JM

IN THE HIGH COURT OF SOUTH AFRICA
(REPUBLIC OF SOUTH AFRICA)
PRETORIA

7/2/2014

CASE NO: 30318/2012

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED ✓

7.2.14
DATE

SIGNATURE

In the matter between:

PAUL FRANCIOUS VAN VUUREN APPLICANT

AND

MINISTER OF CORRECTIONAL SEVICES RESPONDENT

JUDGMENT

MSIMEKI J:

[1] This is an application by the Applicant seeking an order:

"a. That this application is enrolled as an urgent application.

b. That due to the urgency the requirements regarding forms and service are dispensed with in terms of Rule 6 (12).

c. That the decision by the respondent issued on 19 April 2012 refusing to release applicant on parole is reviewed and set aside.

d. That the decision of the respondent is replaced with an order to release applicant on parole on or before 14 July 2012.

e. Further and/or alternative relief.

f. costs of this application."

[2] The matter came before my brothers Preller J and Ranchord J. Preller J, under case number 48132/2011 on 16 February 2012 made the following order:

"1. That the first respondent must consider the applicant for release and placement on parole by the end of April 2012.

2. That the profile of the applicant should be submitted to the first respondent including a fully motivated, psychiatric report as requested by the first respondent in her discussion on 6 April 2011, dealing with the (sic) Dr Venter evidence.

3. No order to cost is made".

The order appears on page 17 (Annexure "V V 02") of the paginated papers.

On 10 July 2012, Ranchord J, under case number 30318/2012 made the following order:

" 1. The respondent is ordered to allow a private psychiatrist, appointed by the applicant, to conduct a full clinical assessment and evaluation of the applicant before 30 July 2012.

2. The private psychiatrist's report must be served on the respondent and filed on the court file on or before 10 August 2012.

3. A full psychiatrist report of the applicant, dealing inter alia with the evidence Of Dr Verster who testified at the initial trial, compiled on request of the Respondent and a copy of the applicant's profile and all relevant reports which served before the respondent on 19 April 2012, must be served on the

Applicant's attorneys of record and filed on the court file on or before 20 July 2012.

4. The applicant will have the right to amend and supplement this application After receipt of the reports as set out in paragraphs 2 and 3 and to approach this honourable Court on the same papers.
5. The application is postponed *sine die*.
6. (Which is erroneously numbered as 3 instead of 6). Costs to be costs in the application. The order comprises pages 48-49 of the paginated papers and is marked "X" ".

On 8 August 2012 Preller J, under case number 30318/2012 made the following order:

" 1. That the matter be and is hereby postponed to 10 September 2012;
2. That this order as well as order by Judge Ranchod and order made by me on 16 February 2012 (Case Number 48132/11) must be served on State Attorney and on Dr Reuben Mbuli the head of legal services in the Department of Correctional Services;
3. That Dr.Mbuli will be held personally liable for compliance with these orders;
4. That Mr.Chowe of State Attorney's office was present in court and will see that these services be effected".

The order forms page 377 of the paginated papers as annexure "MN1O".

The matter then served before me. I heard the matter but could unfortunately not timeously give the judgment due to different ailments over a long period of time.

BRIEF FACTS

[3] On 13 November 1992, the Applicant was convicted of, inter alia, murder and robbery with aggravating circumstances. He was sentenced to death on each of the two charges. The Applicant was alleged to have robbed a 19 year old British tourist of the money which he had received after he sold his motorcycle. The Applicant was alleged to have demanded the money at gun point. He shot the deceased in the stomach and twice in the head. On 6 June 1995 the death penalty was declared unconstitutional. On 20 September 2000 the death penalties imposed on the Applicant were commuted to sentences of life imprisonment and antedated to 13 November 1992, the date on which the Applicant was convicted. In terms of the policy of the Department of Correctional Services which was applicable on 13 November 1992 the Applicant was required to be incarcerated for 10 years prior to consideration for parole. The Applicant in terms of the policy, and only in exceptional cases, could be placed on parole before serving 15 years of his sentence.

Offenders sentenced to life imprisonment, with effect from 1 March 1994 are required to serve 20 years of their sentences before they can be considered for parole. This is evident from annexure "MN1" to the Respondent's Answering Affidavit at page 327. The Applicant approached court asking to be released on parole but the court held that he first had to serve 20 years of his sentence before he could be considered for release and placement on parole. His case proceeded up to the Constitutional Court which on 30 September 2010 found that he was entitled to be considered for placement on parole in terms of the policy which applied on 13 November 1992. *(See Van Vuuren v Minister of Correctional Services 2010 (2) BCLR 1233 (CC).* On 6 April 2011 the Respondent declined to approve the

placement of the Applicant on parole. The Applicant, according to the Respondent, had to be assessed by a psychiatrist to determine whether he still displayed "symptoms that led the High Court on appeal to conclude that the offender is a psychopath and suffers from an (sic) anti-social personality disorder, which led the court to conclude that the chances of rehabilitation are zero". The Applicant, in terms of the Respondent's decision of 6 April 2011, was seen by Dr Lawrence who found that the Applicant still suffered from anti-social personality disorder and that he would not predict the Applicant's behaviour in the future and that there was reason to be concerned about it. This is evident from annexure "MN6" to the Respondent's Answering Affidavit which is page 368 of the paginated papers. On 16 April 2012, subsequent to the procurement of Dr Lawrence's report, and to be able to recommend to the Respondent, the Correctional Supervision and Parole Board (CSPB) considered the Applicant for placement on parole. Having had regard to Dr Lawrence's report the CSPB recommended that the Applicant had to "serve more of his sentence and undergo further psychiatric intervention. "(See annexure "MN7" at page 372 of the paginated papers. On 19 April 2012 the Respondent having had regard to the CSPB's recommendation and Dr Lawrence's report, decided against placing the Applicant on parole stating that the Applicant had to be "enrolled in appropriate programmes to address the behavioural traits identified by the psychiatrist in order to lower the risk of re-offending". (Annexure "MN8" at page 374 of the paginated papers.

THE ISSUES

[4] As the Applicant seeks an order that the decision of the Respondent issued on 19 April 2012 refusing to release the Applicant on parole be reviewed and set aside and that such decision be replaced with an order releasing the Applicant on parole,

the question that springs to mind is whether the Applicant has made out a case to be entitled to such an order. The Respondent opposed the granting of the relief sought.

[5] I must at the very outset thank Advocate Mi T K Moerane SC and Advocate T W G Bester, counsel for the Respondent, as well as Advocate Janse Van Rensburg counsel for the Applicant for their valuable assistance in this matter.

[6] I have to determine if the decision of the Respondent deserves to be reviewed and set aside. Also I need to determine if it will be appropriate for the court to substitute the decision of the Respondent with its own decision.

PRINCIPLES

[7] Before I deal with the issues I need to refer to the case of *Bel Porto School Governing Body v Premier Western Cape 2002 (3) SA 265 (CC).* Chaskalson C.J (as he then was) at pages 91-92 paragraphs 85-89 said:

> "*[85] For good reasons, judicial review of administrative action has always distinguished between procedural fairness and substantive fairness. Whilst procedural fairness and audi principle is strictly upheld, substantive fairness is treated differently. As Corbett CJ said in Du Preez and Another v Truth and Reconciliation Commission 1997 (3) SA 204 (A) at 231 G. 'The audi principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly... The duty to act fairly, however, is concerned*

only with the matter in which the decisions are taken: it does not relate to whether the decision itself is fair or not.

[86] The unfairness of a decision in itself has never been a ground for review. Something more is required. The unfairness has to be of such a degree that an inference can be drawn from it that the person who made the decision had erred in a respect that would provide grounds for review. That inference is not easily drawn.

[87] The role of the Courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation. If these requirements are met, and if the decision is one that a reasonable authority could make, Courts would not interfere with the decision.

[88] I do not consider that item 23 (2) (b) of Schedule 6 has changed this and introduced substantive fairness into law as a criterion for judging whether administrative action is valid or not. The setting of such a standard would drag Courts into matters which, according to the separation of powers, should be dealt with at a political or administrative level and not at a judicial level. This is of particular importance in cases such as the present, in which the issue relates to difficult and complex policies adopted in order to promote an equitable transformation of apartheid structures and a reversal of policies that were grossly unequal".

[89] ..... What they require for a decision to be justifiable, is that it should be a rational decision taken lawfully and directed to a proper purpose".

In Pharmaceutical Manufactures of SA In Re: Ex Parte Application of Pres of RSA 2000 (3) BCLR 241 (CC) at page 272 paragraph [85] and paragraph [90] Chaskalson P (as he then was) said:

"*[85] It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.*

[90] Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirement of our Constitution, and therefore unlawful. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court

cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but if this does occur, a court has the power to intervene and set aside the irrational decision".

In Trinity Broadcasting (CISKEI) v ICA OF SA 2004 (3) SA 346 (SCA) Howie P at page 353 paragraph [20] said:

" In requiring reasonable administrative action, the Constitution does not, in my view, intend that such action must, in review proceedings, be tested against the reasonableness of the merits of the action in the same way as in an appeal. In other words, it is not required that the action must be substantively reasonable, in that sense, in order to withstand review. Apart from that being too high a threshold, it would mean that all administrative action would be liable to correction on review if objectively assessed as substantively unreasonable".

[8] Reverting to the matter *in casu* Mr Van Rensburg pointed out that the Respondent's Answering Affidavit was late. The Applicant, however, did not deem that as an issue as it was not even necessary for them to reply. They were ready to proceed with the matter. Mr Moerane agreed. Mr Van Rensburg submitted that they had not seen Dr Lawrence's report as the Respondent's papers had been filed late.

[9] Mr Van Rensburg submitted that Preller J's order had not been complied with as there was no fully motivated psychiatrist's report dealing with Dr Verster's testimony

as well as the diagnosis of the three psychiatric doctors who observed the Applicant for a period of 30 days in the course of his criminal trial. Mr Van Rensburg further submitted that the Respondent had not considered the reports that had been favourable to the Applicant.

[10] Mr Van Rensburg contended that the Respondent had failed to comply with the court order and that referring the matter back would not assist as the Respondent would never comply with the order. He, as a result, submitted that it would be in the interest of justice that the court steps into the shoes of the Respondent and order the release of the Applicant on parole.

[11] On 10 July 2012, Ranchod J ordered that the Applicant be allowed to be clinically assessed and evaluated by a private psychiatrist of his own choice. Dr L.L Mashayamombe, a specialist psychiatrist chosen by the Applicant, assessed and evaluated him. His report is annexure "WO7" appearing from page 58 to 78 of the paginated papers. The report is at variance with the report of Dr Lawrence.

[12] To support his submission, Mr Van Rensburg referred the court to the case of Witwatesrand Local Division (now South Gauteng High Court) case number 2007/15110 which is the case of:

Plank Dean Lloyd and Van Wyk Cornelius JOHANNES, the first and the second Applicants respectfully *V The Minister of Correctional Services and 2 Others*. The case served before Marais J. This case, however is, as Mr Moerane and Mr Bester correctly pointed out, distinguishable from the case *in casu*. The case dealt with the question whether the applicable policy in the case had been the policy that applied in the current case or the amended policy where lifers first have to serve 20 years of

their sentence before they can be considered for release and placement on parole. The issue is indeed different in the case *in casu*.

[13] The existence of two conflicting reports that of Dr Lawrence and that of Dr Mashayamombe abundantly demonstrates the problem which deserves proper attention. It became evident as the matter progressed that a joint report by the psychiatrists would be of tremendous significance in resolving the matter.

[14] Mr Moerane submitted that the Respondent, when considering the release and placement of the Applicant on parole, duly applied her mind to the relevant aspects. These are, inter alia, the nature and seriousness of the crimes committed by the Applicant; the remarks made by the trial court at the time of the imposition of the sentences of life imprisonment on the Applicant; the diagnosis of the three psychiatrists who observed the Applicant for a period of 30 days in the course of the criminal trial where their conclusion had been that he had been suffering from anti-social personality disorder; the evidence of Dr Verster where he said that the Applicant's crime prognosis was poor and that his prospects of rehabilitation had been nil; Dr Lawrence's report annexure "MN6" as well as the risk of the Applicant re-offending having been diagnosed as a psychopath with anti-social personality disorder. Mr Moerane contended that the Respondent, when arriving at the decisions that the placement of the Applicant on parole not be approved, had considered the factors favourable to the Applicant such as the Applicant's participation in programmes within the correctional centre aimed at addressing his offending trait; his behaviour and adjustment during his incarceration; his scholastic achievements; the social worker's and the psychologist's interventions aimed at assisting the Applicant as well as the support systems available to the Applicant

outside the prison once released. Against these, the Respondent also took the aggravating circumstance into account.

[15] Mr Moerane contended that the Respondent's decision not to place the Applicant on parole at the time had been justifiable; was not tainted by bias; could not be regarded as arbitrary or capricious and was the kind of a decision that a reasonable authority could make. I agree.

[16] Having regard to the principle that the decisions of the executive and other functionaries must be rationally related to the purpose for which the power was given and considering what the Respondent did in this case I fail to see how the decision can be regarded as irrational. Viewed objectively, in my view, the Respondent's decision was rational and is the kind of decision that a reasonable authority could make. The decision, in my view, does not deserve to be reviewed and set aside.

[17] Coming to the issue whether the court ought to substitute the decision of the Respondent with its own, it must be borne in mind that courts are reluctant to usurp the powers of the authorities vested with the exercise of decisions. Courts, however, when exercising their discretions judicially, may in certain instances, interfere with the decisions of functionaries. (*see University of the Western Cape and others V Member of Executive Committee for Health and Social Services and others 1998 (3) SA 124 at page 131D-H).*

[18] Having regard to the facts of the current matter, I find that this is not one of those cases which require the court, in the exercise of its discretion, to interfere with the decision of the Respondent.

[19] The court has at its disposal two conflicting reports of two psychiatrists namely Dr Lawrence and Dr Mashayamombe. The 3 doctors who observed the Applicant as shown above found that the Applicant suffered from anti-social personality disorder. Twenty years down the line Dr Mashayamombe states that that condition no longer exists while Dr Lawrence states that it does. As the parties' counsel conceded it is my view that the need, because of the seriousness of the matter, is even greater that a joint report on the Applicant by the two doctors be procured to enable the Respondent to produce a well informed decision. I inquired from counsel as to who would be responsible for paying the doctors. On 19 September 2012 State Attorney I Chowe advised my registrar that instructions had been received from the Minister of Correctional Services that in the event that the court ordered that a joint report be procured relating to whether or not the Applicant still suffers from anti-social personality disorder, the Department of Correctional Services would bear the costs of obtaining such a joint report. The costs, in that event, would also cover the costs of any report compiled by a psychiatrist other than Dr Lawrence. My registrar was also informed that the legal representatives of the Applicant did not revert to the State Attorney regarding the aspect. I am thankful for such a gesture from the Department.

[20] I have had due regard to the facts of this matter and have come to the conclusion that it will be in the interest of justice simply to give the Respondent a chance to properly deal with the matter. All the relevant documents and reports need to be

given to the Respondents for that purpose. A well motivated report should be procured from Drs Lawrence and Mashayamombe.

[21] After considering all the aspects of this matter I am of the view that the decision of the Respondent does not deserve to be reviewed and set aside.

The court will also not replace the decision of the Respondent with an order to release the Applicant as prayed for as the Applicant has clearly failed to make out a case for such a relief.

[22] **The following order is therefore made:**

1. That the Respondent is ordered within 30 (thirty) days of the date of this order to consider the Applicant for placement on parole.

2. That for purposes of paragraph 1 above, the Case Management Committee for Pretoria Central Correctional Centre shall within 10 (ten) days of the date of this order submit an updated profile report (G 326) to the Correctional Supervision and Parole Board for purposes of its recommendation to the Respondent regarding the placement of the Applicant on Parole .

3. That the Correctional Supervision and Parole Board shall make its recommendation referred to in paragraph 2 above to the Respondent within 20 days of the date of this order.

4. That for purposes of the recommendation of the Correctional Supervision and Parole Board to the Respondent and the decision of the Respondent regarding the placement of the Applicant on parole, a joint report be

furnished by the psychiatrists Dr Lawrence and Dr Mashayamombe in the light of their inconsistent findings contained in their respective reports.

5. That the costs of obtaining the joint report shall be borne by the Department of Correctional Services.

6. That there shall be no order as to costs.

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

COUNSEL FOR THE APPLICANT: Adv. Janse Van Rensburg

INSTRUCTED BY:

COUNSEL FOR THE RESPONDENT: M. T. K Moerane SC
Adv. T. W. G Bester

INSTRUCTED BY: State Attorney

DATE OF HEARING:
DATE OF JUDGMENT: 07 FEBRUARY 2014