IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 17889/15

29/5/2015

DELETE WHICHEVER IS NOT APPLICABLE

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

29/5/15 .....

DATE SIGNATURE

In the matter between:

CLIVE JOHN DERBY-LEWIS	Applicant
and	
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
THE CHAIRPERSON, NATIONAL COUNCIL FOR CORRECTIONAL SERVICES	Second Respondent
THE SOUTH AFRICAN COMMUNIST PARTY	Third Respondent
MRS LIMPHO HANI	Fourth Respondent
MEDICAL PAROLE ADVISORY BOARD	Fifth Respondent

JUDGMENT

Baqwa J

Prison *– Prisoner – Life imprisonment – Application to be released in terms of section 79 of the Correctional Services Act III of 1998 – Minister empowered to order placement of prisoner on medical parole – Courts empowerment to substitute decision in appropriate cases.*

Summary

The applicant was serving a life sentence for murder imposed on him in 1993 and it had been recommended by the Medical Parole Advisory Board (MPAB) that he be released on medical parole after having served 21 years and 6 months of his sentence. It was common cause that the applicant was terminally ill with lung cancer. Despite that recommendation he was not placed on medical parole as the MPAB had staged the cancer at stage IIIB and not stage IV as required by the Act. The first respondent had on that basis refused the placement of the applicant on medical parole. The applicant approached the High Court for a review of first respondent's decision.

Held, that the first respondent had followed a process which was flawed in terms of section 6(2)(b) and section 6(2)(e)(iii) of the Promotion of Administrative Justice Act 3 of 2000 and that his decision had to be set aside.

Held, that because of the urgency of the matter and the imminent death of the applicant (as per medical evidence), and in order to prevent possible prejudice to the applicant, the Court could deal with the matter and substitute its own decision in terms of section 8 of the Promotion of Administrative Justice Act 3 of 2000.

Held, further, that the applicant be released on medical parole, the conditions of which were to be set by the Parole Board of the Kgosi Mampuru II Prison where the applicant was held.

Annotations:

Unreported Cases

Robert Wayne Parker v The Minister of Correctional Services and 5 Others case number 04/9191 WLD page 44 at para [63]

Reported cases

Goldberg and Others v Minister of Prisons and Others 1979 (1) SA 12 (A)

S v Makwanyane 1995 (3) SA 391 page 500 at para 307 – 308

Maharaj v Chairman, Liquor Board 1997 (1) SA 273 (N)

University of the Western Cape and Others v Member of Executive Committee for Health and Social Services and Others 1998 (3) SA 124 CPD at 131D-G

Minister of Correctional Services v Kwalewa and another 2002 4 SA 455 (SCA) at 467 G to 468 H

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC)

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 SCA

Foreign/ International Cases

Charles Sobhraj v Superintendent Central Jail, Tihar, New Delhi (1979) 1 SCR 512 (SC, India)

Rhodes v Chapman 452 US 337 (1981)

Conjwayo v Minister of Justice. Legal and Parliamentary Affairs and Others 1992 (2) SA 56 (ZS) at 60G-61A

Rodriguez v British Columbia (Attorney General) [1993] 3 SCR 519, 1993 ConL II 75 (SCC)

Statutes

Correctional Services Act 8 of 1959

Correctional Services Act 111 of 1998

Promotion for Administrative Justice Act

Constitution of the Republic of South Africa, 1996

The Parties

[1] The Applicant is an adult male sentenced prisoner, incarcerated at Kgosi Mampuru II Prison (Formerly Pretoria Central Prison), aged 79 years. The First Respondent is the Minister of Justice and Correctional Services. The Second Respondent is the Chairperson National Council for Correctional Services. The Third Respondent is the South African Communist Party (SACP). The Fourth Respondent is Mrs Limpho Hani. The Fifth Respondent is the Medical Parole Advisory Board (MPAB).

The Application

[2] This is an application brought on an urgent basis for an order that-

2.1 The decision of the first respondent taken on 30 January 2015 in terms of which the applicant was not granted medical parole be reviewed and set aside.

2.2 The applicant must be placed on medical parole with immediate effect in terms of section 69 of the Correctional Services Act 8 of 1959, alternatively section 79 of the Correctional Services Act 111 of 1998.

[3] The first respondent opposes the application and prays that it be dismissed with costs.

[4] By agreement between the parties the matter proceeds only in respect of the relief claimed by the applicant for his placement on medical parole. Even though canvassed in the papers filed by the applicant, the relief sought for his placement on ordinary parole does not, in the circumstances, fall to be determined at this hearing.

[5] It is common cause that the urgency of the matter is not disputed with regard to the relief claimed by the applicant in respect of medical parole.

Applicable Law

[6] Notwithstanding it having been contended in the founding affidavit that the applicant is to be considered for medical parole in terms of the provisions of section 69 of Act 8 of 1959, it appears to be conceded without this having been expressly abandoned that the provisions of section 79 of Act 111 of 1998 finds application for the consideration of placement of the applicant on medical parole.

[7] Section 79(1)(a)-(c) of the Correctional Services Act 111 of 1998 (the Act) provides that a sentenced offender may be considered for placement on medical parole if:

"(a) such offender is suffering from a terminal disease or condition or if such offender is rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care;

(b) the risk of re-offending is low; and

(c) there are appropriate arrangements for the inmate's supervision, care and treatment within the community to which the inmate is to be released."

[8] In terms of section 79(2)(a) an application shall not be considered by the first respondent if such application is not supported by a written medical report recommending placement on medical parole. An independent medical report must be provided in terms of section 79(3).

[9] Section 79(5) provides that when the MPAB makes a determination as contemplated in subsection 1(b) the following factors amongst others may be considered;

"(a) Whether, at the time of sentencing, the presiding officer was aware of the medical condition for which medical parole is sought in terms of this section;

(b) Any sentencing remarks of the trial judge or magistrate;

(c) The type of offence and the length of the sentence outstanding;

(d) The previous criminal records of such offender; or

(e) Any of the factors listed in section 42(2)(d)."

[10] The applicant submits that he has complied with all the jurisdictional requirements to be placed on medical parole as set out in section 79. He further submits that there is no further requirement in section 79 pertaining to any of the aspects raised by the third and fourth respondents with reference to apologies, political affiliations, alleged non-full disclosure of facts, and any of the other issues that have been raised by the third and fourth respondent.

[11] As required by the Act when receiving an application for medical parole, the MPAB, must make a recommendation to the Minister. Regulation 29A(5) lays down what the MPAB must consider in the assessment, whether the offender is suffering from certain infectious and non-infectious conditions.

[12] Regulation 29A(5) provides that in the assessment by the Medical Parole Advisory Board, the Board must consider whether the offender is suffering from:

"(a) .....

(b) Non-infectious conditions-

(i) Malignant cancer stage IV with metastasis being inoperable or with both radiotherapy and chemotherapy failure..."

[13] Regulation 29A(6) provides that the Medical Parole Advisory Board consider any other conditions not listed in sub regulation (5)(a) and (b) if it complies with the principles contained in section 79 of the Act.

[14] Regulation 29A(7) provides that the Medical Parole Advisory Board must make a recommendation to the Minister, on the appropriateness to grant medical parole in accordance with section 79(1)(a) of the Act. If the recommendation of the Medical Advisory Board is positive then the Minister, must consider whether the conditions stipulated in section 79(1)(b) and (c) are present.

Background Facts

[15] The applicant was born on 22 January 1936 and is currently 79 years old. He was sentenced to death on 15 October 1993 and that sentence was subsequently commuted to life imprisonment in the year 2000, he has currently served 21 years and 6 months of that sentence.

[16] The applicant submitted an application for medical parole to the Department of Correctional Services on 2 May 2014. The application was supplemented by the report of Dr L.S Fourie.

[17] According to the medical reports submitted in support of his application for medical parole, the applicant had been diagnosed as suffering from lung cancer, heart failure and hypertension. Upon receipt of the application for medical parole, the Chairperson of the Medical Parole Advisory Board ("the MPAB") assigned two members of the MPAB (namely Dr Coetzee and Dr Solombela) to perform a medical assessment of the applicant.

[18] The matter was deliberated upon by the MPAB at its meeting on 9 July 2014 in light of the medical reports submitted by the applicant, the reports of Doctors Coetzee and Solombela and the representations submitted by the applicant. The MPAB came to the following conclusions:

18.1 "Mr Clive Derby-Lewis has Stage IIIB Carcinoma of the Lung, which is inoperable but with no distal spread or metastasis. He is receiving chemotherapy and radiotherapy from Eugene Marais private hospital where he is currently admitted.

18.2 He is halfway through his treatment, which he is tolerating well.

18.3 He is clinically well and able to perform his daily activities and inmate self-care.

18.4 The Act is specific on the staging of cancers to be considered for medical parole (Stage IV with metastases). And as matters stand this patient (Stage IIIB) does not satisfy those criteria stipulated in the Act.

18.5 There is no sufficient reliable information on the treatment aims of this patient. Neither is there an unequivocal and unbiased assessment of the prognosis of this individual patient.

[19] The MPAB at its meeting of 9 July 2014 resolved that an independent team of specialists (consisting of an Oncologist, Pulmonologist and Pathologist) should examine the applicant. Dr Wadee (Specialist Physician/Medical Oncologist), Professor Lalloo (Specialist Pulmonologist/ Physician) and Professor Sathekge (Nuclear Medicine, University of Pretoria) were appointed to examine the applicant.

[20] On 23 October 2014 the applicant brought an application pertaining to ordinary parole which was subsequently converted to an application for placement on medical parole.

[21] On 2 December 2014 Louw J, granted an order that the third and fourth respondents' representations be filed and that the decision of the first respondent regarding medical parole be made on 31 January 2015.

[22] The representations of the third and fourth respondents were filed with the first respondent on 9 January 2015 but they were not presented or served on the applicant's legal representatives before 31 January 2015.

[23] At a further meeting of the MPAB held on 14 January 2015 the independent specialists and Dr Fourie (as the applicant's treating medical practitioner) presented their reports and responded to questions by members of the MPAB with regard to their findings (in particular, the staging of the applicant's lung cancer).

[24] In their respective reports submitted to the MPAB, Dr Wadee and Professor Lalloo diagnosed the applicant as suffering from Stage IV cancer on the basis of the spread of cancer to the left adrenal gland. That diagnosis was based on the PET scan performed on the applicant.

[25] The opinion of Professor Sathekge was that the hypermetabolism of the left adrenal gland was not indicative of distal spread of the cancer by way of adrenal metastasis (given that the results of the PET scan were inconclusive, and that the hilar lymph nodes had not been biopsied).

[26] In view of the difference of opinions between the independent specialists the MPAB concluded that the applicant's cancer could be staged at least at stage IIIB with a probable but inconclusive spread to the left adrenal gland. The MPAB recommended to the first respondent that the applicant be placed on medical parole on the strength of that conclusion.

[27] On 30 January 2015, the first respondent decided not to approve the recommendation of the MPAB for the placement of the applicant on medical parole.

Application of the Law to the facts

[28] The reasoning for the refusal to place the applicant on medical parole by the first respondent is briefly as follows:

28.1 In its recommendation, the Board states that Mr Derby-Lewis is suffering from stage IIIB lung cancer and this serves largely as a basis upon which it recommends his placement on medical parole. This finding and recommendation appears to be oblivious of the fact that in terms of the Act, read with relevant Regulations, it is an inmate with malignant cancer stage IV with metastasis being inoperable or with both radiotherapy and chemotherapy failure that qualifies for placement on medical parole. It is therefore inconceivable how the Board came to its conclusion.

28.2 The applicant was found by the first respondent not to have been rendered physically incapacitated so as to severely limit his daily activity or self-care.

28.3 There were no indications to whether the offender had "showed any remorse for the crimes committed."

28.4 The first respondent has since disavowed reference to the use of pseudonyms used at the hospital by applicant and I therefore make no reference to that issue.

[29] It is notable that first respondent did not deal specifically with the risk of re-offending in his reasons, he only referred to section 79(1)(b) with reference to "remorse" even though this could be surmised to be an oblique reference to a possible propensity to re-offend.

Review of the Decision

[30] The grounds for judicial review were elucidated in a Constitutional Court decision in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC),** it was held by O'Regan J as follows:

"[22] In Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others, the question of the relationship between common-law grounds of review and the Constitution was considered by this Court. A unanimous Court held that under our new Constitutional order the control of public power is always a constitutional matter. There are not two systems of law regulating administrative action - the common law and the Constitution - but only one system of law grounded in the Constitution. The Courts' power to review administrative action no longer flows directly from the common law but from Promotion of Administrative Justice Act (PAJA) and the Constitution itself. The grundnorm of administrative law is now to be found in the first place not in the doctrine of ultra vires, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case-by-case basis as the Courts interpret and apply the provisions of PAJA and the Constitution.....

[25] The provisions of s 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to s 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters.

[26] In these circumstances it is clear that PAJA is of application to this case and the case cannot be decided without reference to it. To the extent, therefore, that neither the High Court not the SCA considered the claims made by the applicant in the context of PAJA, they erred. Although the applicant did not directly rely on the provisions of PAJA in its notice of motion or founding affidavit, it has in its further written argument identified the provisions of PAJA upon which it now relies."

[31] O' Regan J further held in paragraph [27] that the failure to identify with precision the provisions of PAJA upon which a litigant relies is not fatal to the cause of action.

[32] **In casu**, the relevant provisions of PAJA are the following:

*"**6. Judicial review of Administrative Action***

(2) A the court or tribunal has the power to judicially review an administrative action if-

(a) The administrator who took it-

(i).....

(ii) was biased or reasonably suspected of bias,

(b) A mandatory and material procedure or condition prescribed by an empowering provision was not complied with

(c) .....

(d) .....

(e) The action was taken-

(i)...

(ii)...

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered"

[33] On 17 March 2009 the Full Bench of this division ordered that the third and fourth respondent have a right to make representations pertaining to the applicant's parole.

[34] On 2 December 2014 Louw J granted an order that third and fourth respondents' representations should be filed and that the decision of the first respondent regarding the medical parole should be made by 31 January 2015.

[35] It is common cause that on 9 January 2015 the representations of the third and fourth respondents were served on the first respondent but that they were never served on the applicant prior 31 January 2015.

[36] It is needless to state that the representations by the third and fourth respondents have been considered to form a critical component of the hearing. That much is evident not only from the history of applicant's incarceration but also from the court orders referred to above. **A fortiori** the significance and impact of those representations would even be more significant to the interests more particularly of the applicant, the third and the fourth respondents. That much would be obvious even to the third and fourth respondents yet for some unknown reason the applicant was not served with their representations.

[37] Upon reading the reasons given by the first respondent for his decision, more particularly with reference to this issue of "remorse", it becomes patently clear that he took the third and fourth respondents' representations into account in reaching his decision. This was done without him being in possession of the applicant's response thereto.

[38] The decision of the first respondent is in contravention of section 6(2)(e)(iii) of PAJA in that where he deals with remorse in so far as it may have been relevant to the question of re-offending, he failed to take into consideration the evidence presented by the Department of Correctional Services which recorded the applicant's expression of remorse on several occasions. The reasons given by the first respondent in justification of his decision are clearly at variance with the said evidence.

[39] This non-service of what has been referenced to as "victim statements" on the applicant is exacerbated when one reads the opening paragraph of Supplementary Victim Representations dated 20 January 2015 by Thaanyane Attorneys on behalf of Mrs Hani and the SACP which reads as follows: "These supplementary admissions are made pursuant to the receipt of the Medical Parole Advisory Board's ("MPAB") report ("The report") to the Minister recommending medical parole to Mr Derby-Lewis dated 19 January 2015." This MPAB report had not been served upon the applicant yet it was furnished to the third and fourth respondents.

[40] It appears that, a line of communication and exchange of documents had been established between the first, third and fourth respondents to the exclusion of the applicant. The documents exchanged would be relied on by the first respondent in reaching his decision to the detriment of the applicant without him having been given an opportunity to respond.

[41] In my view it becomes patently clear that the respondents have fallen foul of the provisions of section 6(2)(b) of PAJA. Service of the representations and any other document which the first respondent was in possession of on the applicant was mandatory in the circumstances outlined herein. Failure to do so cannot but constitute a serious irregularity.

[42] The respondents' Counsel submit, that the applicant's attorneys were well aware of the order granted on 2 December 2014 notwithstanding which no request was made that the applicant be furnished with a copy of the representations. The "**audi alteram partem**" principle, over and above the provisions of PAJA is a basic tenet of our law. It is trite that any document served on the presiding administrative authority and/or tribunal must be furnished to the other party. Blame for failure to adhere to this basic procedure cannot be passed on to the party who was not served. A decision reached without affording the other party the right to reply can only lead to a process which is not only flawed but procedurally unfair. See **Maharaj v Chairman, Liquor Board 1997 (1) SA 273 (N)**.

[43] Counsel for the first respondent have tried to justify non-service on applicant by suggesting that the applicant was in any event aware of the stance taken by Mrs Hani from documents which had been served upon him in previous applications. This submission is totally devoid of merit when one considers that, for example, there was no MPAB report considered by Mrs Hani previously with regard to the medical condition of applicant. Whilst the applicant was not enjoined in law to anticipate what other parties would allege in their opposition to his application without service of the relevant documents, the proposition that he could do so when new issues were being raised against his application becomes ridiculous in the extreme.

[44] In the circumstances I have come to the conclusion that the flawed nature of the process adopted by the first respondent cannot be cured.

Substitution of Decision

[45] The respondents submit that this court ought not to substitute its decision even if it considers the first respondent's decision reviewable whilst, the applicant argues to the contrary.

[46] Section 8(2) of PAJA provides that the court hearing an application for judicial review may grant any order that is just and equitable. It is however, accepted by both parties herein that it is settled law that the court will substitute its decision for that of the administrator in exceptional cases only.

[47] I have considered the circumstances of the present application. I considered in particular the fact that it has been brought on an urgent basis and the fact that urgency has not been contested by any of the parties. The facts in this case do pertain to a matter of life and death, the latter having been forecast as a possibility in the not too distant future. The interests involved therefore are real and immediate. Moreover this court is enjoined not to make orders that are of academic interest only. A conspectus of these factors therefore leads me to the inescapable conclusion that the adjudication of this matter cannot be delayed any further due to the existence of exceptional circumstances.

[48] I find that the remarks in the dissenting judgement of the honourable Mr Justice Cory in the Canadian case of **Rodriguez v British Columbia (Attorney General)** [1993] 3 SCR 519, 1993 ConL II 75 (SCC) at page 51 of equal relevance to the present application.

"Cory J (dissenting) – I have read the excellent reasons of the Chief Justice and Justices Sopinka and McLachlin. I am in agreement with the disposition of this appeal proposed by the Chief Justice, substantially for the reasons put forward both by the Chief Justice and McLachlin J. The bases for my conclusion can briefly be stated.

At the outset I would observe that all parties to this debate take the same basic position, namely that human life is fundamentally important to our democratic society. Those opposed to the relief sought by Sue Rodriguez seek to uphold the impugned provisions of the Criminal Code on the grounds that it assists society to preserve human life. Those supporting her position recognize the importance of preserving the essential dignity of human life, which includes the right of Sue Rodriguez to die with dignity.

Section 7 of the Canadian Charter of Rights and Freedoms has granted the constitutional right to Canadians to life, liberty and the security of the person. It is a position which emphasizes the innate dignity of human existence. This Court in considering s. 7 of the Charter has frequently recognized the importance of human dignity in our society. See, for example, Re B.C. Motor Vehicle Act,1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at p. 512, and R. v. Morgentaler, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30, at p. 166, per Wilson J.

The life of an individual must include dying. Dying is the final act in the drama of life. If, as I believe, dying is an integral part of living, then as part of life it is entitled to the constitutional protection provided by s. 7. It follows that the right to die with dignity should be as well protected as is any other aspect of the right to life. State prohibitions that would force a dreadful, painful death on a rational but incapacitated terminally ill patient are an affront to human dignity"

Our Constitution consists of similar provisions to the Canadian constitution and more pertinently the right to life which was dealt with in the Makwanyane decision. That decision finds resonance not only in the sentiments expressed by the Honourable Justice Cory but also in sections 10 and 11 of the Constitution which deals with the right to human dignity and the right to life.

[49] The approach which I have to adopt in considering the appropriate relief was summarised succinctly in the unreported Judgement of **Robert Wayne Parker v The Minister of Correctional Services and 5 Others case number 04/9191 WLD page 44 at para [63]** delivered on 6 September 2005 when Claasen J said the following:

"[63] The question then arises, what relief should be afforded the applicant? It would be wise to adhere to the principle set out in ***Minister of Correctional Services v Kwalewa and another*** *2002 4 SA 455 (SCA) at 467 G to 468 H:*

> *"[24] In addressing the merits of this appeal it is useful to bear in mind what was said by Gubbay CJ in* ***Conjwayo v Minister of Justice. Legal and Parliamentary Affairs and Others*** *1992 (2) SA 56 (ZS) at 60G-61A:*
>
> > *'Traditionally, Courts in many jurisdictions have adopted a broad "hands off" attitude towards matters of prison administration. This stems from a healthy sense of realism that prison administrators are responsible for securing their institutions against escape or unauthorised entry, for the preservation of internal order and discipline, and for rehabilitating, as far as is humanly possible, the inmates placed in their custody. The proper discharge of these duties is often beset with obstacles. It requires expertise, comprehensive planning and commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Courts recognise that they are ill-equipped to deal with such problems. But a policy of judicial restraint cannot encompass any failure to take cognisance of a valid claim that a prison regulation of practice offends a fundamental constitutional protection.*
> >
> > *Fortunately the view no longer obtains that in consequence of his crime a prisoner forfeits not only his liberty but all his personal rights, except those which the law in its humanity grants him.*

> *For while prison officials must be accorded latitude and understanding in the administration of prison affairs, and prisoners are necessarily subject to appropriate rules and regulations, it remains the continuing responsibility of Courts to enforce the constitutional rights of all persons, prisoners included."*

The learned Chief Justice went on to refer to two decisions of the Supreme Court of India and the decision of the Supreme Court of the United States of America in ***Rhodes v Chapman*** *452 US 337 (1981) in which this approach is followed. It is an approach that I endorse and intend to follow.*

[25] In the ***Conjwayo*** *case (at 62C-D) Gubbay CJ referred with approval to the dissenting judgment of Corbett JA in* ***Goldberg and Others v Minister of Prisons and Others*** *1979 (1) SA 12 (A) which was decided at a time when the Legislature was supreme and where the transgression of human rights was not susceptible to constitutional challenge. In the* ***Goldberg*** *case (at 39C-D) the following appears:*

> *'It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties….of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed.'*

This ***dictum*** *has become known as the* ***residuum*** *principle and has been endorsed in subsequent decisions of this and other Courts.*

*[26] The case of **Charles Sobhraj v Superintendent Central Jail, Tihar, New Delhi** (1979) 1 SCR 512 (SC, India) is one of the cases cited by Gubbay CJ in the **Conjwayo** case **supra**. In the **Sobhraj** case, although it is asserted that courts cannot take over the running of prisons, the following appears at 518-19:*

> *'Whatever fundamental rights are flouted or legislative protection ignored, to any prisoner's prejudice, this Court's writ will run, breaking through stone walls and iron bars, to right the wrong and restore the rule of law.'*

*[27] In **Chaskalson, Kentridge et al Constitutional Law of South Africa** the learned authors state the following at 28-24:*

> *'A key requirement of the principle of legality is that even those rights of prisoners which are restricted as a necessary consequence of incarceration may only be limited if this is done by legislation, either expressly or by necessary implication. The laws regulating prisons in South Africa must therefore be scrutinised to see whether they provide the necessary authority for the restriction of prisoners' rights. The restrictions must, in addition, be formulated sufficiently narrowly to ensure that prisoners are not exposed to overbroad discretionary powers which deny them protection of the law.'*

[64] In section 8 of PAJA, the remedies in proceedings for judicial review are set out. It states as follows:

> *"8(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –*
>
> *(a) directing the administrator –*
>
> *(i) to give reasons; or*
> *(ii) to act in the manner the court or tribunal requires;*

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and –

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases –

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation;

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(e) granting a temporary interdict or other temporary relief; or

(f) as to costs,""

[50] **In casu**, I have already made reference to the events which took place when the applicant's application for medical parole served before the MPAB. A team of specialists consisting of an Oncologist, a Pulmonologist and a Pathologist, on a majority decision of 2 to 1 came to the conclusion that applicant is suffering from stage IV cancer on the basis of the spread of cancer to the left adrenal gland, such diagnosis being based on the PET scan performed on the applicant.

[51] In light of the difference of opinion between the independent specialists, the MPAB concluded that the applicant's cancer could be staged at least as stage IIIB with a probable inconclusive spread to the left adrenal gland. The MPAB which was constituted by 10 medical specialists and practitioners recommended the placement of the applicant on medical parole on the strength of such a conclusion.

[52] The recommendation of the MPAB has to be considered with other factors or co-morbidities:

52.1 In December 2014, independent specialists Dr Wadee and Professor Lalloo had both given the applicant approximately 6 months to live.

52.2 The applicant is 79 years old and has served a term of 21 and a half years imprisonment.

52.3 In the documents which served before the first respondent, the Department of Correctional Services furnished several reports to the effect that the applicant had expressed remorse on not one but several occasions. Similarly in this application the applicant expresses remorse, absence of political ambition, regret at having committed the crimes of which he was convicted and sentenced of and that he subscribes to the rule of law and the Constitution of the Republic of South Africa.

52.4 Besides being terminally ill with lung cancer which is inoperable, he has poor prognosis in respect of the histology of the tumour. He has co-morbidities, namely; hypertension, congestive cardiac failure, prostate cancer and skin cancer.

52.5 According to Dr Fourie, due to co-morbidities, the applicant is now on maintenance chemotherapy after which no other treatment is planned. His prognosis is very poor.

The Constitution

[53] Section 12(1)(e) of the Constitution of the Republic of South Africa, 1996 provides:

"(1) Everyone has the right to freedom and security of the person, which includes the right-

(a) .....

(b) .....

(c) .....

(d) .....

(e) Not to be treated or punished in a cruel, inhuman or degrading way."

[54] The applicant is terminally ill and two independent specialists have given him 6 months to live from December 2014.

[55] The provisions of any statute ought to be interpreted as far as is possible in a manner that upholds basic tenets of our law which are entrenched in the supreme law of the land, our Constitution. One of the principles entrenched in the Constitution is the principle of **Ubuntu** which recognises the inherent dignity in every human being and enjoins people of South Africa to treat one another in a humane manner.

[56] In the **S v Makwanyane 1995** (3) SA 391 page 500 at para 307 - 308 the principle of Ubuntu was captured by Mokgoro J as follows:

"[307] In interpreting the Bill of Fundamental Rights and Freedoms, as already mentioned, an all-inclusive value system, or common values in South Africa, can form a basis upon which to develop a South African human rights jurisprudence. Although South Africans have a history of deep divisions characterised by strife and conflict, one shared value and ideal that runs like a golden thread across cultural lines, is the value of ubuntu - a notion now coming to be generally articulated in this country. It is well accepted that the transitional Constitution is a culmination of a negotiated political settlement. It is a bridge between a history of gross violations of human rights and humanitarian principles, and a future of reconstruction and reconciliation. The post-amble of the Constitution expressly provides,

> *"... there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation..."*

Not only is the notion of ubuntu expressly provided for in the epilogue of the Constitution, the underlying idea and its accompanying values are also expressed in the preamble. These values underlie, first and foremost, the whole idea of adopting a Bill of Fundamental Rights and Freedoms in a new legal order. They are central to the coherence of all the rights entrenched in Chapter 3 - where the right to life and the right to respect for and protection of human dignity are embodied in Sections 9 and 10 respectively.

[308] Generally, ubuntu translates as humaneness. In its most fundamental sense, it translates as personhood and morality. Metaphorically, it expresses itself in umuntu ngumuntu ngabantu, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.[3] In South Africa ubuntu has become a notion with particular resonance in the building of a democracy. It is part of our "rainbow" heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of humanity and menswaardigheid are also highly priced. It is values like these that Section 35 requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality."

[57] Wallis JA (with whom Cachalia, Farlam, Leach and Van Heerden JJA concurred) held in **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 SCA that the modern approach to interpreting statutes, is to consider context and language together, with neither predominating over the other, i.e. to approach the matter holistically, he said the following in paragraph ...[18]:

"Interpretation is the process of attributing meaning to the words in a document, be i.e. legislation... or contract. Having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which it appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all those factors....

A sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document... The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[58] This would seem to me to be the approach to be applied in interpreting the provisions of section 79 of the Act. The provisions ought not to be applied in a rigid manner or be read like a mathematical equation. It would further seem to me that this was the approach adopted by the MPAB in making the recommendation as they did to the first respondent to grant the applicant medical parole. It would certainly not seem that all ten medical specialists were "oblivious" to the provisions of section 79 as the first respondent would have us believe.

[59] The **Bato Star** decision approach is one that would therefore make it possible not only to have regard to the purpose of the provisions in the Act but also to uphold the principles enunciated in the *grundnorm*, the Constitution of the Republic of South Africa and the Makwanyane decision which is a decision of the Constitutional Court.

[60] Regarding the referral of the matter back to the administrator it is instructive to refer to the case of **University of the Western Cape and Others v Member of Executive Committee for Health and Social Services and Others** 1998(3) SA 124 CPD at 131D-G:

"Over the years South African Courts have recognised that in exceptional circumstances the Court will substitute its own decision for that of a functionary who has a discretion under the Act.

Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter, the Courts have not hesitated to substitute their own decision for that of the functionary... The Courts have also not hesitated to substitute their own decision for that of a functionary where further delay would cause unjustifiable prejudice to the applicant.... Our Courts have further recognised that they will substitute a decision of a functionary where the functionary or tribunal has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.... It would also seem that our Courts are willing to interfere, thereby substituting their own decision for that of a functionary, where the Court is in as good a position to make the decision itself."

[61] Without suggesting that referral of the matter back for further consideration because the end result would be a foregone conclusion, I am of the view that further delay by referring the matter back to the administrator would cause unjustifiable prejudice to the applicant whose life is already precariously poised according to the medical evidence presented in this application.

[62] I have read the Parole Manual which also referred to in paragraph 18-19 of the Parker decision (**supra**). The following is stated therein:

"PLACEMENT ON PAROLE

(a) Parole is a form of conditional placement which is granted after a prisoner has served a certain period of his sentence. It pre-supposes careful selection, adequate preparation for placement and a certain degree of supervision while in the community for a period of time.

(b) The philosophy of parole is that:

- *The prisoner has the opportunity to serve the rest of his sentence in the community;*
- *It is one phase of the treatment process;*
- *It is an internationally accepted method of placement;*
- *It is a legal method of conditional placement;*
- *It is an aid to the social control of an offender;*
- *It is an aid to the social re-integration of the prisoner;*
- *It is based on supervision and control*
- *It is based on compassion; and*
- *It has a good prognosis as basis.*

(c) Parole does not imply the following:

- *Acquittal of a sentence;*
- *Mitigation, equation or reviewal of sentence;*
- *A method of controlling/administrating prisons; (Emptying prisons)*
- *A reward;*
- *A right;*
- *A proof of rehabilitation."*

[63] Taking into account all the evidence and all the information that served before the first respondent, the victim representations and the responses thereto by the applicant, the submissions by counsel and also taking into account the parole philosophy I have just referred to, I have come to the conclusion that the applicant has made out a case for placement on medical parole.

[64] The conditions under which he shall be released on medical parole will be determined by the first respondent and the Parole Board. Control and supervision are inherently part of parole conditions to monitor a person's adjustment outside the prison walls and to combat any tendency to contravene those conditions.

Costs

[65] The applicant has asked for a cost order against the respondents who oppose this application. I have not found any reason to prevent me from allowing the costs order to follow the result in this application.

[66] In the premises I make the following order:

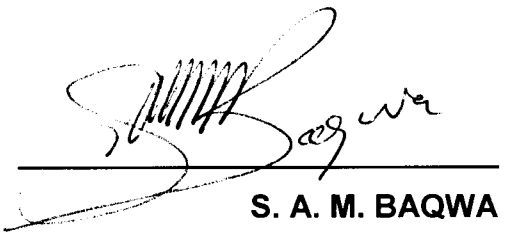
66.1 The decision of the first respondent dated 31 January 2015 whereby the applicant was refused medical parole is reviewed and set aside.

66.2 The applicant is placed on medical parole with immediate effect. His release is subject to the Parole Board determining his conditions of parole.

66.3 The conditions under which the applicant is to be released on medical parole are to be set by the Parole Board of the Kgosi Mampuru II Prison by no later than Friday, 5 June 2015.

66.4 In the event of the respondents failing to comply with the order in 66.2 and 66.3 above, applicant is granted leave to supplement his papers and place the matter on the roll again.

66.5 The respondents are ordered to pay the costs of this application jointly and severally to the extent that the applicant is able to obtain a taxation order in his favour.



S. A. M. BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Heard on:	25 May 2015
Delivered on:	29 May 2015
For the Applicant:	Adv. R du Plessis SC Adv. C Kellermann
Instructed by:	Julian Knight and Associates Inc.
For the First Respondent:	Adv. M T K Moerane SC Adv. T W G Bester
Instructed by:	The State Attorney
Date of Judgment:	29 May 2015