situation where a trial court imposed a period of imprisonment as an alternative to a fine. In such a case the Commissioner may in his discretion at the commencement of the period of imprisonment or at any point thereafter "if it does not exceed five years" act as provided for in sections 276(1)(i) or 276A(3) of the CPA. The question is: does the deeming provision in the proviso of section 63(1)(b)(i) of the Act determine the date of release referred to in section 276A(3)(a)(ii) of the CPA. The conflicting judgments in this division, referred to earlier, are *Charl Gregoire Fourie v Minister van Korrektiewe Dienste en Andere*, unreported judgment of SWART, J, case no 18605/97, delivered 4 November 1998; *Jacobus Marthinus Koen v Minister van Korrektiewe Dienste NO en Andere*, unreported judgment by BERTELSMANN, J, case no 3446/2000, delivered 20 June 2000; and *Gertruida M Giani v Commissioner of Correctional Services*, unreported judgment by WEBSTER, J, case no 18141/2001, delivered some time during 2002. In the *Fourie* matters *supra* SWART, J concluded as follows on the meaning of the phrase "date of release" in section 276A(3)(a)(ii) of the CPA:

Charl Gregoire Fourie v Minister van Korrektiewe Dienste en Andere

Jacobus Marthinus Koen v Minister van Korrektiewe

Dienste NO en Andere

Gertruida

M Giani v Commissioner of Correctional Services

Fourie

supra

"Op die basis van die beredenering tot dusver volg dit dus dat die vrylatingsdatum in subartikel (3)(a)(ii)supravermeld, die werklike vrylatingsdatum is en dat dit nie die bedoeling van die wetgewer kon gewees het om die vrylatingsdatum in artikel 63(1)(b)(i) daarmee gelyk te stel nie. Hierdie afleiding word versterk deur die feit dat laasgenoemde bepaling 'n voorbehoudsbepaling is 'vir die doeleindes van sodanige aanbevelings'. Sodanige aanbevelings kan ongetwyfeld by meerdere geleenthede ter sprake kom soos bv deur die minister vereis of deur die kommissaris spesifiek aangevra of gelas. Daarbenewens moet onthou word dat dit hier gaan slegs om die aanbevelings van die Paroolraad. Daardie aanbevelings is nie gelyk te stel met 'n beslissing deur die kommissaris of 'n aansoek deur hom vir die inwerkingstelling van die bepaling van die Strafproseswet met die oog op die omskepping van 'n vonnis nie."

(See pp32 and 33 of the judgment.)See also pp3637 of the judgment where the learned judge states the following:

"Ek herhaal dat, weens redes hierbo uiteengesit, dit vir my ondenkbaar is dat uit hoofde van artikel 63(1)(b)(i),supra, in artikel 276A(3)(a)(ii) enigiets anders beoog word as die werklike vrylatingsdatum. Artikel 63(1)(b)(i) kan dus slegs beteken dat op die stadium waarop die Paroolraad om 'n verslag en aanbeveling gevra word, die Paroolraad met 'n vermeende vrylatingsdatum moet werk wat ten tye van 'n beoogde aansoek hoogstens vyf jaar in die toekoms sal wees. Die letterlike vertolking van artikel 63(1)(b)(i) kan tot absurde gevolge aanleiding gee."

I will later briefly refer to the absurd consequences referred to by the learned judge.BERTELSMANN, J followed SWART, J's reasoning in theKoenmattersupra. At p1415 of the judgment BERTELSMANN, J states as follows:

Koen

"In hierdie verband kan ek niks byvoeg tot wat SWART R in dieFouriebeslissing waarna hierbo verwys is, geshet nie. Dit is duidelik dat die bepalings van artikel 63(1)(b)(i) van die Wet op Korrektiewe Dienste, indien dit letterlik toegepas word, tot 'n geheel en al anomaliese situasie aanleiding kan gee. Deur die aanwending van die bepalings van artikel 276A(3)(a)(ii), sou mens dan by die resultaat kan uitkom dat, omdat die parooldatum van 'n gevangene na die uitdiening van helfte van sy vonnis deur die Kommissaris oorweeg kan word (dit wil swaar 'n gevangene tot sestig jaar gevangenisstraf gevonniss is, na dertig jaar), terselfdertyd egter vanwede bepalings van artikel 63(1)(b)(i) van Wet 8 van 1959 dieselfde datum, wat nie 'n vrylatingsdatum is nie maar 'n uitplasingsdatum, kan gebruik om 'n vonnis wat nog dertig jaar het om te loop in korrektiewe toesig te omskep. Dit is duidelik dat korrektiewe toesig deur die wetgewer slegs beoog is vir vonnisse watf vyf jaarab initionie te howe gaan nie,f waarvan daar slegs vyf jaar oorbly. Die vyf jaar wat oorbly word bereken met verwysing na die werklike vrylatingsdatum, met ander woorde die vonnis wat inderdaad opgelis met inagneming van amnesties, en nie met inagneming van

krediete of ander maatstawwe soos deur die Departement van Korrektiewe Dienste van tyd tot tyd vir die berekening van 'n uitplasingsdatum op parool oorweeg word nie."

ab initio

In the *Giani* matters *supra* WEBSTER, J considered both the *Fourie* and *Koen* matters *supra* and came to a different conclusion. After having referred to both the *Fourie* and *Koen* matters WEBSTER, J concludes as follows at p11 of the judgment:

Giani

"There is no definition of 'the date of release' in the Act. Section 63(1)(b)(i) provides that definition. There is no conflict between the two statutory provisions. It should be so. The CPA provides for the sentencing and the Correctional Services Act provides for giving effect to that process. The sections are, to my mind, complimentary, they are compatible and could only have been intended to accelerate the release by way of conversion of the sentence of a prisoner whose conduct and behaviour since being sentenced have justified his being placed on parole. I see no absurdity or incongruity in extending to such a prisoner the same privilege as the one whose date of release is five years in the future and to bring him before a court for a conversion of his sentence if the court is satisfied that it is appropriate to do so. That is the ordinary and grammatical meaning of the two sections."

I cannot agree with the conclusion reached by WEBSTER, J in the *Giani* matters *supra*. I am satisfied that the conclusion reached by SWART and BERTELSMANN, JJ is correct for the following reasons. A sentence of correctional supervision for a fixed period not exceeding three years can be imposed by a trial court. [Section 276(1)(h) read with section 276A(1) of the CPA.] A trial court can impose a sentence of imprisonment which the Commissioner may convert into correctional supervision provided the imprisonment does not exceed a period of five years. [Section 276(1)(i) read with section 276A(2) of the CPA.] The Commissioner may convert a period of imprisonment as an alternative to payment of a fine into correctional supervision or apply that it so be converted provided the term of imprisonment does not exceed a period of five years. [Section 287(4) of the CPA.] On the whole structure of the CPA regarding correctional supervision it is clear that the legislature regarded five years of the total sentence imposed as the maximum period that a prisoner should be under correctional supervision. Section 63 of the Act requires a Parole Board to compile and submit a report to inter alia the Commissioner for consideration of a prisoner's placement on parole. Together with such a report a recommendation regarding the placement of such prisoner under correctional supervision is required. For purposes of such recommendation a deeming provision is contained in section 63(1)(b)(i) of the Act. The deeming provision provides for the earliest of two dates, ie either the prisoner's date of release on the expiration of his sentence, or the date on which the prisoner may be considered for placement on parole. If the deeming provision in the Act is read with the provisions of section 276A(3)(a)(ii), the earliest of the two dates must be no more than five years in the future. That means that if the earliest of the two dates is the date on which a prisoner can be placed on parole, that prisoner can be considered for placement under correctional supervision five years before he/she can be placed

on parole. Both SWART and BERTELSMANN, JJ considered such an interpretation as making a mockery of section 276A(3)(a)(ii) of the CPA and sentences imposed by trial courts. Such an interpretation can also lead to absurdities. In terms of the Act a prisoner can be considered for placement on parole after having served one half of the sentence. On the interpretation of section 276A(3)(a)(ii) by WEBSTER, J, that means that if a prisoner was sentenced to say fifty years imprisonment with no credits or amnesty granted to him/her, he/she can be considered for parole after twenty five years. That same prisoner can be considered for placement under correctional supervision five years before he/she can be considered for parole, ie after having served twenty years imprisonment. That means thirty years before the actual expiration date of the sentence. As stated above, the whole tenor of the CPA regarding correctional supervision is that it should not endure for more than five years of the total sentence. The absurdity referred to above becomes even clearer when a prisoner is sentenced to a shorter period of imprisonment. If a prisoner was sentenced to seven years imprisonment on 1 January 1998 his date of release would be 31 December 2004. If such a prisoner receives no credits and no amnesty he/she can be placed on parole after having served half of the sentence, ie on 30 June 2001. On the reasoning of WEBSTER, J a prisoner can be considered for the conversion of his sentence of imprisonment to that of correctional supervision five years prior to the date of 30 June 2001, ie 30 June 1996, ie prior to the date on which he was convicted and sentenced namely 1 January 1998. On behalf of the applicants it was submitted that the "service order" referred to by the applicant Steenkamp in his replying affidavit shows that prisoners in the position of the applicants are obliged to serve at least one quarter of their sentences before a conversion of such sentences can be considered. The "service order" does, however, not help with the interpretation of section 276A(3)(a)(ii) of the CPA. No deeming provision similar to that contained in section 63(1)(b)(i) of the Act is to be found in the Correctional Services Act. Section 73 of the Correctional Services Act deals with the length and form of sentences and makes provision, inter alia, for different terms of imprisonment that must be served before consideration can be given for the conversion of such sentence of imprisonment. The period of imprisonment to be served is now contained in the Correctional Services Act itself and not in any "service order". Section 73(7)(d) of the Correctional Services Act then provides as follows:

"A person sentenced to imprisonment for a definite period in terms of section 276(1)(b) of the said Act may not be placed under correctional supervision unless such sentence has been converted into correctional supervision in accordance with section 276A(3) of the said Act."

This provision leaves no doubt that the five year period referred to in section 276A(3)(a)(ii) of the CPA refers to five years before the actual date of release and has nothing to do with parole or a period of five years before a prisoner can be placed on parole.

It is clear that the "date of release" referred to in section 276A(3)(a)(ii) of the CPA refers to the expiry date of the sentence less any remission of sentence by the State President (section 66 of the Act) or special remission by the Commissioner (section 68 of the Act). The dates for the consideration of and/or for the actual placement of the prisoner on parole have nothing to do with the "date of release" in section 276A(3)(a)(ii) of the CPA. The date deemed to be the date of

release referred to in section 63(1)(b)(ii) of the Act is only for purposes of recommendation referred to in that section. In my judgment it is therefore not necessary to deal with any of the judgments dealing with parole to which reference was made in the heads of argument. (See for example *Winckler & Others v Minister of Correctional Services and Others* 2001 2 SA 747(C); *Combrink & Another v Minister of Correctional Services & Another* 2001 3 SA 338(D&CLD); and *Mohammed v Minister of Correctional Services & Others* 2003 6 SA 169(SECLD)). In my judgment there is no merit in the applicant's application. There is no reason why the costs of the applications should not follow the results thereof. The applications are dismissed with costs.

Win

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kler & Others v Minister of Correctional Services and Others

2001 2 SA 747

Combrink & Another v Minister of Correctional Services & Another

2001 3 SA 338

Mohammed v Minister of Correctional Services & Others

2003 6 SA 169

W J VAN DER MERWE JUDGE OF THE HIGH COURT I agree J B SHONGWE JUDGE OF THE HIGH COURT I agree N M MAVUNDLA ACTING JUDGE OF THE HIGH COURT

JUDGE OF THE HIGH COURT

ACTING JUDGE OF THE HIGH COURT

21018-2003 CASE NO: 21018/03 HEARD ON: 19/8/2003 APPLICANT IN PERSON FOR THE RESPONDENT: ADV I P NGOBESE INSTRUCTED BY: STATE ATTORNEY, PRETORIA CASE NO: 1614/2003 HEARD ON: 25/3/2003 APPLICANTS IN PERSON FOR THE RESPONDENTS: ADV B R TOKOTA INSTRUCTED BY: STATE ATTORNEY, PRETORIA

21018-2003

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