IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

REPORTABLE

CASE NUMBER 20371/2008

10/6/2008

In the matter between:

LOMBAARD, PETRUS JOHANNES **Applicant**

And

MINISTER OF CORRECTIONAL SERVICES **1st Respondent**

CHAIRPERSON, CSPB PRETORIA CENTRAL CC **2ND Respondent**

CHAIRPERSON, CMC PRETORIA CENTRAL CC **3RD Resondent**

And

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
10/6/08 DATE SIGNATURE

Case number 21400/2008

In the matter between:

DU TOIT, BAREND JOHANNES JACOBUS **Applicant**

And

MINISTER OF CORRECTIONAL SERVICES **1st Respondent**

CHAIRPERSON, CSPB PRETORIA CENTRAL 2ND Respondent

CHAIRPERSON, CMC PRETORIA CENTRAL CC 3rd Respondent

And

CASE NUMBER 38209A/2008

In the matter between

PISTORIUS, DEON Applicant

And

MINISTER CORRECTIONAL SERVICES 1ST Respondent

CHAIRPERSON, CSPB PRETORIA CENTRAL 2ND Respondent

CHAIRPERSON, CMC PRETORIA CENTRAL 3RD Respondent

JUDGMENT

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1. These three applications were launched as individual matters, but were heard together as the issues arising in each one are substantially the same.
2. All three applicants are inmates of the Pretoria Central Correctional Centre.

3. All three have been found guilty of serious crimes and sentenced to lengthy terms of imprisonment.

4. All three qualify, in terms of the former Correctional Services Act, 8 of 1959, for possible placement on parole. In terms of the provisions of section 136 (1) of the present Correctional Services Act 111 of 1998, the applicants are not subject to the latter act's mandatory provision that half of any sentence of imprisonment must be served before parole can be considered. Section 65 (4) of Act 8 of 1959 provides that a prisoner will not be considered for parole unless he has served at lest one half of his sentence of imprisonment. In terms of section 22A of this Act, however, this period may be shortened by credits for good behaviour reducing the time that has to be served behind bars. The credits are granted on the basis of one day for each two days of the determinate sentence served, so that the prisoner concerned may qualify for parole after serving at least one third of his sentence. The three applicants became eligible for parole period after having served more than one third of their sentences. R.13

5. All three appeared before the second respondent seeking a decision setting aside earlier decisions of the second respondent relating to their future placement on parole, or determining dates upon which a further profile should be compiled prior to placing them on parole. All three had previously obtained orders against the respondents successfully challenging failures to properly consider their eligibility for parole, or orders that compelled the respondents to properly assess the applicants for release. In all three instances the second respondent refused to place the applicants on parole forthwith. The applicants sought orders to set aside these refusals and substituting them with decisions placing the applicants on parole within thirty days from date of the hearing.

6. Their applications were heard on the 13h May 2008.

7. In all three cases, the respondents opposed the application, but did not file any opposing affidavits.

8. The minutes of the proceedings before the second respondent were filed of record. It is unnecessary to deal with them in detail. It is clear that the second respondent did not consider all relevant factors in the applicants' favour correctly or at all.

9. During argument on the 13th May 2008 it became common cause that the applicants were, in fact, entitled to an order substituting the second respondent's negative decision with one placing them on parole within thirty days of the hearing.

10. During the hearing, however, the respondents informed the court that the Commissioner of Correctional Services had, a day or two before the hearing, and as a result of the applications to this court having been launched, exercised the discretion conferred upon him in terms of section 78 (5) of Act 111 of 1998 and had decided to refer the second respondent's decisions relating to the applicants placement on parole to the Correctional Supervision and Parole Review Board. ("the Review Board").

11. Section 75 (8) of the present Act reads as follows:
" A decision of the Correctional Supervision and Parole Board is final except that the Minister or the Commissioner may refer the matter to the Correctional Supervision and Parole Review Board for reconsideration, in which case the record of the proceedings before the court must be submitted to the Correctional Supervision and Parole Review Board."

12. In terms of section 77 of the Act the Correctional Supervision and Parole Review Board ("the Review Board") must, after considering the record, any submissions by the Commissioner, the inmate concerned and any other relevant factors or arguments, either confirm the Parole Board's decision or substitute its own decision and make any order that the second respondent ought to have made.

13. The Review Board must give reasons for its decision, which must be made available to the applicant and any other person or body entitled to receive the same.

14. The court was informed of the Commissioner's decision by a perfunctory affidavit filed by the respondents' attorney of record.

15. After recording the Commissioner's decision and setting out the above-quoted statutory provisions, the affidavit continues as follows:

"Thus, once referred by the Honourable Commissioner of Correctional Services, a statutory obligation arises vis-à-vis the Correctional Supervision and Parole Review Board to reconsider the particular affected person's case.

We thus submit that the application should merely be removed from the Honourable Court's roll in that it will properly dealt with (reconsidered) at the hearing during June 2008 of the Correctional Supervision and Parole Review Board."

16. The Commissioner did not apply to be joined as a party and did not favour the court with any reasons for his decision. In particular, the Commissioner did not see fit to enlighten the court why he deemed it necessary to exercise his discretion as aforesaid while being fully aware of the pending application to court.

17. In this connection, it must be underlined that the Commissioner is not bound to exercise his discretion to refer any matter decided by the second respondent to the Review Board within a prescribed period. There was therefore no regulatory provision compelling the Commissioner to take the decision while the applications were pending before the court.

18. The applicants concluded in the light of the absence of any further explanation that the Commissioner's decision was taken with the intention of preventing this court from overturning the second respondent's decisions. While this reaction is understandable, it may not be justified – but as no reasons for the decisions and the timing

thereof were provided at the time, the court could not comment thereupon.

19. The affidavit raised the question whether the Commissioner's decision ousted the Court's jurisdiction. The wording of attorney's affidavit quoted above was certainly capable of being construed as suggesting that this was the case.

20. Counsel for the respondents immediately emphasized that this was not what his clients contended for, but could take the proposal that the matters ought to be removed from the roll no further. R.B.

21. His concession that the court's jurisdiction was not ousted was correct. It is seldom if at all to be presumed that the court's jurisdiction is excluded by any statutory provision: *Metcash Trading Ltd v Commissioner, South African Revenue Services, and Another* 2001 (1) SA 1109 (CC).

22. It should furthermore be clear that the mere fact that the Commissioner exercises his discretion to refer the second respondent's decision to the Review Board for reconsideration does not eradicate the former's decision. Its element of finality is all that is removed when the Commissioner decides to act in terms of the subsection.

23. By the same token the referral to the Review Board is not to be equated with an internal remedy in terms of section 7 (2) of the Promotion of Administrative Justice Act 3 of 2000. This is so because the inmate, a person vitally affected by the second respondent's decision, has no right to approach the Review Board to claim a reconsideration of the second respondent's administrative action.

24. The fact that an inmate who is dissatisfied with the second respondent's decision might approach the Commissioner or the Minister with a request to refer the matter to the Review Board cannot alter the position.

25. Nor does the position change once the Minister or the Commissioner decides to refer the matter for reconsideration by the Review Board.

The mere fact that the second respondent's decision is reconsidered by the Review Board at the instance of an outsider to the original administrative process cannot elevate the resultant reconsideration to an internal remedy that is at the disposal of an affected party as a matter of right. Nor is the obligation upon the Review Board to take cognizance of the inmate's concerns sufficient to categorize the process as an internal remedy – it is an independent statutory process that is initiated not as a matter of course, but clearly as an extraordinary event initiated by either the Minister or the Commissioner at any time after the original decision was taken, subject only to the fact that it must take place prior to the latter being put into effect.

26. If the powers of the Review Board as conferred upon it by section 77 are considered, it becomes clear that the Review Board conducts a completely new hearing of the matter:

"***Powers of Correctional Supervision and Parole Board in respect of cases decided by Correctional Supervision and Parole Board.*** – *On consideration of a record submitted in terms of section 75 and any submission which the Minister, Commissioner or person concerned may wish to place before the Correctional Supervision and Parole Review Board, as well as such other evidence or argument is allowed, the Correctional Supervision and Parole Board must-*

a) confirm the decision; or

b) *substitute its own decision and make any order which the Correctional Supervision and Parole Board ought to have made."*

27. The Minister or the Commissioner may request the Review Board to "reconsider" the second respondent's decision. The term "reconsider" is a wide one – see *Lourenco and others v Ferela (Pty) Ltd and others (No 1)* 1998 (3) SA 281 (T), at 290 C-H. This use of this term underlines the fact that the Review Board conducts a fresh hearing when it "considers again" (see *Lourenco*, loc.cit).

28. Even if this reasoning is wrong, and even if the referral to the Review Board by the Commissioner is to be regarded as a step invoking an internal remedy, the court still retains the power in terms of section 7 (2) (c) of the Promotion of Administrative Justice Act to intervene in extraordinary circumstances.

29. The Commissioner can only refer a decision which would otherwise be final to the second respondent on review. This implies that the Commissioner (or the Minister) is of the view that the second respondent's decision may have to be looked at again with an eye to a possible amendment or setting aside thereof. The fact that it is the decision of the second respondent that is taken on review to the Review Board is confirmed by a very recent judgment delivered by Jones J in the Eastern Cape High Court on the 10th May 2008, which was drawn to this Court's attention after the applications had been granted on the 13th May 2008. Jones J concluded in *Appolis v Commissioner of Correctional Services and others* (Case No 945/2008) that a sentenced prisoner was no longer entitled to be placed on parole if the matter was taken on review to the Review Board prior to his release date determined by the Correctional Supervision and Parole Board.

30. Although the judgment concludes that the Correctional Supervision and Parole Board's decision is no longer final once it is taken on review, it is clear that the question of the court's power to review the parole board's decision in spite of a reference thereof to the Review Board by the Commissioner did not arise in the *Appolis* case.

31. The position in the present matters is complicated by the fact that the Commissioner, while fully aware of the fact that the court had been approached by the applicants and that the applications were pending in the urgent court, neither applied to be joined in the proceedings, nor did he favour the court with an affidavit explaining his invocation of the review process taken with the full knowledge that the court was about

to consider the applications. Although I accept that the Commissioner did not intend to inconvenience or to upstage the court, it would have been decidedly preferable for him to take the court into his confidence by applying to be joined and filing a comprehensive application setting out his reasons to invoke the review process in spite of a pending review before the High Court. Should a similar situation ever occur in future, this is the practice that should be followed in order to ensure that the court is properly appraised of the reasons for the Commissioner's or the Minister's intervention in pending review applications to the High Court; and that the applicant(s) are given a fair opportunity to deal with the concerns advanced by the Commissioner or the Minister.

32. The Commissioner might - as was suggested by the applicants – be of the view that the parole board took the correct decision, but that its motivation is unconvincing or incorrect. Given the wide meaning of the term "reconsider" I accept that, in a proper case, the Commissioner might have a decision reviewed that he supports, but for reasons that differ so significantly from the Correctional Supervision and Parole Board's motivation that he or she feels compelled to have the matter reviewed.

33. In such event it should be incumbent upon the Commissioner to explain his point of view succinctly and fully to the persons affected and, if the matter is already subject to review by a court, to the court in the manner suggested above.

34. In the absence of any such reasons and in the light of the common cause fact that the second respondent had failed to consider the applicants' cases properly, it would have amounted to the perpetuation of an injustice to defer the adjudication of the applications to a later date, or to allow a postponement pending a decision of the Review Board. The second respondent's decision denying immediate placement on parole was set aside in each case and substituted with

an order that the relevant applicant be placed on parole within thirty days from date of the order.

35. After the three applications had thus been disposed of, the respondents approached the court by way of urgency with the request to clarify a perceived ambiguity in the court's order in all three matters. The deponent on behalf of the respondents stated that the court's order could be interpreted to include, or to amount to, a *mandamus* ordering the respondents to release the applicants irrespective of any function the Review Board might still have in the matter consequent upon the Commissioner's reference of the second respondent's decision to it. At the same time, applications for leave to appeal were filed on the same grounds.

36. As this perception might involve the interests of the Commissioner and the effect of his aforesaid referral, the court ordered the Commissioner to be joined formally as a party to the application.

37. The Chief Deputy Commissioner: Corrections, who was responsible for the referral as delegated official of the Commissioner, filed an affidavit in consequence of the joinder. From this affidavit it emerged that he received the papers in the review applications and the full record of the proceedings before the second respondent prior to the hearing of the applications.

38. He stated his reasons for the referral. They included considerations relating to the crimes committed by the applicants, the length of their sentences and the portion served of these sentences, the conditions attached by the second respondent to the placement on parole – or the lack thereof – and the question whether sufficient retribution had been exacted upon the relevant prisoner. The reasons do not directly address the question, however, whether the second respondent's decision was wrong or not in each instance.

39. It is clear, however, that he felt uncomfortable about the decisions in the light of the pending applications to court, but disavowed any

intention of interfering with the court's jurisdiction On the other hand he suggested that the Review Board had become seized of the matter as a result of the referral.

40. The procedure that should be followed in future in regard to these procedures has been discussed in paragraphs 31 to 33 above. Nothing further needs to be added other than the fact that the Deputy Commissioner disavows any intention to delay the applications or to avoid a finding by the court that might be interpreted as negative for the respondents.

41. Turning to the perceived need to clarify the court's judgment, it soon became clear during argument that the court could not have intended to issue a *mandamus* as the dispute before it concerned no more than a review of the second respondent's decision and a substitution of an appropriate order should the original order be set aside.

42. Such an order was issued and no more. The order to release the applicants is, of course, subject to the determination of appropriate conditions by the respondents.

43. The setting aside of the second respondent's order and the substitution of a new order also terminates the Commissioner's reference of the original order to the Review Board as that referred order no longer exists.

44. The parties were ad idem that the applications for leave to appeal would follow the result of the second application.

45. The clarification application is therefore dismissed with costs.

Signed at Pretoria on this 10th day of June 2008.

E Bertelsmann
Judge of the High Court