IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 44933/2014

DATE: 18 SEPTEMBER 2013

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

FREDERICK WILLEM MATHYS DU PREEZ **APPLICANT**

And

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES **FIRST RESPONDENT**

THE CHAIRPERSON: CSPB KGOSI MAMPURU II CENTRAL PRISON (ADV MKWANAZI) **SECOND RESPONDENT**

THE HEAD COMMUNITY CORECTIONS KGOSI MAMPURU MANAGEMENT **THIRD RESPONDENT**

JUDGMENT

MAVUNDLAJ;

[1] The Applicant approached this court by way of urgency, which is no longer an issue, seeking a declaratory order that it be declared that the second respondent had no jurisdiction to revoke the applicant's parole, and the decision of the second respondent dated 13 August 2014 be reviewed and, set aside and substituted (in terms of section 8 of PAJA) and further ordering his release from incarceration at Kgosi Mampuru II Prison into the custody of the Head of Community Corrections (third Respondent) for purposes of re-establishing the conditions of his parole and a costs order against the respondents.

[2] I must hasten to point out that in so far as the prayer that the court should substitute the respondent's decision with its own and place the applicant on parole, this Court, as already found by the Supreme Court of Appeal in the matter of *Derby-Lewis v Minster of Correctional Services*[1], does not have the statutory powers to do so. In this regard, it needs mentioning that courts are slow in agreeing to be dragged into stepping into the shoes of and doing the functions preserved for functionaries, such as, *inter alia,* Parole Boards. In this regard Tokota AJ in the matter of Van *Gun v Minister of Correctional Services*[2] quite correctly, in my view, held that:

> "The fact that the applicant has undergone this anger management programme is no bar to the Board deciding that he should do it again if it did not achieve the desired effect. It is up to the applicant to obey the authorities or stay longer in prison. The choice is his. This court would be inundated with urgent applications for the release of prisoners on parole if it were to easily usurp this power of the Parole Board. Courts ought to adopt a 'hands off' attitude to matters reserved for other arms of government, and only intervene when circumstances warrant such intervention."

[3] It is common cause that the applicant together with three others (dubbed Waterkloof-4") were convicted on the murder of a homeless person and sentenced on the 18th of January 2005 to a determinate sentence of twelve (12) years imprisonment. Two of his associates in crime have already been placed on parole. Becker, who was serving a sentence with the applicant at Kgosi Mampuru II Prison was transferred from Kgosi Mampuru II Prison, post the events relating to this matter and he is currently incarcerated in Kokstad Prison. The Correctional Supervision & Parole Board Kgosi Mampuru II Prison of on the 27 January 2014 approved the applicant's placement on parole. The applicant was subsequently released from incarceration to serve his sentence on parole under the auspices of the third respondent with effect from 11 February 2014. The third respondent stipulated the conditions for the applicant's parole to be adhered to whilst servicing his sentence outside correctional facility in terms of the Correctional Services Act, No 111 of 1998 ("the Act").

[4] It is common cause that on the 16th February 2014, just five days after the applicant had been placed on parole, a media report carrying an article in which it was reported that the applicant and some inmates had smuggled alcohol and held a party in a cell at the Kgosi Mamuru II Correctional Centre, just before placement on parole, came to the attention of the respondent. A video of the party was posted on the YouTube showing the applicant and fellow inmate drinking and using a cell phone. According to the respondent had the CMC and or the Board been aware of this incident prior to the applicant's consideration for placement on parole, the applicant would not have been placed on parole.

[5] It is common cause that the applicant was released on parole subject to various conditions stipulated by the third respondent, on the 11th February 2014. It is common cause that on the 16th February 2014 the

applicant was re-arrested by members in the employ of the Department of Correctional Services at his parental home situated at 709 Gaub Street, Erasmuskloof, Pretoria. The re-arrest of the applicant was pursuant to the provisions of section 70 of the Act as a result of which the third respondent issued a warrant (which was later extended), in order to investigate allegations that he violated his parole conditions by leaking video footage, taken whilst incarcerated at Kgosi Mampuru II Prison, to the media alternative the social media. From 16 to 20 February 2014 a preliminary investigation took place into allegations of misconduct and leaking of video footage, allegedly resulting in the denting of the image of the Department of Correctional Services, according to the officials within the employ of the Correctional services. In order to verify the authenticity of the video and veracity of the allegations made in the newspaper article, including clarity on all other allegations contained in the article, officials were dispatched on the same day to fetch the applicant. To this end a warrant of arrest, in terms of s70 (1) (a) (iii) of the "Act", was authorized and issued by the Head of the Community Corrections Office to whom such powers were delegated. According to the respondents, one of the terms and powers of the conditions for the appellant's placement on parole was to refrain from contact or interviews with media without the consent of the Department. The video footage could only land in the possession of the media through contact with the media and such contact would imply violation of the parole conditions. The investigation that was conducted into the incident could not establish the violation of the aforesaid condition, because the video was apparently leaked whilst the applicant was still incarcerated. It was the respondent's view point that it was reasonable for it to have the parole revoked and the applicant rearrested.

[6] It is common cause that subsequent to the issue of the warrant in terms of s70 and his arrest, the applicant appeared before the Correctional Supervision and Parole Board ("CSPB") on the 21 February 2014. On the 28 February 2014 the CSPB pronounced its decision revoking the applicant's parole for a period of 1 year. This was in terms of s75. The applicant then launched an application which eventuated in Bertelsmann J on 10 July 2014 holding, inter *alia,* that the CSPB hearing was grossly irregular in that the composition of the Board which pronounced its decision on the 28th February 2014 was different to the one which set on the 21st February 2012. Bertelsmann J proceeded to set aside the Board's decision and referred the matter back to the CSPB constituted by different panel for determination de novo. It is this newly reconstituted Board's decision this application is directed against.

[7] The applicant's chagrin against the decision sought to be reviewed is *inter alia,* that the reconstituted board did not have jurisdictional authority to hear the matter. It was further contended that the video recording, although recorded whilst the applicant was still incarcerated, does not amount to violation of parole conditions as envisaged in terms of s70 because it preceded the release. It was further contended that assuming the incident of the virile video, is a breach of the internal Correctional Service conditions, it can only amount to a disciplinary violation the sanction of which is not covered by s70. The latter section targets

breaches committed outside the Correctional Service whilst on parole and not conduct which occurred inside prison, prior to the grant of parole.

[8] The crisp question to be answered in this matter is, whether the Commissioner and or the reconstituted board had jurisdiction to hear and/or adjudicate the matter; and whether the applicant's parole can be revoked for reasons of subsequently discovered transgression committed whilst in the correctional service but prior to his release on parole, whether such transgression constitutes breach of his parole conditions and if so this Court should then order the release of the applicant on parole. The question of the competence of this Court to substitute its own decision for that of the Parole Board and order the applicant's release has already been addressed herein above.

[9] The applicant like any parolee, remains at all times a sentenced prisoner, and has no right to parole, similarly to resist, in my view, the revocation thereof.[3] The National Commissioner has a wide discretion[4] in deciding whether to grant a prisoner parole or cancel it. Cancellation may be done in terms of, *inter alia*, s70(3) if the Commissioner is satisfied that that the prisoner has failed to comply with parole conditions; s71(l) in the opinion of the Commissioner where there are changed circumstances warranting the change of conditions of parole; s75(2)(a) &(b);75(7)(b) which all these sections of the "Act" do not stipulate as to what factors must be considered, vide the authority herein below. The wide discretion enjoyed by the National Commissioner, entails, *inter alia,* in my view, that in deciding whether to or not to revoke the parole, any factor which comes to the attention of the Commissioner may be taken into consideration. This, in my view, includes even past conduct of the parolee, brought to light subsequent to his release from incarceration, as *in casu.*

[10] According to the respondents, in order to verify the authenticity of the video and veracity of the allegations made in the newspaper article including clarity on all other allegations contained in the article, officials were dispatched on the same day to fetch the applicant. To this end a warrant of arrest, in terms of s70 (1) (a) (iii) of the Act, was authorized and issued by the Head of the Community Corrections Office to whom such powers were delegated. One of the terms and conditions for the appellant's placement on parole was to refrain from contact or interviews with media without the consent of the Department. The video footage could only land in the possession of the media through contact with the media and such contact would imply violation of the parole conditions. Although the investigation that was conducted into the incident could not establish the violation of the aforesaid condition, because the video was apparently leaked whilst the applicant was still incarcerated, but that this was the reasonable basis for the issuing of the warrant.

[11] It is not in dispute that the applicant conceded before the Reintegration Evaluation Committee/ Supervision Committee that he partook in the making of the video which was made before his release on

parole. The applicant's version was that he had given instruction that the video should be destroyed. He however conceded that he knew that they were not supposed to keep a cell phone or make any recording whilst in custody. Regard being had to the fact that the objectives and aims of imprisonment are, inter alia, retributive and rehabilitative. The general deportment of a prisoner is fundamental in determining whether he qualifies to be admitted to or permitted to continue remaining on parole. Should previously information regarding the prisoner's deportment in prison, as *in casu*, which the respondents would not have been aware of, but subsequently come to the attention of the Commissioner, the latter is duty bound and obliged to have regard to the nature and gravity of such previously unknown information in deciding to or not to revoke the parole.

[12] A parolee remains at all times a sentenced prisoner, and has no right to parole.[5] The National Commissioner has a wide discretion in deciding whether to release sentenced person on parole or revoke the parole[6]. The wide discretion enjoyed by the National Commissioner, entails, *inter alia,* in my view, that in deciding whether to or not to revoke the parole, any factor which comes to the attention of the Commissioner may be taken into consideration. This includes previously unknown or undisclosed information subsequently discovered post release on parole, as *in casu.* In as much as the consideration of revoking the parole, is an administrative decision subject to review, in certain instances, as *in casu,* the question that arises is whether it is reasonable in the circumstances of this case to have regard to the incident that comes to light after release on parole but committed prior to grant of and release on parole, my view, is that the nature and gravity of the subsequently discovered information would have to be considered in taking a decision.

[13] In the matter of *Deacon v Controller of Custom and Excise*[7] the Court held that: 'At the outset, I need to emphasise that there will be situations where an Act of Parliament or conduct in terms of such an Act by the authority concerned, by reason of the very nature of the Act, its requirements and objects, would not be subject to the rules of natural justice. The exigencies of government are such that an individual cannot rely on the protection of the Constitution in every case where his rights may be adversely affected by an administrative act. In given circumstances public policy and public interest will hold sway over the rights of individuals in order to ensure effective governance." Similar view was expressed, albeit differently in the *Roman v Williams NO*[8] matter as follows:

> "In reviewing a decision of the Commissioner to re-imprison a probationer in terms of s 84B(1) of the CSA the Court will not lose sight of the main objects and the administrative demands of the discipline of correctional supervision and will bear in mind that the relevant statutes do not prescribe the factors to be taken into account or to be excluded from consideration by the Commissioner and that he is burdened with the duty to decide which factors are relevant and what weight ought to be attached thereto and to test and assess a probationer's character and correctional potential." *In casu,* the

relevant sections empowering the Commissioner to cancel parole do not prescribe the factors which must be taken into consideration. Therefore any factor which is reasonable in the circumstances of the case qualifies to be considered.

[14] In as much as the decision of the Commissioner to revoke the parole of the applicant, as it did, is administrative and subject to be reviewed in terms of s8 of PAJA, the nature and gravity of the conduct of the applicant, which was not disclosed previously is critical in deciding whether the court must interfere therewith. In my view, the nature and gravity of the applicant's conduct in participating in the video recording, was very serious and undermined the general authority of the correctional services and also demonstrated that the prisoner was not sufficiently rehabilitated to be admitted to parole. His conduct received wide publication in the general electronica and printed media. In my view, the general public would lose confidence in the administration of the correctional services and justice in general, were conduct such as that of the applicant not attract any serious censor for whatever technical reason. I am of the view that, in the circumstances of this case, it was reasonable and appropriate on the part of the Commissioner and the board to revoke the parole of the applicant, as it did.

[15] Consequently, in the exercise of this Court's judicial discretion, this Court concludes that it is proper and just not to interfere with the decision complained of and that the application stands to be dismissed. Both parties engaged the services of two counsel, with a senior on the part of the respondents, justifiable so in my view. The logical consequences are that the costs should follow the event to include the costs of senior and junior counsel in the case of the respondents.

[16] In the result the application is dismissed with costs, which cost are to include the costs of engaging a senior and junior counsel.

N. M.MAVUNDLA

Date of Hearing : 05/09/2014

Date of Judgment : 18/09/2014

APPLICANTS' ADVOCATE: ADV J ROUX, with ADV C G V O SEVENTER

INSTRUCTED BY : DE MEYER ATTORNEYS

RESPONDENT'S ADV: ADV MTK MOERANE SC, with ADV E B NDEBELE

INSTRUCTED BY : STATE ATTORNEY

[1]2009 (6) 205 (SCA) at 206D.

[2]2011 (1) SACR 16 (GNP) at 21

[3]'Vide Van Gund v Minister of Correctional Services supra at para 20f-h.

[4]Vide Roman v Williams NO 1998 (1) SA 270 (C) at 284F-285D.

[5]. *Vide Van Gund* v *Minister of Correctional Services supra.*

[6]In this regard *vide Roman v Williams NO* (supra.

[7]1999(2) SA 905 (SECLD) at 914H-915E.

[8]1998 (1) SA 270 (CPD) at 285C-D.