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Parole pandemonium

by Julia Sloth-Nielsen

Judge T Matshipa of the Johannesburg High Court handed down judgment in the matter of *Motsemme Henry v Minister of Correctional Services and Others* (case 04/26569, as yet unreported), on a parole-related application on 14 October 2005. The judgment raises some deeply concerning issues, which bear further investigation. Before detailing the principal concerns, however, it is necessary to set out the history and facts of the case in some detail, for they are significant.

The applicant was sentenced in 1996 to serve what was effectively a 17 year sentence for robbery and unlawful possession of arms and ammunition.[1] In his founding affidavit (the prisoner spent his time in prison wisely acquiring a law degree), the applicant notes that at the time of commencement of the sentence, his parole was governed by the Correctional Services Act 8 of 1959, and he was told in the initial phases of his sentence that he could be considered for parole after serving one half of his sentence, once any credits earned had been taken into the reckoning. He appeared before a parole board in August 2002, and was then told he would have to serve three quarters of his sentence in accordance with a policy directive of 23 April 1998.[2]

In May 2004, the applicant instituted proceedings against the respondent to reconsider his possible placement on parole in accordance with Act 8 of 1959 and the policies in place at the time of his conviction and sentence. Satchwell J granted the application, requiring a fresh parole hearing and ordering that the policy directive which superimposed a new mandatory three quarters non-parole period be disregarded. She also noted - with obvious foresight – that in the parole hearing, consideration had to be given to the provisions of the Constitution and those contained in the Promotion of Administrative Justice Act 3 of 2000, enacted to give effect to section 33 of the Constitution, which requires lawful, reasonable and procedurally fair administrative action. The hearing had to be conducted by the end of September of that year.

A parole hearing was indeed convened by the fourth respondent (the Chairperson of the Parole Board at the prison command in question)[3] prior to the specified date. The same criteria were used as before (that the applicant had not served three quarters of his sentence), and the matter was then postponed by the Parole Board for a further 12 months, i.e. until September 2005.

This the applicant did not take lying down. In October 2004 he was back in court arguing for a review of this decision. Since the respondents failed to file answering affidavits, Willis J (now the second judge to be seized with the case), postponed the matter until November 2004, and coupled this with an order compelling the respondents to file the necessary papers.

This order was finally complied with mid-January 2005. However, the papers were incomplete, the respondents having failed to include the records of the proceedings which were the subject of the review action. Again the matter was postponed (until February 2005) by Acting Judge Bruinders (now the third judge in the case). On the return date, after hearing the matter, an order was fashioned compelling the Parole Board to re-hear the matter, and at that hearing to take into account a report by the Case Management Committee (CMC), dated 10 October 2004, recommending the granting of parole to this prisoner. The Parole Board was also instructed to record all the reasons why the applicant should not be considered a suitable candidate for parole, should that be the finding.

This CMC Report (hereafter the Report) is reproduced at length in the judgment, and must

surely record one of the most successful rehabilitation endeavours in the history of DCS. After detailing his LLB and LLM studies, teaching of other inmates, positive attitude and exemplary behaviour in prison, his high level of motivation, his effective efforts to resolve the underlying motivation for the original offences, the completion of a variety of courses and receipt of a prize for rehabilitation, and establishment of a hand skills project for other inmates out of his own pocket, the report says he shows "maturity and selflessness and with this and other positive factors in his favour, the CMC believes he is an ideal candidate for placement on parole. He has become a very responsible an respectful individual who may no longer pose any further danger to society… he has obtained maximum benefit from his imprisonment and his paroling will no doubt lead to further rehabilitation. Nothing we believe would negatively impact upon his suitability of (sic) parole."

Alas, the saga does not end there. Within the specified time frames, the CMC convened a further sitting. The applicant was told that the CMC was impressed with his achievements since his incarceration and that the members were satisfied that he had been rehabilitated. However, they concluded that he was not a suitable candidate for parole due to the seriousness of his offence and the length of his sentence. The parole application was then postponed until March 2007! Pointing out that this decision could not be correct as the CMC had already made it's recommendation in the Report quoted above, the judgment also points out that the decision is in direct conflict with the order of Bruinders AJ to the effect that the persons conducting the hearing must take account of the findings of the mentioned Report. Nor was it clear why any sitting of the CMC was infact necessary, as this team had completed it's functions.

The next step was the further hearing before a Parole Board (the third one) which took place within days of the CMC sitting (March 2005). It is the decision of this Parole Board that the present legal application sought to set aside. This is because the applicant was informed at this hearing that the Parole Board 'was obliged' to follow the CMC's recommended postponement of the matter until March 2007. Even more bizarrely, the applicant alleged that he had then countered with arguments that an earlier Parole Board, with the same chairperson, had proposed a further profile date of July 2006, and when he argued against it then, had changed that to September 2005. Now the proposal of the same Board was changed from September 2005 to March 2007. The Chairperson responded that the length of sentence and nature of offence remained paramount, which was why the CMC had made her change her mind.

In this application to set that decision aside (now the fourth round of litigation), the applicant contended that the fourth respondent was biased against him, and laid the basis for an established practice of releasing rehabilitated prisoners once they had served half their time by citing numerous real life examples. Amongst them was one instance of a fraudster (involving amounts totalling approximately R35 million) who had been imposed a (plea bargained) eight year sentence and served a mere two years and two months!

Whilst maintaining the necessity of an individualised approach to decision making about parole, the judge conceded that the examples cited (of which the above is only one) showed rather obvious inconsistency on the part of the Parole Board in effecting it's duties. Further, the Parole Board was found to have ignored the applicable law,[4] as well as it's own manual. In addition, it had ignored the favourable CMC report and misdirected itself as to the role of the seriousness of the offence in decisions about parole which should involve taking into account all relevant factors, including positive ones. Having recourse to a policy directive in preference to the applicable legal provisions was also wrong, and the applicant's parole fell to be considered under the Act in force at the time that he commenced serving his sentence But further to this, the judge notes that "a disturbing feature of this case is that the respondents in this matter, particularly the fourth respondent, have been consistently ignoring court orders with impunity. There have been five court orders all of which have been ignored,,,causing great damage to the administration of justice. Such conduct from State Organs, who ought to be leading by example, makes a mockery of our Constitution,,,".

Whilst commending the applicant for his persistence in asserting his rights, the Court castigated the Parole Board as having been 'grossly incompetent' and having failed to apply its mind to the relevant issues in accordance with the requirements of natural justice. The Court ventured to ponder on how many other cases have been dealt with in an equally flippant manner. An investigation into the activities of this Board was thereafter requested, and the applicant's release on parole ordered, the court taking a highly unusual step of substituting its own decision for that of an administrative authority, rather than referring the matter back for reconsideration (undoubtedly the right approach given the history of this case).

One further notable point concerning this matter: in the final instance, no papers were filed for any of the respondents at the last hearing, including papers providing reasons for the March 2005 Parole Board decision which was the subject of this application for review. Furthermore, counsel for the respondents withdrew 'as there had been a lack of proper communication between him and his clients'. The learned judge inferred that this gave rise to the irresistible inference that the respondents chose not to oppose the application because they realised it

would have been insupportable. This turn of events between the Department of Correctional Services and counsel midstream in litigation is not unusual according to De Vos who has previously alluded to the lackadaisical way in which the Department of Correctional Services approacheslitigation against it, failing to file papers and properly brief counsel, or indeed to take heed of court orders against it.[5] This case confirms his findings rather pointedly.

To return to the principal concerns raised by the case. The first question must be what training on administrative justice and the Promotion of Administrative Justice Act (3 of 2000), not to mention the contents of the Manual: Correctional Supervision and Parole Boards dated 17 February 2005, has in fact been given to the new Parole Boards set up under the new Act if they can misconstrue their powers so astonishingly? Further aspects of training should include proper explanations as to the independence of the Parole Boards from DCS command structures (indeed, the whole point of providing for civilian representation on the new Parole Boards), and the importance of adhering to the principle of legality.

Second, there has been growing consternation[6] amongst prisoners sentenced before the coming into effect of Act 111 of 1998 that their parole position would be prejudiced in that Parole Boards would apply new and harsher rules,[7] leading to their serving a longer non-parole period. This fear is not without merit, as is apparent from this case. However, the judgment also clearly directs that the parole provisions of Act 8 of 1959 - and not policy directives of 1998, nor any other subsequent legislation – governs the position of prisoners admitted to serve their sentence before October 2004, the date on which the applicable provisions of the new Correctional Services Act 111 of 1998 came into operation. Further, the credit system previously in place still counts in the calculation of the minimum non-parole period to be served in respect of those prisoners, and will continue to do so for some years to come. This leads inevitably to the further conclusion that Parole Boards will have to be thoroughly informed as the workings of the former as well as the new system, to enable them to function effectively and within the confines of the law.

Third, the judgment confirms the trite but important point that parole is not a ‘nice to have’ or ‘optional extra’ to be employed when and if the authorities feel like it. It is in fact ‘an integral part of the penal system’ (unreported judgment at p 13). Thus, despite the fact that a prisoner has no right to insist on his or her release, the consideration of this possibility in accordance with applicable constitutional and other legal principles is indeed a rightful demand, and one that serves valuable penal objectives in furthering sound prison management, encouraging prisoner involvement in their own rehabilitation and so forth as this case so ably demonstrates).

From this flows a fourth important point: that as a legitimate functional area in the implementation of the administration of justice, the parole system (and the accompanying system of correctional supervision) must be adequately established, implemented and resourced. Muntingh[8] has shown recently that the budget allocation for community corrections as a proportion of overall DCS spending has in fact decreased in real terms, and this gives rise to serious concerns as to the capacity of DCS to effectively implement parole as part of its lawful mandate.

Fifth, it must be noted that the Parole Board concerned is one that serves one of the largest prisons in the country and should by all accounts be convened on more or less a full time basis, seeing numerous prisoners. It is thus astounding that such obvious caprice as the judgment highlights can characterize its decision- making. Whilst Parole Boards should under all circumstances and regardless of the size of the prison population act with absolute professionalism, it follows that the negative impact of poor decision-making is quantitatively larger when high numbers of prisoners are being dealt with. The Parole Board cannot escape from its dual function of ensuring that public safety is maintained by not releasing unrehabilitated persons, whilst at the same time assisting the DCS to manage the prison population more effectively by releasing those prisoners who do not warrant further imprisonment.

Finally, matters have reached a sorry state when a judge has to reprimand an organ of state directly concerned with the criminal justice system for ‘causing great damage to the administration of justice’. This is not the first instance of judicial irritation with DCS, and one can but have sympathy with the courts when tallying up the numerous trial hours that had to be devoted to just this one case.

It will be incumbent on official structures, such as the Parliamentary Portfolio Committee on Correctional Services, as well as upon organs of civil society, to ensure that Judge Masipa’s request that the activities of this Parole Board be investigated is indeed carried out. After all, the functioning of the parole system is funded from the public purse, and we have a right to exact effective administration.

Victims of crime and the parole boards – a knock at the door or a whisper in the hallway?

by Lukas Muntingh

The strength of the victims' rights movement can be measured by numerous legislative and policy changes since 1994 and it was therefore no surprise to see these interests reflected in the legislation regulating the release on parole of offenders. The Judicial Matters Second Amendment Act (55 of 2003), effecting an amendment to S 299A of the Criminal Procedure Act, provides for the right of a complainant to make representation in certain matters relating to the placement on parole, on day parole, or under correctional supervision of an imprisoned offender. A complainant is understood to be the victim of the crime, or the immediate family, in the case of a murder. Not all crimes are covered by this provision and the emphasis is clearly placed on serious crimes such as murder, rape, robbery, sexual assault and kidnapping. On 31 March 2005 the Judicial Matters Second Amendment Act (55 of 2003) came into effect.

The procedure is at face-value fairly uncomplicated. Firstly, the sentencing officer is required, at sentencing, to inform the complainant, if present at the court, that he or she has the right to make representation when the offender is considered for parole, day parole, or correctional supervision, and also to attend any relevant meeting of the parole board. Should the complainant wish to make representation, he or she has the duty to inform the Commissioner of Correctional Services thereof in writing, and to provide the commissioner with his or her contact details (to be updated as necessary). In turn, the Commissioner is required to inform the relevant parole board of the declared intention. The duty then rests on the parole board to inform the complainant when a meeting will take place with regard to the particular offender.

For this procedure to work, two immediate requirements need to be met. Firstly, the sentencing officer must inform the complainant of his or her right to make representation. Secondly, the complainant must be in court to receive this information. The legislation does not deal with the very likely scenario where the complainant is not at court but may wish to make representation if he or she was aware of this right.

The Act also provides in S 299A(4) for the Commissioner of Correctional Services to issue directives regarding the manner and circumstances in which a complainant may exercise this right. Such directives were recently, albeit late, submitted to Parliament and accepted by the Portfolio Committee on Correctional Services.[9] There appear to be a number of points of incongruence between the provisions of S 299A of the Criminal Procedures Act and the *Directives Regarding Complainant Participation in Correctional Supervision and Parole Boards* (the Directives).

The most glaring of these is the shift in responsibility with regard to notification. Whereas in proceedings relating to parole, the Act is clear that the complainant must inform the Commissioner of his/her intention to make representation, as well to provide up to date contact details, with the latter then informing the relevant parole board, the Directives sets out a different procedure. Paragraph 3 of the Directives state that the complainant must ensure that the relevant parole board in whose area the offender is being detained, is informed of both the desire to make representation and to be informed of relevant parole board meetings. In addition to this, the complainant must inform the Chairperson of the Parole Board of the following:

- name of the offender
- offence committed
- case number, the date and name of the court where the offender was convicted
- physical and postal address of the complaint.

It is not clear how a complainant will know where any prisoner is being detained and there is no procedure set out that compels the Commissioner to keep the complainant informed of where an offender is being detained. The question, therefore, is how will the complainant know this? There is no requirement in S 299A of the Criminal Procedure Act where the sentencing officer is instructed to give any information regarding the offender to the complainant.

The Directives also require a level of knowledge from the complainant about the offender's case that is perhaps at the level of engagement that most victims of murder, rape, robbery, sexual assault and kidnapping would prefer to avoid. Again the question is: how would the complainant know all this? Is this a reasonable expectation given the crime concerned? Does this reflect victim sensitivity? By implication it means that if the complainant is not able to furnish all this information and/or directs his or her notification to the wrong parole board, the right to make representation is effectively lost due to administrative concerns. Lack of information in this case can then result in secondary victimisation by a procedure that was presumably developed with the opposite intention.

It is also clear from the Directives that the Commissioner has been removed from the procedure

and that the responsibility for giving effect to S 299A now rests with the Chairperson of the Parole Board and the complainant.

The analysis above dealt with a particular aspect of the legislation and directives, namely the notification process, and does not provide a full description of the directives. However, given the centrality of this step in the process of victim involvement in parole board decision-making, it is regarded as an important indicator of a victim-sensitive approach. It is concluded that the Directives do not facilitate the objectives of the legislation by making the decisions of parole boards more democratic and enhancing public safety. The net effect will in all likelihood be resentment and exclusion on the part of complainants, despite the intentions of the Victims' Charter.

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SA prison at a glance

Category	Feb-05	Jul-05
Functioning prisons	233	238
Total prisoners	186823	155 662
Sentenced prisoners	135743	110 736
Unsentenced prisoners	51080	44 926
Male prisoners	182652	152 557
Female prisoners	4173	3 105
Children in prison	3035	2 245
Sentenced children	1423	1 001
Unsentenced children	1612	1 244
Total capacity of prisons	113825	114 495
Overcrowding %	164	135
Most overcrowded		
Feb '05: Durban Med C	387.63%	
Jul '05: Johannesburg Med B	382%	
Least overcrowded		
Apr '05: Emthonjeni	27.85%	
Jul '05: Pomeroy	13%	
Awaiting trial longer than 3 months	23132	22 015
Infants in prison with mothers	228	123

[1] The original sentence was 18 years. He benefited from one 6 months amnesty and a special remission of 3 months of his sentence.

[2] Note that this is even more harsh than the minimum parole period generally provided for under the new Act (111 of 1998), which would have required him to serve two thirds of his sentence.

[3] The second respondent was the Commissioner of Correctional Services, and the third respondent the Head of CMC Leeuwkop Medium C prison.

[4] The provisions of Act 8 of 1959 which provide that an offender may be considered for parole after serving one half of his or her sentence, less credits earned.

[5] De Vos, P (2003) Prisoners' rights litigation in South Africa since 1994 - a critical evaluation, CSPRI Research Paper Series No 3, Accessed from http://www.communitylawcentre.org.za/cspri/publications/Prisonersrightslitigation.pdf

[6] Personal communication by NGO's working in prisons with the author.

[7] The new Act provides for a minimum period of one half to be served before parole may be considered, and in certain instances an even longer minimum period must be served where the prisoner was sentenced in accordance with the minimum sentences legislation (Act 105 of 1997).

[8] Submission by CSPRI to the Portfolio Committee of Correctional Services on the Departmental Budget, 5 April 2005, http://www.pmg.org.za/viewminute.php?id=5734

[9] See minutes of the Portfolio Committee on Correctional Services, 28/10/2005, Accessible at http://www.pmg.org.za/viewminute.php?id=6632

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