Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case no: 2248/2014
Date heard: 6.3.2014
Date delivered: 4.9.2014

In the matter between:

BERNARD GARFIELD PADDOCK **Applicant**

vs

THE CORRECTIONAL MEDICAL PRACTITIONER,
ST ALBANS MEDIUM B CORRECTIONAL CENTRE **First respondent**

THE HEAD OF CORRECTIONAL CENTRE,
ST ALBANS MEDIUM B CORRECTIONAL CENTRE **Second respondent**

THE MINISTER OF CORRECTIONAL SERVICES **Third respondent**

JUDGMENT

SUMMARY : First respondent herein did not recommend that applicant be released from prison on grounds of medical parole in terms of section 79 (1) of the Correctional Services Act 111 of 1998 (the Act). Section 79 (2)(b) of the Act provides that the relevant officials (the National Commissioner, the Correctional Supervision and Parole Board or Minister), as the case may be, shall not consider an application for release on medical parole if it is not supported by a written medical report recommending placement on medical parole. Applicant applied for review of first respondent's decision aforementioned. The Court dismissed the review application.

TSHIKI J:

A) INTRODUCTION

[1] This matter comes before me by way of a review application which seeks, *inter alia*, the review and setting aside of the first respondent's decision to refuse to recommend the release of the applicant from prison on medical parole pursuant to an application in terms of section 79 of the Correctional Services Act[1] (hereinafter referred to as "the Act").

[2] Applicant further seeks an order directing the third respondent to appoint a medical practitioner other than the first respondent to conduct a medical evaluation in terms of section 79 of the Act within 20 days of the order.

[3] Applicant has also sought an order striking out certain allegations contained in the respondents' answering affidavit[2]. More to this will be conveniently dealt with later in this judgment.

[4] The respondents have opposed the application on various grounds which appear in the opposing affidavit.

B) BACKGROUND

[5] Applicant herein was sentenced in a Court of law on the 2nd August 2005 to twenty years imprisonment following convictions on charges of murder, robbery and unlawful possession of a firearm and ammunition. At the time of the launching of this

[1] Act 111 of 1998
[2] To strike out the whole of paragraphs 9, 10, 11, 15, 16, 17, 22, 23, 24, 25, 26, 27, 28, 29, 30, 39, 40, 41, 44 – annexure "COR2" and the final three sentences of paragraph 45 of the answering affidavit

application, he was in custody in St Albans Maximum Correctional Centre, Port Elizabeth and was classified as a medium security offender. He was later transferred to St Albans Medium B Correctional Centre in the same prison.

[6] According to the applicant, upon being admitted to St Albans Medium A Correctional Centre in Port Elizabeth, he suffered from the following complaints:

[6.1] A significant loss of hearing in both ears which is permanent and this illness was caused by an assault committed on him by another offender in 2001 when he was incarcerated for another offence. The injuries he sustained as a result of this assault led to him suffering severe permanent damage to his hearing. He was later provided with hearing aids for both ears. As time progressed the hearing aids broke and were unusable but the St Albans Correctional Centre refused to provide him with replacement hearing aids.

[6.2] He has [........] infection and is also suffering from hypertension, depression and anxiety disorders which are persistent.

[6.3] He is also experiencing problems with his feet and legs. Upon examination by the medical personnel it was determined that he had developed osteoporosis in both legs and was given wooden crutches to use to assist his mobility. He says he is now unable to walk without the assistance of crutches. He needed to use both crutches until his left wrist was injured in an assault whereafter he could not hold a crutch with his left hand. He must now rely only on his right hand and arm. He is unable to stand or walk without the assistance of the crutch.

[6.4] During September 2009 he sustained a severe injury as a result of him being pushed down a flight of steps at St Albans Maximum Centre during the course of an

assault upon himself. As a result his smaller wrist bones were broken and that the injury was inoperable.

[6.5] During July 2010 he began experiencing severe breathing problems and it was determined that his left lung had collapsed and that his left pharyngeal nerve in his throat which operates the voice box had become paralysed. He was informed that both of these conditions are as a result of having contracted tuberculosis whilst he was incarcerated in St Albans Correctional Centre during 2009. (It is not clear from the papers why the applicant would have to be informed about where and how he contacted these illnesses.) He alleges further that he can only get relief if provided with oxygen from a cylinder through a face mask which he frequently needs.

[6.6] In November 2012 he began to experience a severe bladder problem which resulted in his retention of urine to a substantial degree. He has to endure use of a catheter on an ongoing basis. However, the urine retention problem has been solved, but he experiences a problem of incontinence on a daily basis which is ongoing. He says he has been advised that nothing further can be done to assist him. He needs to use no less than twenty seven items of medication on a daily basis, on this account he submitted a two page list of medicine which he needs to get and have on a daily basis. He is a stage 3 diabetic which entails insulin injections twice daily.

[6.7] On a daily basis when he needs to walk, he has to use an aluminium crutch in his right hand and with his left arm he carries an empty plastic bucket that has a lid. He uses the bucket so that he can sit on it as his legs cannot support him and his right arm becomes painful with walking. In a nutshell he is unable to use his limbs and legs without the assistance by another person.

[7] For the above reasons, applicant through his attorneys requested the respondent to consider his application for consideration of his release on medical grounds in terms of section 79 of the Act as well as on the grounds of the regulations promulgated in terms of the Act.

C) ISSUES

[8] In order to follow and understand the nature of the present application it would be convenient for me to proceed with the relevant provisions of section 79 of the Act which provide:

> "**79 Medical parole**
>
> (1) Any sentenced offender may be considered for placement on medical parole, by the National Commissioner, the Correctional Supervision and Parole Board or the Minister, as the case may be, 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.
>
> (2) (a) An application for medical parole shall be lodged in the prescribed manner, by-
>
> (i) a medical practitioner; or
>
> (ii) a sentenced offender or a person acting on his or her behalf.
>
> (b) An application lodged, by a sentenced offender or a person acting on his or her behalf, in accordance with paragraph (a) (ii), shall not be considered by the National Commissioner, the Correctional Supervision and Parole Board or the Minister, as the case may be, if such application is not supported by a written medical report recommending placement on medical parole.
>
> (c) The written medical report must include, amongst others, the provision of-
>
> (i) a complete medical diagnosis and prognosis of the terminal illness or physical incapacity from which the sentenced offender suffers;

(ii) a statement by the medical practitioner indicating whether the offender is so physically incapacitated as to limit daily activity or inmate self-care; and

(iii) reasons as to why the placement on medical parole should be considered.

(3) (a) The Minister must establish a medical advisory board to provide an independent medical report to the National Commissioner, Correctional Supervision and Parole Board or the Minister, as the case may be, in addition to the medical report referred to in subsection (2) (c)."

[9] It follows from the provisions of section 79 (1)(a), (b) and (c) that an applicant for medical parole should satisfy the stipulated provisions before his or her application can be considered by the National Commissioner, the Correctional Supervision and Parole Board or the Minister, as the case may be.

[10] In the present case, the first respondent, who is the Correctional Medical Practitioner at St Albans Medium B Correctional Centre, has not recommended that the applicant be released on grounds of medical parole as envisaged in section 79 (1) of the Act. The applicant is not satisfied with the first respondent's conclusion that he did not meet the requirements for his release on medical grounds.

[11] Applicant herein seeks a review of the first respondent's decision not to recommend his application for medical parole on the grounds mainly that the first respondent's decision was influenced by a failure to take into account relevant considerations. What is of note in the applicant's contentions is that he relies on facts which are denied by the first respondent who also contends that all the relevant considerations were complied with. For the purposes of establishing grounds of review relative to the issues in this case, the applicant must show that the decision-

maker failed to apply his or her mind to the relevant issues in accordance with the applicable statutory provisions and requirements of natural justice. Section 6 (2)(e)(i)-(vi) of the Promotion of Administrative Justice Act[3] (hereinafter referred to as PAJA) provides that an administrative action is reviewable if, *inter alia*:

> "(e) the action was taken –
>
> (i) for a reason not authorised by the empowering provision;
>
> (ii) for an ulterior purpose or motive;
>
> (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
>
> (iv) because of the unauthorised or unwarranted dictates of another person or body;
>
> (v) in bad faith;
>
> (vi) arbitrarily or capriciously."

[12] If the decision in question points, on balance, to bad or flawed reasoning and such reasoning was of material or substantial significance in prompting the decision-maker to come to his or her decision, the decision would be invalid and liable to be set aside on review. This would be consonant with the well-established values of justice, fairness and reasonableness. It would also accord with the requirements of good faith and public interest[4].

[13] The role of the Courts has always been to ensure that the administrative process is conducted fairly and that the decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation. If these requirements are met, and if the decision is one that a reasonable authority could make, Courts would not interfere with the decision[5].

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[3] Act 3 of 2000

[4] Per Van Zyl J in Standfield v The Minister of Correctional Services and Others 2004 (4) SA 43 (C) at para [102] B-C

[5] Bel Porto School Governing Body and Others v Premier, Western Cape and Another 2002 (3) SA 265 (CC) at para [87]

[14] In this case it does not seem to me that the applicant has laid sufficient basis for his assertion that the first respondent has not applied her mind when considering the case of the applicant. I do not understand on what basis, if any, does the applicant contend that, other than the delay complained of by the applicant against the first respondent in processing his case, there is any justification for the conclusion that first respondent's actions amount to a failure of justice as envisaged in PAJA. The applicant's complaints appear to be based on assumptions and are not supported by evidence. I say so, because there is no basis for the applicant's contention that the first respondent 'compiled the report using certain treatment charts, if that is so, the report is woefully inadequate'. To me this is an unsupported and grave accusation of unprofessional conduct against the first respondent. In his allegations, the applicant states that he has been advised about the inadequacy of the report yet he should be the one who gives instructions based on facts known by him about how the conduct of the first respondent is grossly unprofessional. These allegations to me are not supported by evidence and neither do they have factual or legal basis for this Court to review and set aside the first respondent's actions. In ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others***[6] O'Regan J stated:

> "In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. 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 on the identity of the decision-maker. A decision that

[6] 2004 (4) SA 490 (CC) at 514 para [48]

> 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. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker."

[15] The above does not necessarily mean that a Court should support a decision which is not reasonably supported by facts or a decision that is unreasonable. There is no basis for the applicant's contention that the first respondent should have compiled a written medical report which complies with the requirements of section 79 as suggested by the applicant. First respondent is a medical doctor by profession and is always expected to approach her work professionally. Unless there is a justification for her to support the applicant's application for medical parole she was not obliged to support it if there was none.

[16] On the 9th January 2013 the office of the second respondent advised the applicant of the decision by the first respondent who also furnished applicant with a written report on the applicant's medical condition which also noted the conclusion arrived at. First respondent was not, on a proper evaluation of the applicant's condition, prepared to make a written recommendation in the form of a medical report recommending placement of applicant on medical parole as envisaged in section 79 (2)(b) and (c) of the Act.

[17] It follows therefore that the purpose of the correctional system is to contribute to a just, peaceful and safe society by, *inter alia*, detaining all inmates in safe custody whilst ensuring their human dignity[7]. As a general rule an offender cannot expect to escape punishment or seek an adjustment of his term of incarceration because of ill health unless his/her circumstances are justified by section 79 (1)(a)(b) and (c) of the Act.

[18] It seems to me that the applicant is of the view that the first respondent was obliged to process and lodge the applicant's application for medical parole notwithstanding that in first respondent's view, applicant does not meet the requirements envisaged in section 79 (1) (a), (b) and (c) of the Act. In my view, and in the circumstances, first respondent had to first consider whether or not the applicant's condition satisfied the provisions of section 79 (1) of the Act. In other words, first respondent had to first consider whether the applicant's condition conforms with such requirements before any application for medical parole could be submitted for consideration by the National Commissioner, the Correctional Supervision and Parole Board or Minister, as the case may be. The Correctional Medical Practitioner does not make a final decision but can only make a recommendation to the Medical Parole Advisory Board for its decision.

[19] The main requirement for the consideration, it seems, is the contents of the medical report especially the medical opinion and recommendations , if any, of the doctor who examined the patient which will have a decisive factor in the decision to be taken by the National Commissioner, Correctional Supervision and Parole Board

[7] Section 2(b) of the Correctional Services Act 111 of 1998

or the Minister. It also follows that the recommendation of the Correctional Medical Practitioner should under normal circumstances be persuasive, if not decisive.

[20] The PAJA does not resurrect symptomatic unreasonableness, nor does "gross" unreasonableness feature expliticitly in section 6 (2)(h) of PAJA. In fact, one could argue that "gross" is not strong enough: and that only a decision which is utterly and completely unreasonable will be so unreasonable that no reasonable person would have arrived at it[8]. In ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs***[9] *supra* O'Regan J stated (referring to the judgment of Lord Cooke in ***R v Chief Constable of Sussex, ex parte International Trader's Union Ferry Ltd***[10]:

> "Even if it may be thought that the language of section 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 33 which requires administrative action to be 'reasonable'. Section 6 (2)(h) should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach."

[21] In this matter, the jurisdictional connecting factor for the applicant's consideration of his application for medical parole is that it has to be supported by a written medical report recommending placement on medical parole. If there is no

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[8]See Cora Hoexter on *Administrative Law in South Africa* 2007 ed p 314
[9]See footnote 6 *supra* at p 512G-513
[10][1999] 1 ALL ER 129 (HL) at 157

such recommendation the National Commissioner, the Correctional Supervision and Parole Board, or the Minister, as the case may be, will not consider his application.

[22] In my view, if there is no such recommendation the matter is *cadit quaestio*. From the nature of the provisions of the Act, unless the administrator's decision is shown to have been based on arbitrariness and capriciousness and therefore unreasonable, the Court cannot interfere in the circumstances. If the subject matter of an administrative action is technical or of a kind in which a Court has no particular proficiency the Court can only interfere if the Court can conclude that the decision cannot be sustained on rational grounds[11].

[23] In this case it is the applicant's contention that the decision that the applicant does not meet the criteria for release on medical grounds falls to be set aside. The motivation for such submission is that such a decision was materially influenced by a failure to take into account relevant considerations. Applicant's complaint is, *inter alia*, that the first respondent did not complete the medical report as required by the Act and its regulations as envisaged in section 79 (1) of the Act.

[24] On the other hand, respondents contend that a medical report by Dr Matolweni, the first respondent, complied with the obligations imposed in terms of section 79 (2) of the Act notwithstanding that such a report is not accompanied by a positive recommendation to have the applicant released in terms of section 79 (1) of the Act. The first respondent who is a doctor asserts positively that the applicant "does not meet the criteria for release on medical grounds and that all of the applicant's

[11] See Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Fishing (Pty) Ltd 2003 (6) SA 407 (SCA) at para [53]

medical problems are well controlled" and that applicant was malingering. According to the respondent, the applicant was thoroughly examined by the first respondent. The assessment as to non-qualification for medical parole by applicant was based on medical examination, regard being had to the medical history and records and laboratory tests and guided by the Medical Parole Procedures contained in annexure "CORS1". The contents of the answering affidavit of Lungiswa Ngwanya referring to the role of Dr Matolweni was confirmed by the latter in her confirmatory affidavit. There is, therefore, no hearsay evidence in this regard as suggested by the applicant.

[25] Applicant seeks to suggest that he was never examined by Dr Matolweni and his assertion is disputed by the respondents. It being a material issue in the applicant's case in motion proceedings the version of the respondent will normally be accepted[12].

[26] Applicant's further contention is that there was no medical report which should have accompanied the application lodged for the purposes of consideration by the National Commissioner, Correctional Supervision and the Parole Board or the Minister , as the case may be. This submission fails to consider the provisions of section 79 (2)(b) of the Act quoted above. The interpretation of section 79 (2)(b) prevents any application for parole being forwarded to the relevant parole board entity or person contemplated in the said section **in circumstances where an application is not supported by a written medical report recommending placement on medical grounds**. In the present case, the application has not been supported by a written medical **report recommending placement on medical**

[12] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

grounds and, therefore, there was no obligation to comply with the said provisions because the written medical report did not recommend the placement of the applicant for parole on medical grounds. It follows that the submission by the applicant that his application be forwarded to the Medical Advisory Board for consideration lacks merit and should be dismissed.

[27] In view of my conclusion in this matter, I do not consider wise to deal in detail with the applicant's preliminary grounds of objection relating to the striking out of averments contained in the respondent's answering affidavit. In any event, all of them, on a thorough examination of those objections they lack merit and cannot succeed.

[28] I am of the view that there are no grounds for this Court to review and set aside the first respondent's action or conduct in this matter.

[29] In the result, I make the following order:

[29.1] The application is hereby dismissed with costs.

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P.W. TSHIKI
JUDGE OF THE HIGH COURT

Counsel for the applicant : Adv Ah Shene

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