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

REPUBLIC OF SOUTH AFRICA

14/4/2016

CASE NUMBER: 41828/2015

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

14.4.2016 .....
DATE SIGNATURE

In the matter between:

JANUSZ JAKUB WALUS	Applicant
and	
MINISTER OF CORRECTIONAL SERVICES	First Respondent
CHAIRPERSON, NATIONAL COUNCIL FOR CORRECTIONAL SERVICES	Second Respondent
THE SOUTH AFRICAN COMMUNIST PARTY	Third Respondent
MRS LIMPHO HANI	Fourth Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The first respondent seeks leave to appeal to the Full Bench of this court against the whole of the judgment and the order of costs granted by this court on 10 March 2016.

[2] Section 17(1) of the Superior Courts Act, 10 of 2013, provides that a judge may only grant leave to appeal if he/she is of the opinion that the requirements set out in subsection (a) to (c) have been met. These requirements are:

> *"(a) (i) the appeal would have a reasonable prospect of success; or*
>
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;"*
>
> *(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and*
>
> *(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."*

[3] Section 16(2)(a) provides that an appeal in which a decision on the issues will have no practical effect or result, may, at the hearing, be dismissed on this ground alone. The matter under consideration does not fall within the ambit of section 16(2)(a) and consequently the first respondent meets the requirement contained in section 17(1)(b).

[4] The appeal, should leave be granted, will dispose of all the issues between the parties and as a result the requirement in section 17(1)(c) has also been met.

[5] The remaining two requirements contained in section 17(1)(a), however, requires further scrutiny.

REASONABLE PROSPECT OF SUCCESS

[6] This requirement has been the bench mark in applications for leave to appeal for many years and decisions dealing with this requirement, prior to the enactment of the Act, still apply.

[7] A useful expose of the requirement appears in *S v Sikosana* 1980 (4) SA 559 AD at 562 D – F:

> "……,*and it must be said once more that the application should not be granted if it appears to the learned Judge that there is no reasonable prospect of success.*
>
> *The trial Judge is faced with no easy task, he must exercise his power judicially.*
>
> *"The mere possibility that another Court might come to a different conclusion is not sufficient to justify the grant of leave to appeal"*
>
> *(per Miller JA in S v Ceaser 1977 (2) SA 348 A at 350). Nor, as it was pointed out by Centlivres JA in Baloi's case supra, is it enough that the case is 'fairly arguable."*

Grounds of appeal

[8] In support of the contention that the first respondent's application meets the requirement of reasonable prospect of success, the first respondent has advanced various grounds of appeal. The grounds are considered *infra*.

i. **Failure to have proper regard to the remarks made by the trial court and the Supreme Court of Appeal at the time of the imposition of the sentence.**

[9] The sentencing remarks made by the trial court and the Supreme Court of Appeal at the time of the imposition of sentence, were properly considered as appears more fully from para [10] and [22] of the judgment.

[10] In the premises, this ground does not meet the requirement of reasonable prospect of success.

ii. Erred in finding that the decision by the first respondent not to place the applicant on parole was not reasonable or rational

[11] The additional grounds relied upon by the first respondent for this conclusion, are that the court erred in:

i. having conflated the principles between appeal and review;

ii. having substituted its value judgment for that of the first respondent; and

iii. having infringed the doctrine of separation of powers.

[12] During argument, Mr Moerane SC, counsel for the first respondent, accepted that, in terms of section 6(2)(h) of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), the reasonableness of a decision is a ground for review.

[13] In respect of the submission that the court erred in finding that the first respondent's decision was unreasonable, it is helpful to have regard to the principle of reasonableness as succinctly summarised by O'Reagan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 CC at 512 H – 513 A,

"In determining the proper meaning of s 6(2)(h) of PAJA in the light of the overall constitutional obligation upon administrative decision-making to act 'reasonably', the approach of Lord Cooke provides sound guidance. Even if it may be thought that the language of s 6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular s 33 which requires administrative action to be 'reasonable'. Section 6(2)(h) should then be understand 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." *(own emphasis)*

[14] The reasonableness of a decision is informed by the empowering provision. These provisions were dealt with in the judgment at para [7] to [9]

[15] The facts upon which the power authorised by the empowering provisions should be exercised are contained in the judgment. [para [10]]

[16] Under the heading discussion, the decision of the first respondent is discussed with reference to the empowering provision and the facts. This approach accords with the following extract from the *Bato Star Fishing* – judgment:

"A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. ***This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision."*** [514 G-515 B] (own emphasis) .

[17] In the premises, the principles applicable to this ground of review were properly considered and applied.

[18] Rationality as a ground of review is contained in section 6(2)(f)(ii) of PAJA and is defined by Hoexter *Administrative Law in South Africa*, 2nd Edition at p340 as follows:

> *"This means in essence that a decision must be supported by the* ***evidence and information*** *before the administrator* ***as well as the reasons given for it****. It must be* ***objectively*** *capable of furthering the purpose for which the power was given and for which the decision was purportedly taken. The question to be asked is the following: 'Is there a* ***rational objective basis*** *justifying the conclusion made by the administrative decision-maker between the material property available to him and the conclusion he or she eventually arrived at?"*

[19] The judgment deals with the evidence and information before the first respondent, the one reason given for the decision and the purpose of parole.

[20] It is therefore clear that:

i. the decision of the first respondent was duly reviewed in terms of the appropriate statutory provisions;

ii. consequently, the principles applicable to the appeal and review processes were not conflated;

iii. the finding that the decision of the first respondent was unreasonable and irrational is an objective finding on the facts and not a value judgment;

iv. a court does not infringe on the doctrine of separation of powers when reviewing the decision of an administrator in terms of the provisions of section 33 of the Constitution read with section 6 of PAJA.

[21] As a result, this ground of appeal has no reasonable prospect of success.

iii. misdirecting itself in the finding that the first respondent did not discuss the positive factors in favour of placing the applicant on

parole and that it was difficult to determine whether all factors were duly considered.

[22] Having regard to the judgment as a whole, this aspect was taken into consideration when examining the rational objective basis for the conclusion drawn by the first respondent that the applicant does not qualify for parole.

[23] The finding was one step in the process and does not in itself lead to the end result. The requirement of reasonable success on appeal is therefore not met.

iv. misdirecting itself in holding that the first respondent attached too much weight to the issue of restorative justice

[24] Save for the concession by Mr Moerane SC that the remarks in respect of restorative justice was obiter, one should bear in mind that the remarks were made when considering an appropriate remedy. The first respondent does not seek leave to appeal against the court's finding in respect of an appropriate remedy and consequently this ground is not relevant to the application under consideration.

v. misdirecting itself in holding that the second respondent recommended the applicant's application for parole

[25] It appears that, due to several amendments to the applicable legislation, the parole board and not the second respondent decided to recommend the applicant's application for parole to the first respondent. The fact, however, remains that the applicant's application was recommended by the body clothed with the necessary expertise to consider parole applications.

CONFLICTING JUDGMENT

[26] According to the first respondent, the judgment *in casu* is incompatible with the judgment of the Gauteng Division, Pretoria of the High Court in the matter of *Barnard v Minister of Justice, Constitutional Development and Correctional Services* delivered on 14 September 2015.

[27] Mr Moerane SC, when invited to indicate in which respects the judgment *in casu* is incompatible with the *Barnard* judgment, could not give a satisfactory answer and did not persist with this ground of appeal.

CONCLUSION

[28] I am of the opinion that the first respondent's application does not meet the requirements contained in section 17(1)(a) and stands to be dismissed.

ORDER

In the premises, I make the following order:

1. The first respondent's application for leave to appeal is dismissed.
2. The first respondent is ordered to pay the costs of the application, which costs include the costs of two counsels.

JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Appearances

Counsel for the Appellant	: Advocate R Du Plessis SC
and	
	: Advocate Kellerman
Instructed by	: Julian Knight and Associates Inc.
Counsel for the State	: Advocate M T A Moerane SC
and	
	: Advocate T W G Bester SC
Instructed by	: The State Attorney