



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)**

REPORTABLE
Case No: 20343/10

In the matter between:

DIRK HERMANUS SWART

Applicant

and

**THE MINISTER OF CORRECTIONAL SERVICES
THE NATIONAL COMMISSIONER OF
CORRECTIONAL SERVICES
THE REGIONAL COMMISSIONER OF CORRECTIONAL
SERVICES: WESTERN CAPE
THE HEAD: CDC CORRECTIONS: DEPARTMENT
OF CORRECTIONAL SERVICES**

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Coram	:	HENNEY, AJ
Judgment by	:	HENNEY, AJ
For the Applicant	:	Adv D. L. Van der Merwe
Instructed by	:	HEYNS & PARTNERS The Chambers 50 Keerom Street P O Box 2251, CAPE TOWN, 8000 Tel: (021) 4247008 Fax: (021) 4247102 Ref: EUGÉNE SCHOEMAN
For the Respondent	:	Adv J J Moses
Instructed by	:	THE STATE ATTORNEY 4 th Floor Liberty Life Centre 22 Long Street CAPE TOWN Private Bag X9001, CAPE TOWN, 8000 Tel: (021) 4419200 Fax: (021) 4219364 (Ref: Mr George Köhler/2459/10/P7)
Date(s) of Hearing	:	3 FEBRUARY 2011
Judgment delivered on	:	31 MARCH 2011



Republic of South Africa

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JUDGMENT DELIVERED ON 31 MARCH 2011

HENNEY, AJ:

INTRODUCTION

[1] The crisp issue for determination in this matter, is whether the applicant

qualifies to be considered for consideration of his sentence of imprisonment to be converted in correctional supervision in terms of Section 276A3(a)(ii) of the Criminal Procedure Act 51 of 1977.

[2] It needs to be mentioned that this is an application where the Applicant seeks an order wherein it should be declared that the "**date of release**" for the purposes of considering an application for conversion of his sentence into correctional supervision as interpreted by the Respondents is not in accordance with the law. It is not a proper application for conversion of his sentence of imprisonment into correctional supervision in terms of Section 276A(3)(a)(ii) of the C.P.A. The Applicant lacks jurisdiction to bring such an application, which can only be brought by the Commissioner of Correctional Services and Parole Board (CSPB).

[3] The applicant is an inmate and is currently serving a fifteen (15) year term of imprisonment at the George Correctional Centre. This was imposed on 8 February 2006 on a charge of theft. The applicant was again sentenced having been convicted on a further two counts of fraud to a further six (6) years imprisonment of which four (4) years imprisonment were suspended for a period of five (5) years. It was ordered that this sentence must run concurrently with the sentence of fifteen (15) years. Adv D L Van Der Merwe appeared for the applicant and Adv J J Moses for the Respondents.

[4] The relief sought by the applicant on an urgent basis was framed as follows:

that it be declared that the "**date of release**" referred to in section

276A(3)(a)(ii) of the Criminal Procedure Act 51 of 1977 (hereinafter "the CPA") means, for the purpose of an inmate subject to the provisions of the Correctional Services Act 111 of 1998 (hereinafter "the CSA") relating to his or her placement under community corrections, the date on which such prisoner may be considered for placement on parole or the date upon which the prisoner may be released upon the expiration of his or her sentence, whichever occurs first;

[5] This Application was opposed on the grounds that the applicant is not eligible for consideration for conversion of his sentence to correctional supervision at this stage due to him having not served the required time as contemplated in terms of Section 73(7)(c) of the Correctional Services Act 111 of 1998 in order for his sentence of imprisonment to be considered for conversion into correctional supervision in terms of Section 276A(3)(a)(ii) of Act 51 of 1977.

[6] **The facts underpinning the application briefly stated are the following:**

- (a) The Applicant filed an application for the conversion of his sentence of imprisonment into correctional supervision with the George Correctional Centre during March 2010.
- (b) At this time the Applicant had already served more than a quarter of his effective sentence of imprisonment and the date on which he was eligible to be considered for release on parole was 7 August 2013. At that stage his application was, it seems erroneously supported by the Deputy Regional Commissioner (Third Respondent), and it was ultimately disapproved on 19

May 2010 by the Fourth Respondent. The Application was refused on the basis that it was time barred in terms of a policy directive no 1/8/P issued by the Second Respondent on 10 June 2009.

- (c) As a result of the policy directive, the Applicant therefore would only become eligible for consideration for his sentence to be converted into correctional supervision on 7 February 2016.

The Applicant contends that the date for consideration for conversion of his sentence should be determined in line with the principles set out in **Price v Minister of Correctional Services [2008] 1 All SA 455 (SCA) at page 463**. It was decided in such matter that the date from which an inmate can be considered to have his sentence converted is the date on which he first becomes eligible for parole or his date of release whichever occurs first.

[7] **ISSUES FOR DETERMINATION**

The issues for determination are as follows:

- 7.1 Whether the Applicant indeed qualified as at 19 May 2010 to be considered to have his sentence of imprisonment converted into correctional supervision in terms of Section 276 A(3)(a)(ii) of the Criminal Procedure Act 51 of 1977 read with the provisions of the Correctional Services Act 8 of 1959 or Correctional Services Act 111 of 1998.
- 7.2 Whether the date for conversion of sentence, as set out in the **Price dictum**, should be considered to be the date when an inmate first becomes

eligible for parole.

- 7.3 Whether the refusal of the Second Respondent to consider the Applicant for conversion of sentence as a result of the policy directive of the Second Respondent was in accordance with the law as set out in the **Price dictum**.

[8] In order to deal with these issues, it would be appropriate firstly to have regard to the legal framework applicable to this application.

[9] **LEGAL FRAMEWORK**

The conversion of a sentence of direct imprisonment into one of correctional supervision is dealt with in Section 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)

(ii) exceeding five years, but his date of release in terms of the provisions of the Correctional Services 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.

[Para (a) amended by s 46(a) of Act 129 of 1993 and by s 21(a) of Act 87 of 1997.]

The court in the **Price** matter in dealing with this issue came to the conclusion on **page 463** that:

“The “date of release” referred to in Section 276(A)(3)(a)(ii) of the C.P. Act means, for the purpose of an inmate subject to the provisions of the 1959 Act relating to his or her placement under community corrections, the date on which such prisoner may be considered for placement on parole or the date on which the prisoner may be released upon the expiration of his sentence, whichever occurs first”.

[10] Mr Van der Merwe contends that notwithstanding the fact that the **Price dictum** gave an interpretation to date of release for the purposes of Section 276A(3)(a)(ii) of the CPA in terms of the previous Correctional Services Act of 1958, it still holds good in law. This, despite the fact that the Correctional Services Act 111 of 1998 came into operation on 1 October 2004 and is applicable in this case. The provisions relating to the release and placement of offenders are dealt with in Chapter 111 of the Correctional Services Act 111 of 1998.

The relevant provisions are:

Firstly, Section 73(1)(a) of the Correctional Services Act which states:

***“Subject to the provisions of this Act -
a sentenced offender remains in a correctional centre for the full
period of sentence, ...”***

read together with Section 73(3) stating that:

"A sentenced offender must be released from [a] correctional centre and from any form of community corrections imposed in lieu of part of a sentence of incarceration when the term of incarceration has expired". (own emphasis)

and Section 73(4):

"In accordance with the provisions of this chapter a sentenced offender may be placed under correctional supervision or on day parole before the expiration of his or her term of incarceration".
(own emphasis)

[11] The relevant section dealing with length of period that has to be served before and offender can be considered for placement under correctional supervision for the purposes of Section 276A(3)(a)(ii) of the CPA in Section 73(7)(c)(i) of the C.S.A and it states the following:

"If a person has been sentenced to incarceration for

- i) a definite period under Section 276(1)(b) of the Criminal Procedure Act***
- ii)***
- iii)***

the person shall serve at least a quarter of the effective sentences imposed or the non-parole period, if any, whichever is the longer before being considered for placement under correctional supervision, unless the court directed otherwise".

The new Act deals separately with the matters relating to parole under Section 73(6) and that of Correctional supervision under Section 73(7).

The new Act further does not contain a similar provision to Section 63(1) of the 1959 Act, which stated:

"..... that for the purposes of such recommendations, an inmate's date of release contemplated in Section 276(A)(3)(a)(ii) of the Criminal Procedure Act, 1977, shall be deemed to be the earliest date on which an inmate may, in terms of this Act, be considered for placement on parole or the date on which the prisoner may be released upon expiration of his sentence, whichever occurs first".

[12] EVALUATION

It therefore seems that by repealing Section 63(1) of Act 8 of 1959, which for the purposes of Section 276(A)(3)(a)(ii) of the CPA determined the date from which an inmate could be considered to be placed under community corrections to be the date on which such inmate may be released on parole, or the date upon which the inmate may be released upon the expiration of his sentence, whichever occurs first, the legislature decided that these dates should not be regarded as the same date upon which an inmate may be considered to be placed under community correction.

[13] For the purposes of determining the date of parole, an inmate must be dealt with in terms of the provisions of Section 73(6) of the new C.S.A. This section is clear that such an inmate may only be considered for parole if he or she has either served a stipulated non-parole period, or if no non-parole period was stipulated, half of the sentence. For an inmate who falls under the provisions of Section 73(7)(c)(i), like the Applicant, who is serving a definite period of imprisonment in

terms of Section 276(1)(b) of the CPA and whose sentence is in excess of five (5) years, he or she shall serve at least a quarter of his effective sentences or the non-parole period, if any, whichever is the longer, before being considered for placement under correctional supervision, unless the court has directed otherwise.

In this matter, Applicant's effective sentence of 15 years would make his sentence expiry date 7 February 2021. In terms of Section 73(6) of the new C.S.A, half of his effective sentence would be served by 7 August 2013, according to documentation provided by the Respondents which would qualify him to be released on parole.

[14] Nowhere in the present Act does it state, unlike in the previous Act, that this date for release on parole, is the date that should be considered as the date of release for the purposes of Section 276A(3)(a)(ii), of the C.P.A.

In the decision of **Price** at para 9 the following was said:

"[9] In the light of the above, the reference to "date of release in Section 276A(3)(a)(ii) would at first blush appear to be a reference to the date of the expiration of the prisoner's sentence so that the period of the correctional supervision provided for in that section would similarly not exceed five years. But the words "date of release" in Section 276A(3)(a)(ii) are qualified by what immediately follows, namely, "in terms of the provisions of the Correctional Services Act, 1959 (Act 8 of 1959) and the Regulations made thereunder."

No such qualification and expansive meaning is given in terms of the new Correctional Services Act that would deviate from the ordinary meaning of

"date of release" within the meaning of Section 276A(3)(a)(ii) of the C.P.A.

[15] Mr Van der Merwe for the Applicant argues that even though the Price matter was decided on another now repealed Act containing a deeming provision which is not retained in the new Correctional Services Act (1998), that the interpretation of **"date of release"** in Section 276A(3)(a)(ii) of the CPA still holds good for an inmate subject to the provisions of the new Correctional Services Act of 1998 relating to his placement under community corrections.

[16] He further argues that if the **"date of release"** as contemplated in Section 276A(3)(a)(ii) of the CPA was intended by the legislature to be the sentence expiry date, as it was argued on behalf of the Respondents, the legislature could and would have stated so.

[17] Lastly, he argues that an interpretation that an offender would only be eligible for conversion of his/her sentence if he/she is within five (5) years of his/her **"sentence expiry date"** would make the provisions of Section 73(7)(c) of the new Act, which state that an offender may only be considered for conversion of sentence once he/she has served at least a quarter of the effective sentences imposed or the non-parole period, non-sensical. Such an interpretation gives rise to the absurdity that an offender sentenced to imprisonment for a long term, might be considered and released on parole much earlier than he/she may have been considered for conversion of his/her sentence to correctional supervision, which may already be done as soon as a quarter of his/her effective sentence has been served.

[18] I am unable to agree with these submissions for the following reasons:

Firstly, in the **Price dictum**, the court was aware of the fact that the new C.S.A. Act 1998 was in operation and that the provisions relating to the date of release of an inmate for the purposes of Section 276A(3)(a)(ii) of the CPA were repealed. The court decided the matter in terms of the old Act, due to the fact that the Applicant had been incarcerated whilst the old Act was still in operation. See **458 a-e**.

[19] Secondly, the legislature was aware of the fact that there would be changes in the legislation that would affect the dispensation for the release of prisoners under correctional supervision under the new Act. This was done by enacting Section 136(1) of the new Correctional Services Act, a transitional provision. It reads:

"Any person serving a sentence of imprisonment immediately before the commencement of Chapters IV, VI and VII is subject to the provisions of the Correctional Services Act, 1959 (Act 8 of 1959), relating to his or her placement under community corrections by the Correctional Supervision and Parole Board in terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of those Chapters".

[20] There was therefore a clear intention on the part of the legislature that the provisions of the previous Act relating to parole and community corrections would not be made applicable to prisoners that had been incarcerated after the

commencement of the 1998 Act.

[21] The intention of the legislature, as to the length and form of sentences, is set out clearly in Chapter VII of the Act. Section 73(1)(a) states that a sentenced offender remains in a correctional centre (prison) for the full period of sentence. In my understanding, this would mean that an inmate must stay in prison until his or her sentence expires, unless stated otherwise elsewhere in the Act. Section 73(3) of the Act further states that a sentenced offender must be released from a correctional centre "**and any form of community corrections imposed in lieu of part of a sentence of incarceration when the term of incarceration imposed has expired**".

*Section 73(4) of the Act states that in accordance with this Chapter (VII) a sentenced offender may be placed under correctional supervision "**before the expiration of his term of incarceration**".*

[22] In my view therefore these provisions serves to substantiate the fact that the legislature intended the date of release of an inmate for the purposes of Section 276A(3)(a)(ii) of the C.P.A. to be the date when the term of imprisonment imposed had expired. This is evident from Section 73(3) of 1998 Act.

[23] I am unable to agree with the proposition that it is absurd that an offender who is sentenced to long term imprisonment might be considered and released on parole much earlier than he/she may have been considered for conversion of his/her sentence to correctional supervision.

[24] An inmate is not as a rule automatically entitled to either the benefit of release on parole or the consideration for placement on correctional supervision. In terms of Section 276A(3)(a)(ii) of the C.P.A the commissioner exercises a discretion as to whether to refer a person to a court for consideration of his sentence and the discretion is dependent on a number of circumstances.

[25] One of these would be the length of the sentence and type of incarceration. This is clear if one has regard to the provisions of the Act. Section 73(7)(a) for example, illustrates this point where it says if a person had been sentenced to incarceration in terms of Section 276(1)(i) of the Criminal Procedure Act, he or she must serve at least a sixth of his or her sentence unless the court directs otherwise. In the case of the Applicant, he had been sentenced to a determined period of incarceration in terms of Section 276(1)(b) of the C.P.A.

[26] From this it is clear that the time when they will qualify for consideration for placement under correctional supervision depends on the length and type of sentence imposed by the court.

[27] In my view, if an inmate has served more than a quarter of his/her effective sentence, he/she will not be prejudiced, because he/she may be considered to be placed on parole after he/she has served half of his/her sentence. He/she is therefore entitled to either benefit, whichever occurs first, provided that he/she is found to be suitable. If due to the length of a sentence, it may be more beneficial for an inmate who qualifies to be considered or even released on parole rather to be considered for correctional supervision, then that may be the proper course of action to follow.

[28] Section 73(7)(c)(i) of the C.S.A is clear – when the remainder of the effective sentence served is longer than the quarter he/she served, he/she cannot be considered for placement under correctional supervision. If, therefore, he/she reaches half of his/her sentence after he/she has served a quarter and the remainder of his/her sentence is longer than the quarter he/she served, he/she may be considered for parole. The consideration for parole will occur before the consideration for correctional supervision.

There is therefore, nothing absurd in the interpretation. It is clear and unambiguous and there is no need for the court to interpret it otherwise.

[29] **CONCLUSION**

On a proper interpretation of the provisions of the Correctional Services Act 111 of 1998 relating to the conversion of a term of imprisonment in terms of Section 276A(3)(a)(ii), I conclude that where a person had been sentenced by a court to imprisonment exceeding five (5) years, as in the case of the Applicant, his date of release in terms of Section 73(7)(c)(ii) read with Section 73(1)(a), Section 73(3) and Section 73(4) of the New Correctional Services Act 111 of 1998 and the regulations thereunder, be regarded as the date upon which **his/her sentence expires**. In other words, for him or her to qualify for consideration the date of the expiry of sentence should not be more than five (5) years in future at the time of application.

The Applicant therefore had not served the required time, which would be five (5) years before his date of release, being 7 February 2021, in order for his sentence

of imprisonment to be considered for conversion into correctional supervision.

Therefore, in the light of what was stated above, this application was clearly premature and not a ripe hearing, and as a result was not so urgent as to invoke the provisions of Rule 6(12) of the Uniform Rules of Court.

[30] **COSTS**

I was not persuaded by the argument of Mr Van Der Merwe as to why the costs should not follow the suit.

[31] **ORDER**

The application is dismissed with costs.



HENNEY, AJ

