IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

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Case number: 32623/2014

In the matter between:

KELLY, ASHLEY RICARDO	**Applicant**
And	
THE MINISTER OF CORRECTIONAL SERVICES	**First Respondent**
THE NATIONAL COUNCIL FOR CORRECTIONAL SERVICES (NCCS)	**Second Respondent**
THE NATIONAL COMMISSIONER CORRECTIONAL SERVICES	**Third Respondent**
THE HEAD OF PRISON (JOHANNESBURG MEDIUM B)	**Fourth Respondent**
THE CHAIRPERSON OF THE PAROLE BOARD (JOHANNESBURG MEDIUM B)	**Fifth Respondent**

SUMMARY:

Correctional Services and consideration for parole of an offender sentenced to life imprisonment - NCCS recommendation to Minister that offender not be recommended for placement on parole – three requirements laid down by NCCS and a further requirement laid down by Minister.

Application for review – initial judge ordered NCCS to provide clarification on what was taken into account in making recommendations – supplementary affidavit failed to provide information or clarification or to substantiate that NCCS had given consideration to the issues underlying the further requirements.

Such further requirements either not extant or unexplained in the intervening 16 months. Participation in a Gang Management Strategy Programme is not offered at the relevant prison and has never been availed to applicant; Development of skills to compete in labour market already taken place on the part of applicant and NCCS cannot give any indication of what further needs to be done; Participation in Restorative Justice programme not offered by and unknown to NCCS and applicant has done what he could. In the face of 'impossible' and 'unreasonable hurdles placed upon applicant when refusing to recommend placement on parole, the recommendation of the NCCS and the decision of the Minister set aside.

Notwithstanding that applicant has been prejudiced and the matter does concern liberty of the individual - parole is not a right but a privilege – applicant is a convicted murderer whose early release must be subject to implementation with prescribed procedures – not appropriate for the judge to substitute own decision for that of Minister – time periods set for implementation of prescribed process.

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. The applicant is a prisoner serving a sentence of life imprisonment for murder who seeks to review and have set aside the recommendation made by the National Council for Correctional Services on 26th June 2014 and approved on 25th August 2014 by the Minister that the applicant be "not recommended [for] placement on parole" and that the matter be reconsidered again in 24 months' time. I take this to be an application to review and set aside the decision of the Minister since the NCCS only made a recommendation and it was the Minister who made the decision. It matters not since all are included amongst the Respondents and all are represented and have prepared papers.

2. Applicant was sentenced on 7th June 2000. It would seem to be common cause that the applicant is subject to the regime regarding parole as set out in the erstwhile legislation, Act 8 of 1959, and that the various complexities of calculating so-called 'credits' in relation to parole in terms of that legislation led to a policy directive that persons sentenced to serve sentences of life imprisonment were eligible to be considered for parole once they had served a period of 13 years and 4 months notwithstanding the provisions of the legislation requiring that a period of 20 years be served before the Minister could consider applications for release on parole. It is agreed that, by the time applicant launched these proceedings on 20th November 2014, he had already completed the required 13 years and 4 months period of imprisonment.

3. Applicant appeared before the Correctional Supervision and Parole Board on 22nd October 2013. Thereafter his case was considered by the NCCS and the aforesaid recommendation was made which was the basis upon which the Minister made his decision.

4. When this matter came before my brother Mothle J in August 2015 he handed down a written judgment.

5. With respect to my learned brother, I am in agreement with the approach taken by him to the respondents' attitude that the application, prepared by and argued by the applicant without legal representation, does not comply with the requirements of review proceedings. Mothle J made no finding thereon and commented, with empathy, on the difficulties experienced by the applicant in handling the matter by himself absent any assistance.

6. Regrettably, the counsel who had been briefed in this matter, an Advocate N Sikhakhane, failed to appear. I was informed by his attorney, Mr Reginald Pooe, that Advocate N Sikhakhane was not available until Friday. The discourtesy to the court and disregard for the procedure approved by the Judge President of this division insofar as it pertains to the opposed motion court has been reported to the senior counsel of the group in which this advocate practises. In the meantime, Mr Pooe presented the case for the respondents and, as always, did an admirable job.

REQUIREMENTS TO BE CARRIED OUT BEFORE 2016

7. Three requirements or conditions which were made by the NCCS and agreed to by the Minister as to what was to be done within this intervening period of 24 months and before the issue of parole would or could be considered were:

a. Firstly, the applicant was "to participate further in the Gang Management Strategy".
b. Secondly, the applicant was to be "encouraged and assisted to develop academic and/or practical skills to enable him to compete in the labour market once released on parole".
c. Thirdly, when the matter was again brought before the NCCS it should be accompanied by the profiles of the applicant's accomplices.

8. It has not been suggested that the third requirement will not be met and there was no argument on this point. This is, after all, a directive to the authorities and not to the applicant.

9. Insofar as the first two requirements are concerned, these were raised in the hearing before my brother Mothle J. He succinctly stated the position that the applicant takes the view that he has met the conditions stated by the Minister and the NCCS but whilst the learned judge felt that clarification was required from the Minister and the NCCS. Accordingly, the learned judge made an order that within 30 days the respondents were to answer certain questions directly put by the learned judge.

10. I note that the Promotion of Administrative Justice Act[1] (PAJA) envisages a number of grounds for judicial review of administrative action which include , in section 6, that the action was procedurally unfair; the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered; the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

11. In *Bato Star Fishing (Pty) Ltd v The Minister Of Environmental Affairs And Tourism; The Chief Director: Marine And Coastal Management, Department Of Environmental Affairs And Tourism; and Certain Rights Holders* 2004 (4) SA 490 (CC) was stated:

> [44] The subsection must be construed consistently with the Constitution and in particular section 33 which requires administrative action to be "reasonable". Section 6(2)(h) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach.
>
> [45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to

[1] 3 of 2000.

> the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.
>
> [50] If we are satisfied that the Chief Director did take into account all the factors, struck a reasonable equilibrium between them and selected reasonable means to pursue the identified legislative goal in the light of the facts before him, the applicant cannot succeed

Gang Management Strategy

12. The respondents were required, as of August 2015, to provide clarification as to what the NCCS meant by the Gang Management Strategy, where such Gang Management Strategy programme is offered and how the applicant would be assisted to access and participate in such a programme? (my underlining).

13. In its supplementary answering affidavit dated 20th November 2015 , a penologist employed by the NCCS advised that the main objective of such a programme is to raise awareness amongst offenders on gang related activities, specifically the negative consequences thereof (I must ask – are there positive consequences?). The programme specifically empowers offenders with practical skills to change behaviour and cope in a correctional centre without any affiliation to gangs in any form (I must ask whether or not such a prison actually exists?).

14. The deponent to this affidavit advises that "Johannesburg Prison where the applicant is incarcerated does not offer this programme but Modderbee does offer such programme" and "Applicant will be transferred to Modderbee Prison for him to be able to participate in this programme".

15. The recommendation of the NCCS was taken on 26th June 2014. The decision of the Minister was taken on 25th August 2014.

16. It is common cause that the applicant has never been transferred to Modderbee Prison to participate in such a programme at any time prior to the NCCS making these recommendations or the Minister making his decision or in the intervening 16 months between such recommendations and decision and this hearing.

17. This application was launched in November 2014 and the only real response from respondents was to quibble over procedure. Once Mothle J was seized of the matter and focussed the attention of respondents on the real issues, respondents have been similarly dilatory and taken their own process no further.

18. However, notwithstanding the budgetary restraints and other difficulties to which the respondents may be subject and which may have prevented their

implementation of their own recommendations, the applicant is not a man without enthusiasm and resources. He presented to this court a certificate of participation by himself in a course in "Moral Regeneration and Gangsterism" offered by an entity known as "Fear Free Life". This course covered "the Triune Being: Our True Self; Definition of Crime; Definition of a Gang, Gangsterism and a Gangster; Description of Different Gangs; Factors that Lead to One Joining the Gang; Effects of Gangsterism on the Individual, the Family, the Immediate community, Business and the Country; Quitting Crime and Gangsterism; Change of Attitude; Breaking Free from the Past". The certificate is signed by the President of the Organisation and a pastor who is the Spiritual Coordinator.

19. Respondents had not had the opportunity to deal with this course in their supplementary affidavit. Mr Pooe informed me from the bar that he understood that this is a course organised by the Prison inmates. It may well be so. It would however appear that whoever created and devised this course has some idea of what would need to be covered in a course on Gang Management Strategy – which suggests that such person or persons have comprehension and understanding of the problem. I cannot comment on the course applicant claims to have attended. I do note that, in line with many of the courses authorised by the Department of Correctional Services, there is the usual 'spiritual' or even religious component which is somewhat worrying in a society where adherence to no faith at all is protected in our Constitution. It is to be commended that a prisoner receive solace and strength and direction on the way forward from religious faith but no prisoner should be disadvantaged because he or she does not want to participate in a programme which offers a religious or spiritual component.

20. Argument in this application concerned the difficulty of the applicant obtaining a fair hearing before the NCCS or anywhere else where his parole application is refused on grounds that he must undergo a course which course is not offered by the respondents and has never been made available to him.

21. The wording of the NCCS requirement or condition is that applicant "must participate further in <u>the</u> Gang Management Strategy" programme suggests that there is an identified programme which is already extant and that there has been initial participation therein. Both these premises are incorrect. No such programme was ever availed to the applicant prior to the NCCS recommendation; there had been no initial participation to be taken further.

22. Both prior to the imposition of this condition and in the past 16 months it has proved impossible for the applicant to comply with the condition imposed by or contained

within the recommendation of the NCCS and the decision of the Minister. The impossibility is of the respondents' own making.

23. It would appear that the recommendation of 2014 that parole not be considered was based on the absence of participation in the programme before 2014. The future consideration of parole was dependent upon further participation in the non-existent programme. The requirement or condition was laid down by respondents who then failed to procure that such was capable of fulfilment.

24. I note that the supplementary answering affidavit specifically states that "the negative factors that militated against the applicant was the fact that the applicant has not attended a program called 'Gang Management Strategy' which is relevant to the crimes that he permitted" (my underlining). This is a clear indication that the NCCS took into account and based its decision and recommendations (in part) on the fact that the applicant had not attended a course which has never been and is not offered at the prison where he is incarcerated and that he had never been offered the opportunity of attending such a course anywhere else prior to the NCCS making this decision as to its recommendations.

25. It is difficult to comprehend how the recommendations of the NCCS and the decision taken by the Minister can be regarded as fair administrative action.[2]

26. I have had to ask myself whether or not a recommendation made and a decision taken on the basis that the prisoner has not yet undergone and should still undergo a prescribed or described course which had never been made available to him at any time before (or after) the recommendation and decision (and which may not even exist) can be a fair and reasonable decision.

27. The answer is to be found in posing a hypothetical question. If the prisoner had been told that his parole depended on the condition that he fly to the moon by waving his arms there would be no doubt in finding that such condition is an impossibility and therefore the recommendation and decision predicated upon such flight to the moon was unreasonable and must be set aside

28. In the present circumstances, attendance of a course on 'Gang Management Strategy' has proven equally impossible for respondents to procure and applicant to attend prior to making the recommendation and decision (as well as thereafter). It cannot be considered to have been anything other than an inadmissible or incompetent consideration.

[2] See Lawrence Baxter *Administrative Law* (1984) on reasonableness pages 489-497; 501 – 507; and 527-529.

Development of Skills for the Labour Market

29. The second condition or requirement set out in the NCCS recommendations adopted by the Minister, was that "the offender should be encouraged and assisted to develop academic and/or practical skills to enable him to compete in the labour market one released on parole".

30. In the judgment of Mothle J dated August 2015 he referred to the numerous certificates attached to applicants founding affidavit to demonstrate that he will be able to compete in the job market on his release on parole. Those certificates are endless and indicate that applicant clearly sought out and joined in every conceivable course available to him. They cover 'basic computer skills', 'end-user computing', 'information technology course', 'A+ advanced information technology' as well as programmes on health and safety, democracy and human rights, stress management, project management, suicide prevention, life skills and so on and on.

31. The learned judge asked of respondents that they indicate in their supplementary affidavit whether or not the NCCS considered the number of certificates acquired by applicant in prison as part of his academic development and practical skills and "what more is expected of the applicant in this regard?".

32. The deponent to the supplementary answering affidavit failed to answer these questions posed by the learned judge. The response was that "the NCCS considered all the positive factors in favour of the applicant and the negative factors against the applicant. The applicant is expected to attend to the recommended programs by the NCCS and to address the concerns as stipulated in the psychologist report so that he does not relapse to crime when he is released".

33. The supplementary affidavit fails to indicate what programmes (if any) have been recommended by the NCCS (other than the Gang Management Strategy programme). There is no indication as to whether or not the NCCS or the Minister took into account any one or all or some or none of the many, many courses which he has attended and completed.

34. The reference to the report of the psychologist is equally unhelpful. No reference is made in the NCCS recommendations to such report, what concerns are stipulated or how these concerns are to be addressed. The supplementary affidavit refers to this anonymous and concealed report by reference to paragraphs in a number of respects. However, none of the 'concerns' appear to deal with vocational or educational qualifications. The applicant is given no indication as to what he should do in relation to training so as to secure his entry into the labour market.

35. The supplementary answering affidavit of respondents relies on this alleged report to state that "the NCCS found that the applicant was not remorseful", that he is "troublesome, always complaining" etc.. etc, that his behaviour is "threatening usually in written format", that his "release plan is relatively naïve", that the applicant "has a sense of entitlement". All of these averments are based on or emerge from a report which is not disclosed to this court, attached to this affidavit, authored or placed in context. The court can have no regard to such an anonymous document which respondents failed to attach to their papers.

36. Worryingly, this unauthored and anonymous psychologist's report purportedly states that gangsterism is even more present within the community in which the applicant grew up than when he was originally incarcerated This is indeed of concern. But the applicant cannot be held to blame for this nor can he not be considered for release on parole because of the conditions in the community from which he comes. I note that the respondents' supplementary answering affidavit does not offer to relocate applicant to Outer Mongolia or the suburb of Houghton in Johannesburg or anywhere else where gangsterism may not exist. Failing such assistance, applicant cannot be refused consideration for parole because of circumstances beyond his control.

37. The crux of the matter is that the NCCS has failed to have given any indication of any regard to the courses undertaken and completed by the applicant, has failed to indicate what it believes will or will not conduce to his successful entry into the labour market and has given no indication how or when or where or in what manner the applicant should develop skills which will assist in the labour market.

38. I do have a general concern with regard to this condition. A great percentage of the South African population is unemployed for a multiplicity of reasons - all addressed in their annual reports by several of the South African Directors-General dealing with statistics, labour, trade and industry etc. An even greater percentage of black or coloured South Africans under the age of 30 are unemployed. I would be most concerned if prisoners with an advantaged background and academic qualifications and skills were to find that they were released on parole earlier than those of disadvantaged background who have previously enjoyed no such educational or vocational opportunities.

39. I appreciate that unemployment is a significant contributor towards crime and particularly, gang related activities. But we must be careful, in the administration of justice, not to visit injustice or deprivation twice upon the disadvantaged. If one takes the approach which seems to be that of the NCCS (perhaps - since the

approach is most unclear) too far then no medical practitioner will ever be sentenced to imprisonment because he or she, as a middle class person, can perform in the labour market whilst an orphan from an informal settlement with no educational or vocational background will languish in prison far longer than anyone else.

40. However, these are general comments. What is clear in this instance is that the NCCS gives no indication that it did consider the courses undergone by the applicant or his ability to enter the labour market. The NCCS has given no direction in this regard. The NCCS has simply ignored the questions posed by the learned judge in the earlier hearing.

41. In such circumstances, it cannot be said that the NCCS did indeed "consider all the positive factors in favour of the applicant'. It appears to have ignored one which it considers so important that it was stated as condition or requirement two in its own recommendations to the Minister. I have already referred to the requirements of PAJA in this regard.[3]

Restorative Justice

42. The decision of the Minister stated an additional condition. "The offender should participate in Restorative Justice Processes involving the family of the victims as well as the community".

43. The applicant claimed in his founding affidavit that he has been forgiven by a relative of a victim; respondents original answering affidavit stated that "the applicant should participate in restorative justice processes involving the family of the victims as well as the community". Mothle J asked respondents to advise whether or not the Minister had considered the affidavit of one of the victims attached to the papers and what more was expected of the applicant in this regard.

44. The respondents' supplementary affidavit quibbles over the address of the author of the affidavit purporting to be from a victim and then goes on to say "there is also no evidence that applicant also participated in the restorative justice within the community" and "the applicant is expected to do restorative justice with the victim, the victim's family and the community" and "the NCCS did not have any information about the applicants interaction with other victims".

[3] See Baxter above.

45. In short, respondents have taken no steps at all to implement any of the possibilities which may be available in any restorative justice programme. They claim ignorance of any such steps and then seek to penalise the applicant for their ignorance.

46. If any restorative justice is desired by victims or their families or the community it is hardly possible for the applicant to go and visit the victims or hold a town hall meeting or devise a programme. Respondents are absolutely silent on what could or should be done and who should do it and when or how. No direction is given to applicant and none is taken by respondents from the learned judge Mothle J.

47. It may be, of course, that none of the victims or their families wish to participate in any restorative justice programme. That is their right. They are not obliged to interact with, meet with, communicate or engage with – and certainly not to forgive – the offender. And no burden should ever be placed on such a victim that he or she is responsible for the continuing incarceration of the offender.

Other Considerations

48. The decision of the Minister was based upon the recommendations of the NCCS. His attention was obviously alerted to the requirements or conditions to which they adverted.

49. Those additional matters raised in the supplementary answering affidavit are just that – additional. They are also based on a report which is not before the court and therefore does not exist in this court.

Conclusion

50. My brother Mothle J went out of his way to identify the issues, focus the attention of respondents' thereon, and direct them towards what information need be placed before the court when they were confronted with this application. Respondents failed to embrace the opportunity offered them by the learned judge and were unable or unwilling to deal with the issues raised in this application.

51. There is no indication that, prior to making its recommendation in June 2014, the NCCS ever made any enquiry into the existence of the Gang Management Strategy or its availability or the value and import of the courses already undergone by the applicant.

52. I am satisfied that the applicant has, on more than a balance of probabilities, discharged the onus of showing that the recommendations of the NCCS took into account factors which should not have been taking into account (i.e. inadmissible or

incompetent considerations) and that, accordingly, the decision of the Minister was equally vitiated at the time it was made.

PROCEDURE ON THE WAY FORWARD

53. Mr Pooe correctly argued that a court should not set aside a decision in circumstances such as these unless the circumstances are' exceptional'. I agree.

54. The circumstances to which he adverted are the laid down procedures for processing applications for release on parole. They involve a carefully charted chain of command or consideration and decision making - the Case Management Committee, the Correctional Supervision and Parole Board, the NCCS and the Minister. Each brings different skills and different responsibilities to the process. I am loathe to simply bypass them and make an order which interposes my opinion in the face of what should have been a professional and considered process.

55. But the question arises whether or not these are exceptional circumstances. This case concerns, in a sense, the freedom of the individual. A man seeks his release on parole and indicates that he continues to be incarcerated because the requirements to be fulfilled before he can be considered for release on parole are impossibilities set up by the authorities as hurdles which he cannot overcome. On this approach, there is a need for intervention by the court.

56. On the other hand, this is not a case of unlawful detention. The applicant is a convicted murderer who is serving a sentence of life imprisonment imposed by the High Court. He is not entitled as of right to be released on parole. The only right which he has is the right to a fair hearing which involves a fair process resulting in decisions based upon considerations which do not offend the administration of justice and which do not furnish grounds as provided for in PAJA.

57. I also bear in mind that the sentencing judge took the view that a sentence of 'life' imprisonment was the appropriate sentence and that it was administrative problems which led to development of the policy that 'life' means that only a period of 13 years and 4 months need elapse before a life prisoner may be released on parole and that many are so released. Worryingly, prisoner applicants are now submitting in this court – life means 13 years and 4 months, 5 years means less than 1 year and accordingly 15 years should not mean more than 3 years!

58. I am also mindful that, to seek a psychologists report, preparation of a profile by the CMC, a hearing by the parole board and preparation/consideration of a new profile, submission of same to the NCCS and consideration thereof and a decision on recommendations, submission to the Minister and consideration and decision by

him will take months and months. Mr Pooe indicated at least three weeks for each process and eight weeks for the Minister. The upshot is that respondents will face no consequences of their *laissez-faire* approach to this parole application or to this court application or to the disregard which they have shown to the questions most seriously and carefully posed by the learned Judge Mothle. If this order will require one or more of respondents or their servants to work nights and weekends and public holidays – so be it, that would be a desirable outcome.

59. I have weighed up these considerations with some care and have decided that I will set aside the decision taken by the Minister for the reasons set out above but that I will not substitute my own decision and I will direct that the prescribed processes are carried out but in a manner which requires expedition.

60. In the result an order is made as follows:

    a. The recommendations of the 2nd Respondent of 26th June 2014 and the decision of the 1st Respondent dated 25th August 2014 are hereby reviewed and set aside.
    b. The 4th Respondent is directed to procure preparation of a new profile (including psychologist or social worker reports) on or before 12h00 Friday 11th March 2016.
    c. The Case Management Committee is directed to give consideration to and prepare such recommendations as they should on or before 18th March 2016.
    d. The 5th Respondent is directed to prepare such report as is required of that Board on or before Friday 1st April 2016.
    e. The 2nd Respondent is directed to give consideration to this application for parole at the first meeting falling immediately after the 1st April 2016, i.e. the next meeting, and then to place its recommendations before the Minister within ten days of such meeting.
    f. The 1st Respondent is directed to give his earliest possible consideration to the recommendations of the NCCS, the 2nd respondent, but not later than four weeks after receipt of same.
    g. There is no order as to costs.

DATED AT JOHANNESBURG 03RD MARCH 2016

SATCHWELL J

For Applicant: Appeared in person.
For Respondent: Mr R Pooe of the Office of the State Attorney
Dates of hearing: 29th February 2016.
Date of judgment: 03rd February 2016.