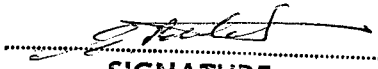


**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

|   |  |
|---|--|
| <b>DELETE WHICHEVER IS NOT APPLICABLE</b> |  |
| (1) REPORTABLE: YES/NO.                   |  |
| (2) OF INTEREST TO OTHER JUDGES: YES/NO.  |  |
| (3) REVISED. ✓                            |  |
| DATE 28/7/14                              | <br>SIGNATURE |

**CASE NO: 44933-2014**

**DATE: 2014-07-10**

10 In the matter between

**FWM DU PREEZ**

**Applicant**

**and**

**MINISTER OF JUSTICE & CORRECTIONAL**

20 **SERVICES**

**First Respondent**

**CORRECTIONAL SUPERVISION AND**

**PAROLE BOARD OF THE KGOSI MAMPURU II**

**CORRECTIONAL CENTRE**

**Second Respondent**

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**J U D G M E N T**

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**BERTELSMANN J:** The applicant applies by way of urgency for an

order that the decision taken by the Correctional Supervision and Parole Board of the Kgosi Mampuru II Correctional Centre, the first respondent, on 28 February 2014, revoking his parole for one year, be reviewed and set aside. When the matter was called the issue of urgency was raised but because the liberty of the applicant is at stake, the matter was regarded as urgent and argument proceeded.

The applicant was convicted of murder and sentenced to 12 years imprisonment in January 2005. On 11 February 2014 he was released on parole. Five days later, he was rearrested, when a video  
10 recording emerged that had been made while he was still incarcerated, which contained *prima facie* evidence of significant transgressions of the Correctional Services regulations applying to convicted offenders who are still incarcerated.

While it is common cause that the applicant was pictured in the video, he denied all allegations of wrongdoing, of involvement in the recording of the video or of being in possession of the device with which the video was made. On 21 February 2014 the applicant appeared before the Correctional Supervision and Parole Board of the Kgosi Mampuru II Correctional Centre ("the Board"). The Board had to  
20 decide whether the applicant should be released on parole again, albeit on stricter conditions than had applied to him before, or whether his parole ought to be withdrawn because of the alleged involvement in the recording of the video prior to his release.

A Board is constituted in terms of Section 74 of Act 111 of 1998, the Correctional Services Act, and the relevant provisions read as

follows:

**" Correctional Supervision and Parole Boards.**

(1) *The Minister may:*

- (a) *name each Correctional Supervision and Parole Board;*
- (b) *specify the seat for each Board;*
- (c) *determine and amend the area of jurisdiction of each Board.*

(2). *The Minister must appoint one or more Correctional Supervision and Parole Boards consisting of –*

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- (a) *a chairperson;*
- (b) *a vice-chairperson;*
- (c) *.....*
- (d) *.....*
- (e) *one official of the Department nominated by the National Commissioner; and*
- (f) *two members of the community.*

(3) *The National Commissioner must designate the correctional official referred to in (2) (e) to act as secretary for a Board.*

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(4). *If the chairperson is absent from a meeting of the Board, the vice-chairperson must preside at that meeting.*

(5). *Three members constitute a quorum for a meeting of a Board and must include the chairperson or vice-chairperson.*

(6). *Any decision of a Board must be taken by resolution of the majority of the members present at any meeting of that Board and, in the event of equality of votes, the person presiding shall have the casting vote as well as a deliberative vote."*

The further provisions of the section are not relevant for purposes of the present enquiry.

The manner in which a Board functions, is set out in a circular which was prepared and published by the (then) Department of  
10 Correctional Services in 2012. It is primarily directed at sentenced offenders who may be looking forward to being paroled.

The pamphlet describes the functions and the functioning of a Board in the following terms:

*"The Parole Board is established in terms of the Correctional Services Act 111 of 1998 and consists of a number of members from the community, a member from the DCS and may also co-opt members from the SAPS and the Department of Justice. A quorum of the Parole Board is three members, one of which must be the chairperson or  
20 vice-chairperson. With some exceptions, the Parole Board may approve an offender's placement on parole or under Correctional Supervision. The Parole Board may also request that a further profile report be submitted to them at a later stage and in exceptional cases, may also refuse parole. The report as submitted by the Case Management*

*Committee will be deliberated on the day of the sitting. The Board will also consider the representations submitted by the offender and the inputs of the complainant / victim, SAPS and the Department of Justice (if any). During the proceedings the offender will be afforded the opportunity to make representations to the Board on the recommendation made by the Case Management Committee and the representation if any, submitted by a complainant. The Board may put questions to the offender at any stage of the proceeding in order to clarify any issue which may have an influence upon their decision e.g. progress with rehabilitation programmes, any problems experienced et cetera. The offender is present during the presentation of the case, but when the Board enters into deliberations, all non-Board members (offender, family, victim, et cetera) must leave the proceedings. The Board will then deliberate the case and come to a decision. Once the Board has reached a decision the offender is informed accordingly. If for some reason the offender is not present at the Board meeting the Case Management Committee will inform him/her accordingly."*

A Board is therefore an administrative tribunal that should, according to Shirley Gillian Armstrong's thesis for her Master's degree on tribunals exhibit at least the following features:

*"Firstly, they should have the ability to make final legally*

*enforceable decisions. Secondly, they should be independent from any departmental branch of the government. Thirdly, the nature of the hearings conducted in tribunals should be both public and of a judicial nature, while not necessarily subject to the stringent formalities of a court of law. Fourthly, tribunal members should be in possession of specific expertise, in the field of operation of the tribunal as well as traditional expertise. Fifthly there should be a duty on tribunals to give clear reasons for their decisions, and lastly there should be a right of appeal to a higher court on disputes regarding points of law.”*

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The proceedings before a Board must therefore comply with the principles of just administrative action and fair administrative procedures. The right to just administrative action is enshrined in the Constitution as well as in the Promotion of Administrative Justice Act 3 of 2000.

It is common cause that the hearing that took place on 21 February 2014, at which the applicant was present, was conducted before a Board of five members. Applicant attended and was legally represented by Mr Oeloff de Meyer, who presented argument on the applicant's behalf.

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During the hearing, two members of the board voiced the opinion that the applicant should be re-released on parole on conditions stricter than those imposed when he was previously released. The impression may therefore have been created that the Board was minded to release

the applicant when it entered into its deliberations.

When the Board withdrew to deliberate, the chairperson postponed the taking of a final decision for a week. Unbeknown to the applicant, the composition of the Board was then changed. One community member was replaced by another. The latter had not been part of the Board during the public hearing. This newly constituted Board then deliberated without a further hearing and resolved that the applicant's parole ought to be revoked.

The applicant applies for a review of this decision on the grounds  
10 that the manner in which it was reached offended his rights to fair administrative proceedings and to just administrative action. A fair procedure before the Board clearly envisages a public hearing. This includes the right to deal with any negative impressions that may have been created by reports placed before the Board, to deal with evidence received by it before a decision is taken and the right to address any concerns that the Board might entertain regarding the proposed parole and the conditions to which the offender should be subjected to in the event of a parole release being granted. In fact, the statutory provisions expressly provide for the applicant to be present and to engage the  
20 Board in respect of all issues that might arise.

The applicant furthermore has the right to have his case decided on the basis of the proceedings before the Board of which each and every member had an opportunity to engage with him and to raise issues that might have concerned that particular member.

The manner in which the present Board came to its conclusion

clearly does not comply with these fundamental principles.

The substituted member did not hear any evidence and could not engage with the applicant's legal representative. The applicant was therefore denied the right to deal with any concerns that this new member might have. His right to have his fate decided by a Board that had had the opportunity to engage with him was therefore infringed.

The Board that took the decision was not the same that attended the hearing and consequently the applicant was denied the right to a fair hearing before a properly constituted Board. The decision is therefore  
10 fundamentally flawed and must be reviewed and set aside.

It was urged upon the court that the court should substitute its own decision for that of the Board. A court is generally loathe to substitute its own decision for a decision of an administrative tribunal and will only do so if it is clear that the individual that will be affected by the decision of the relevant tribunal will not be given a fair hearing; or where bias has been shown to such an extent that the possibility of a fair re-hearing does not exist. This is not such a case.

What needs to be addressed is the manner in which the flawed decision should be corrected.

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### ORDER

[1] The decision of the Correctional Supervision and Parole Board of the Kgosi Mampuru II Correctional Centre to revoke the applicant's parole, taken on the 28<sup>th</sup> February 2014, is reviewed and set aside.

[2] The matter is referred back to the second respondent.



- [3] The second respondent must, within 21 days of the date of the court's order, constitute a new Correctional Services and Parole Board consisting of members who were not previously involved in the hearing to re-hear the applicant's application for parole.
- [4] As the applicant has been successful he is entitled to his costs, such costs to be calculated on the basis that the employment of two counsel was justified.
- [5] Pending the finalisation of the new re-hearing the applicant will remain incarcerated.