NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO: 48967/2012

DATE: 30/11/2012

In the matter between:

C V **Applicant**

and

THE MINISTER OF CORRECTIONAL SERVICES **First Respondent**

COMMISSIONER OF CORRECTIONAL SERVICES **Second Respondent**

HEAD OF THE FEMALE CORRECTIONAL CENTRE,

PRETORIA CENTRAL PRISON **Third Respondent**

CASE MANAGEMENT COMMITTEE: FEMALE

CORRECTIONAL CENTRE,

PRETORIA CENTRAL PRISON **Fourth Respondent**

PAROLE AND CORRECTIONAL SUPERVISION BOARD:

FEMALE CORRECTIONAL CENTRE,

PRETORIA CENTRAL **Fifth Respondent**

JUDGMENT

MAKGOKA, J:

[1] The applicant seeks, in the main, an order reviewing and setting aside the decision of fifth respondent (the parole board) made on 7 August 2012 not to recommend her for conversion of her sentence into correctional supervision. The applicant accordingly seeks an order substituting that decision with an order referring her to the sentencing court for reconsideration of her sentence in terms of s 276A(3)(a)(ii) of the Criminal Procedure Act, 51 of 1977 (the CPA). In the alternative, the applicant seeks an order directing the second respondent to refer the matter to the Correctional Supervision and Parole Review Board.

[2] The applicant is currently serving a 7 years prison term, following her conviction by this court (Eksteen AJ) of twelve counts including fraud; several counts of indecent assault involving minor girls, among others; contravention of s 27(1)(a) of the Films and Publications Act 65 of 1996; contravention of s14(3)(c) of the Sexual Offences Act, 34 of 1957. She was sentenced on 10 February but only commenced serving on 17 May 2010 after an application for leave to appeal was refused by the Supreme Court of Appeal. She received a 6 months presidential general amnesty announced on 27 April 2012. Her effective sentence is therefore 6.5 years.

[3] Since her incarceration, the applicant has taken some steps towards rehabilitation. She

has completed an HIV/Aids adherence and prevention programme. She has also obtained a certificate in a skills development project hosted by the University of Pretoria, and participated in a restorative justice programme. She was appointed a tutor in adult basic education and English, assisting offenders to complete grades 10, 11 and 12. She has letters of support and recommendation from the chairperson of the fourth respondent, a priest form the Dutch Reformed Church; a spiritual care coordinator of the prison; and her mother.

[4] The conversion of a sentence of direct imprisonment into one of correctional supervision is deal with in s 276A (3)(a)(ii) of the CPA. The following provisions are relevant:

'(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,

And such a person has already been admitted to a prison, the Commissioner or a parole board may, if he or it 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',

[5] In terms of s 73(7)(c) of the Correctional Services Act 111 of 1998 (before its amendment in March 2012 by Act 5 of 2011) an inmate must have served at least a quarter of her sentence before he or she is considered for conversion of sentence. It is common cause that the applicant qualifies in this regard, having served a quarter of her sentence. The next step in the process is a finding by the parole board that the inmate is fit and suitable to be referred to the sentencing court for reconsideration of their sentence. In this regard the parole board

decided on 7 August 2012 that the applicant is not suitable. The applicant is aggrieved by that decision, hence this application.

[6] The applicant seeks to review and set aside the parole board decision in terms of s 6(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), on the ground that:

(a) the audi alteram partem rule was not fairly applied;

(b) the decision was not rationally connected to the information before the parole board, or the reasons furnished for it by the parole board;

(c) the decision was taken in bad faith, arbitrarily and/or capriciously;

(d) irrelevant considerations were taken into account and relevant considerations were not considered.

[7] Before I consider the specifics of the present application, it is prudent to set out the process of conversion of sentence into one of correctional supervision. The process commences with the fourth respondent, who, in terms of s 42 of the Act, is enjoined, among others, to ensure that each sentenced prisoner has been assessed. For prisoners serving more than twelve months there should be a sentence plan as required by s 38(2). Of particular relevance to the present case, the fourth respondent has to prepare and submit to the parole board, a profile report, together with the relevant documents, regarding:

(a) the offence or offences for which the sentenced prisoner is serving a term of imprisonment together with the judgment on the merits and any remarks made by the court in question at the time of the imposition of sentence if made available to the Department of Correctional Services;

(b) the previous criminal record of such prisoner;

(c) the conduct, disciplinary record, adaptation, training, attitude, industry, physical and mental

state of such prisoner;

(d) the likelihood of a relapse into crime, the risk posed to the community and the manner in which this risk can be reduced;

(e) the possible replacement of such sentenced offender under correctional supervision in terms of a sentence provided for in s 276(1) (i) or 287(4)(a) of the CPA, or in terms of the conversion of such an offender's sentence into correctional supervision under sections 276A(3)(e)(ii), 286B(4)(b)(ii) or 287(4)(b) of the CPA and the conditions for such placement;

(f) the possible placement of such prisoner for such placement; and

(g) such other matters as the parole board may request.

[8] Back to the facts of the present case. In February 2012, the fourth respondent commenced with the process to prepare the applicant's profile to place her before her before the fifth respondent to consider her suitability for reconsideration of sentence. That process was interrupted by circumstances which are not particularly relevant for the present purposes. On 29 May 2012 the applicant brought an application before this court to enforce certain of her rights. That application was ultimately settled between the parties on the following basis:

(a) the fourth respondent would prepare the applicant's profile and recommendation by no longer than 31 July 2012;

(b) the parole board would consider the applicant's suitability for conversion of her sentence by no later than 31 August 2012;

(c) the applicant would receive a copy of her profile at least 7 days before the hearing.

[9] Shortly after the settlement, the applicant was consulted by a social worker and a psychologist, with a view to compiling the relevant reports to be submitted to the parole board. On 24 July 2012 the fourth respondent recommended the conversation of the applicant's

sentence into correctional supervision in terms of s 276A (3) of the CPA. On 7 August 2012 the applicant appeared before the parole board for consideration whether she is a suitable candidate for conversion of sentence. The parole board decided that she is not. The reasons for that decision are stated as follows;

The Board has decided not to recommend the offender for conversion of sentence. The CSPB has noted with concern, the seriousness of the crime, the number of victims involved and the negative impact this had on the community. Many lives were affected; especially the minors whose future was adversely scarred by the experience the offender put them through. The fact that offender attended and completed relevant programs are greatly appreciated, and the efforts she put in improving fellow offenders' lives. The board also noted the Court/Judge sentence remarks (enclosed) that the only appropriate sentence for the offender is direct imprisonment. The offender, in her capacity as a learned advocate, betrayed less learned victims as she misused her position of trust and misled poor, disadvantaged children. The Board concur with the court that offender should serve the sentence as prescribed'.

[10] It is common cause that the decision of the parole board was taken without the social worker and psychologist's updated reports. These reports are extremely important for the fourth respondent's recommendation to the parole board for it to
properly exercise its discretion as to whether the applicant is a suitable candidate for reconsideration of sentence. That discretion must be exercised taking into account a range of considerations, including the contents of the reports by the social worker and/or psychologist.

[11] In addition, the views of the victims and their families need to be considered. In terms of s 299A of the CPA, the nature of the offences of which the applicant was convicted, accords the victims or their relatives, a right to attend a meeting of the parole board or make

representations when placement on parole of the applicant is considered. Under those circumstances, s 74(4) of the Act provides that the second respondent (the commissioner) must inform the complainant or relative in writing when and to whom he or she may make representations, and when and where a meeting will take place. This is dependent on whether during the sentencing the victims or relatives were informed of their right, and have indicated their wish to the commissioner to exercise that right. There is some debate in the present case as to the adequacy of the explanation by the court during the sentencing stage. In the end, nothing turns on this aspect as it is now clear that the victims wish to exercise that right and they were not informed of the sitting of the parole board.

[12] In the absence of all the above information, it is clear that the decision of the parole board was taken without all the prescribed information being available. To that extent, it was arbitrary and capricious. On that basis alone the parole board's decision has to be set aside. What remains is what should be ordered in its stead. Mr. Engeibrecht SC, counsel for the applicant, urged me, quite forcefully, not to refer the matter back to the parole board. Instead, counsel proposed, I should refer the applicant directly to the sentencing court to reconsider the sentence. This, counsel submitted, was justified as the applicant should not be prejudiced by the respondents' failure to ensure that all the relevant information was before the parole board when it considered the applicant's suitability for sentence reconsideration. Counsel furthermore submitted that the applicant has proven herself to be a 'model prisoner' having regard to the favourable considerations mentioned in paragraph [3] above.

[13] I have a conceptual difficulty with the above proposition. As indicated elsewhere in this judgment, the jurisdictional factor which must be present before a referral to the court for sentence reconsideration, is the opinion of the parole board that an inmate is a suitable

candidate for such reconsideration. On a proper construction of the enabling section (276A(3) of the CPA) the only functionary body entrusted with that task is the parole board. I find nothing in the plain language of the section that a court can, without further ado, usurp that power and substitute the decision of the parole board with its own. Of course, the court retains the residual discretion in terms of s 8(1)(ii)(aa) of PAJA, where exceptional circumstances justify such a decision. In the present application no such circumstances exist. It is not even suggested that there are any such circumstances.

[14] It has been stated - repeatedly now, that a court should be careful not to attribute itself superior wisdom in relation to matters entrusted to other branches of government: See Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004
(4) SA 490 (CC) para 48, which has been followed in a line of subsequent cases. I therefore conclude that this court is not competent, in the absence of clear and demonstrable exceptional circumstances, to refer the applicant directly to the sentencing court.

[15] Even if this conclusion is wrong, the proposition contended for on behalf of the applicant is in any event, self-defeating. It is the applicant's case, and my finding, that the decision of the parole board was capricious and arbitrary, to the extent that the relevant information, which I have set out above, was not before it. As correctly submitted by Mrs. Manaka, counsel for the respondents, this court is in no better position than the parole board was when it took the decision. Were I to refer the applicant directly to the sentencing court, like the parole board, it would have to be on the basis of a finding that the applicant is suitable for reconsideration of sentence. Like the parole, I do not have all the relevant information which I would have to consider for that decision. All there is before me is evidence that the applicant appears to have acquitted herself very well as an inmate. That, however, relates to

rehabilitation, which is but only one of the various factors to be considered, together with others.

[16] The applicant has prayed that, in the event I disincline to refer her directly to the sentencing court, I should order the commissioner to refer the matter to the Correctional Supervision and Parole Review Board. In my view, this would not be a proper order under the circumstances, for the simple reason that having found that the decision of the parole board was taken without adequate information, it is only fair and just that the parole board be afforded an opportunity to make a proper decision, with all relevant information before it.

[17] Although there is a muted allegation of bias on the part of the parole board against the applicant (with the concomitant fear of the board's decision being a foregone conclusion not to recommend her), I find no evidence of that on the papers.
I therefore conclude that the matter should be remitted to the parole board for it to consider afresh, the applicant's suitability for conversion of her sentence. In the light of this conclusion, it is not necessary to consider a preliminary point argued on behalf of the respondents in terms of s 7(2) of PAJA, that the applicant has not exhausted all internal remedies before approaching this court.

[18] From the papers, it seems that both the psychologist and the social workers' updated reports are ready. The access to the victims would be facilitated by the presence of Mr. Coetzee, counsel who appeared on the day of the hearing. Although his application for joinder/postponement was refused, he remained on a watching brief throughout the hearing.

[19] Finally, the issue of costs. The applicant has been substantially successful. She is entitled

to her costs. On her behalf, it was contended that these costs should include the costs of two counsel and ‘a senior attorney’. In my view this is a simple and straight-forward application, where the employment of senior counsel was not warranted. I will therefore allow only costs of a junior counsel. To clarify the position for taxation purposes before the taxing master, the costs consequent upon employment of senior counsel are not allowed. The applicant’s attorney is not entitled to the costs of arguing the application.

[20] In the result the following order is made:

1. The decision of the Parole and Correctional Supervision Board: Female Correctional Centre, Pretoria Central not to recommend the applicant for referral to the sentencing court, taken on 7 August 2012 is reviewed and set aside;

2. The Case Management Committee: Female Correction Centre, Pretoria Central is ordered to immediately prepare ail the relevant documentation, including the applicant’s social worker and psychologist’s reports, within 21 days of this order;

3.The Parole and Correctional Supervision Board: Female Correctional Centre, Pretoria Central, is ordered, by no later than 31 January 2013, to convene and consider the applicant’s suitability for recommendation to the sentencing court for conversion of her sentence to one of correctional supervision.

4. The fifth respondent is ordered to pay the costs of the application, subject to the remarks made in paragraph [18] of the judgment;

JUDGE OF THE HIGH COURT

DATE OF HEARING: 26 NOVEMBER 2012

JUDGMENT DELIVERED : 30 NOVEMBER 2012

FOR THE APPLICANT : ADV J ENGELBRECHT SC WITH

ADV A JANSEN VAN VUUREN AND MR R KUHN (ATTORNEY)

INSTRUCTED BY : J BREWIS ATTORNEYS,

PRETORIA

FOR THE FIFTH RESPONDENT: ADV N O MANAKA

INSTRUCTED BY : THE STATE ATTORNEY, PRETORIA