

JM//  
REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT, PRETORIA

28/11/12  
CASE NO: 64018/09

(1)	REPORTABLE: <del>YES</del> / NO
(2)	OF INTEREST TO OTHER JUDGES: <del>YES</del> / NO
(3)	REVISED. ✓
28/11/12	
DATE	SIGNATURE

In the matter between:

GERT PETRUS BESTER

Applicant

And

THE MINISTER OF CORRECTIONAL SERVICES

1<sup>st</sup> Respondent

THE NATIONAL COMMISSIONER DEPARTMENT  
OF CORRECTIONAL SERVICES

2<sup>nd</sup> Respondent

THE PAROLE BOARD, KLERKSDORP

3<sup>rd</sup> Respondent

THE CASE MANAGEMENT COMMITTEE,  
KLERKSDORP CORRECTIONAL CENTRE

4<sup>th</sup> Respondent

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J U D G M E N T

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MSIMEKI, J

## INTRODUCTION

[1] The Applicant brought this application seeking an order as follows:

"1. that the respondents and or interested parties hereby be summoned to give reasons, if any why;

The decision by the 3<sup>rd</sup> respondent alternatively the 1<sup>st</sup> respondent together with other respondents to the effect not to adequately consider, recommend and or approve the applicant's placement on parole. Such decision should be reviewed, set aside and substituted with the following;

- (a) the respondents are ordered to place the applicant on parole within 30 days subject to him being monitored by the respondents division "community corrections" in accordance with the statutes and regulations of the Republic of South Africa or
- (b) respondents be ordered to reconsider the applicant for parole and/or conversion of his sentence into correctional supervision within 30 days after the decision of the above Honourable Court and
- (c) respondents be ordered not to utilize the 2/3 (two thirds) or ¾ policy criteria as a prerequisite when Applicant is considered for possible placement on parole.
- (d) To allow the Applicant to be represented at the hearing when Applicant is considered for conversion of sentence or possible placement on parole and

- (e) Allow Applicants (sic) representatives to make oral and written submissions prior to any decision taken by relevant Respondents and
- (f) Respondents to be ordered to bear the costs of this application;
- (g) Further and/or alternative relief."

[2] **BRIEF FACTS**

On 26 October 2000 the Applicant was convicted of rape and kidnapping and sentenced to an effective sentence of 20 years imprisonment. He appeared before the Parole Board, Klerksdorp on 2 April 2009 when his placement on parole was considered. This was after the Case Management Committee ("CMC") had made its recommendation to the Board. The CMC did not recommend that the Applicant be placed on parole. The Third Respondent, instead, recommended further profile for 30 December 2010. The Applicant was not happy therewith and proceeded to launch this application which is opposed by the Respondents.

[3] The Applicant brought the application on the basis that the Parole Board did not apply their minds to his application. It is the Applicant's further contention that certain documents were missing while others which were irrelevant were considered. The Respondents deny this.

[4] It is conceded, on behalf of the Respondents, that the decision taken by the Third Respondent constitutes an administrative decision which can be reviewed by this

Court subject to certain requirements having been met. The Applicant therefore has to satisfy the Court that he, due to the circumstances of his case, is entitled to have the decision reviewed, set aside and substituted.

[5] **REQUIREMENTS FOR THE REVIEW**

Section 6(2) (h) provides:

"(2) A court or tribunal has the power to judicially review an administrative action if-

(a) -----

(b) -----

(c) -----

(d) -----

(e) -----

(f) -----

(g) -----

(h) *The exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function"; or*

(i) -----

The section has from time to time been considered and interpreted. In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) at 512- 513 D O'Regan J** said that the Section must be considered, construed consistently with Section 33 of the Constitution which requires administrative action

to be "reasonable". An administrative decision is reviewed if "a reasonable decision maker could not reach it". In determining whether a decision is reasonable factors such as the nature of the decision, the reasons for the decision, the identity and expertise of the decision maker, factors relevant to the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected are taken into account.

The court warned against usurping the functions of the administrative agencies. The analysis of Section 6 (2) (h) was stressed in the case of **Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC)** at 59 para [107].

- [6] A court dealing with a matter where the attack is on the basis of unreasonableness sits as a review court and not an appeal court. The test applicable in matters of this nature must then be applied. The court will intervene only if the decision is so unreasonable that no reasonable person would have reached it. The Applicant's case is that the Respondent did not apply its mind when the application for placement on parole was considered. The case, as Mr Malatji for the Respondents, correctly submitted, is not that the decision of the Third Respondent is so unreasonable that no reasonable person could have reached it.

The Third Respondent showed that due consideration was accorded to the application. The Applicant was present and his legal representative submitted written representations and submissions. With the exception of the reports that

were not there, reports were there for the Third Respondent to consider when it dealt with the application. It is not correct as Mr Chauke argued on behalf of the Applicant that a decision was taken even before the application was heard.

[7] It is noteworthy that a prisoner has no right to be released on parole. He, however, has a right to be considered for placement on parole. Parole is only a privilege. (**Combrink and Another v Minister of Correctional Services and Another 2001 (3) SA 338 (D and CLD) at 341**). A perusal of the Respondents' answering affidavit discloses that the Third Respondent, indeed, applied its mind when it considered the Applicant's application.

[8] It was submitted on behalf of the Applicant that this is one appropriate case where the Court could substitute the decision of the Correctional Supervision and the Parole Board. It is noteworthy that the circumstances under which that can be done are, indeed, circumscribed. The Court, in circumstances such as these, will invariably refer the matter back to the CSPB except in cases where bias or gross incompetence has been demonstrated or where the outcome is a forgone conclusion. (**Onshelf Trading Nine (Pty) Ltd v De Klerk N.O. and Others 1997 (3) SA 103 (W) at 111-112 and Erf One Six Seven Orchards CC v Greater JHB Metropolitan Council 1999 (1) SA 104 (SCA) at 109**).

This, in my view, is not the case where bias or gross incompetence has been shown. Neither are the facts of the case warranting the substitution of the decision of the CSPB with that of the Court.

[9] Having regard to the facts of the matter I am not satisfied and persuaded that I should exercise my discretion in favour of reviewing, setting aside and substituting the decision of the Third Respondent as prayed for by the Applicant. The application, in my view, should fail.

[10] **COSTS**

Having regard to the facts of the case my considered view is that there should be no order to costs.

[11] I, in the result, make the following order:

1. The application is dismissed.
2. There will be no order as to costs.



MSIMEKI M.W.  
JUDGE OF THE HIGH COURT  
NORTH GAUTENG HIGH COURT

Counsel for applicant: Advocate A Chauke  
Counsel for respondent: Advocate S.M. Malatji  
Attorneys for applicant: Julian Knight and Ass Inc  
Attorneys for respondent: State Attorneys  
Date heard: 28 October 2010  
Date of judgment: