CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 42/05

BONGANI NORMAN MNGUNI	Applicant
and	
MINISTER OF CORRECTIONAL SERVICES	First Respondent
NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	Second Respondent
GAUTENG PROVINCIAL COMMISSIONER	Third Respondent
HEAD OF LEEUWKOP MEDIUM "A"	Fourth Respondent
CHAIRPERSON OF CASE MANAGEMENT COMMITTEE	Fifth Respondent
CHAIRPERSON OF PAROLE BOARD, LEEUWKOP PRISON	Sixth Respondent

Decided on : 26 September 2005

JUDGMENT

THE COURT:

[1] The applicant, Mr Bongani Norman Mnguni, who brings this application without the benefit of legal assistance, is serving a prison term of 15 years at Leeuwkop Medium "A" Prison in Johannesburg. He seeks an order requiring the

respondents to reconsider his request for medical parole in terms of section 79 of the Correctional Services Act, 111 of 1998 (the Act).[1]

[2] The respondents are the Minister of Correctional Services, the national Commissioner of Correctional Services, the provincial Commissioner of Correctional Services in Gauteng where the prison is situated, the head of the Leeuwkop prison, the chairperson of the Case Management Committee at Leeuwkop prison established in terms of section 42 of the Act and the chairperson of the Parole Board at Leeuwkop. None of the respondents have, within the time set in the rules, indicated that they intend to oppose the application.

[3] The applicant alleges that he was diagnosed as living with HIV-AIDS during 1998 when he was already in prison; and that during 2004 his doctor informed him that his CD 4 blood count had dropped below 200, which is an indicator of a severely compromised immune system. He accordingly applied ─ unsuccessfully it would appear ─ for medical parole.

[4] The applicant then approached the Johannesburg High Court for relief. On 8 June 2005 an order was made by that court in the following terms:

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[1] Section 79 provides as follows:

> "Any person serving any sentence in a prison and who, based on the written evidence of the medical practitioner treating that person, is diagnosed as being in the final phase of any terminal disease or condition may be considered for placement under correctional supervision or on parole, by the Commissioner, Correctional Supervision and Parole Board or the court, as the case may be, to die a consolatory and dignified death."

"1. The applicant is to be seen by the medical practitioner of Johannesburg Hospital on or before 23 June 2005; and the medical practitioner is to prepare the applicant's medical practitioner report/profile regarding the status of the applicant.

2. The applicant gives consent to the respondents to have access to his medical record.

3. The Case Management Committee of Leeuwkop Medium "A" prison is to interview the applicant on or before 14 July 2005 and to prepare and submit the report and the relevant documents to the Correctional Supervision and Parole Board of Leeuwkop Johannesburg in terms of the provisions of section 42(2)(d)(i), (ii), (iii), (iv) and (vii) of Act 111 of 1998 regarding:

3.1 the offences for which the applicant is serving his sentence of imprisonment together with the judgment on the merits, and any remarks made by the court in sentencing him, if made available to the Department of Correctional Services;

3.2 the criminal record of the applicant;

3.3 the conduct, disciplinary record, adaptation, training, aptitude, industry, physical and mental state of the applicant;

3.4 the likelihood of his relapse into crime, the risk he poses to the community and the manner in which this risk can be reduced;

3.5 the possible placement of the applicant on day parole or on parole or further alternative on medical parole, and the conditions for such placement.

4. The Case Management Committee and the Correctional Supervision and Parole Board are to have regard in favour of the Applicant's case for placement on parole, to any credits the applicant may have earned before 1 October 2004, in terms of sections 22A and 62 of Act 8 of 1959.

5. The Correctional Supervision and Parole Board of Leeuwkop is ordered to consider the placement on parole of the Applicant taking account of the following factors enumerated in sections 69 and 63(F)(a)

5.1 the nature of the offence;

5.2 any remarks made by the court in question at the time of imposition of sentence, if made available to the Department of Correctional Services;

5.3 the applicant's conduct, adaptation, training, aptitude, industry and physical and mental state, and the possibility of his relapse into crime;

5.4 the report of the Case Management Committee aforesaid;

5.5 any written or oral representations the Applicant may make to it.

6. A meeting of the Correctional Supervision and Parole Board aforesaid will take place in order to give effect to paragraph 5 of this Order on or before 2 August 2005, and the Applicant is to be given at least seven (7) days notice of such meeting.

7. The Applicant shall be entitled to present his case during the interview at the Case Management Committee and to actively participate at the Correctional Supervision and Parole Board proceeding.

8. No order as to the costs."

[5] The applicant alleges that on 4 July 2005 he was called before the Case Management Committee and informed that prisoners are no longer released on medical parole. The applicant seeks an order requiring that this decision be reconsidered.

[6] The application is, in effect, for direct access to this Court in terms of section 167(5) of the Constitution[2] and rule 18.[3] Because it is not ordinarily in the interests of

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[2] Section 167(5) reads:

"The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

[3] Rule 18 reads:

"(1) An application for direct access as contemplated in section 167(6)(a) of the Constitution shall be brought on notice of motion, which shall be supported by an affidavit, which shall set forth the facts upon which the applicant relies for relief.
(2) An application in terms of subrule (1) shall be lodged with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out–
    (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted;
    (b) the nature of the relief sought and the grounds upon which such relief is based;

justice for this Court to sit as a court of first and final instance, such applications are only granted in exceptional circumstances.[4] We are not of the view that the applicant has established that exceptional circumstances justifying direct access to this Court in this matter. The application must therefore be dismissed.

[7] Nevertheless, the issues raised by the applicant are important and it may be that they require adjudication, though on the papers lodged by the applicant, and in the absence of any response from the respondents, we cannot be sure. It does seem clear that the issues are unlikely to be formulated properly if the applicant does not receive some legal advice. In the circumstances, it seems appropriate to direct that the registrar of this Court draw this judgment to the attention of the Law Society for the Northern Provinces with the request that it consider whether to appoint an attorney to consult with the applicant. The Law Society may then decide whether the applicant has a legal claim which needs to be pursued, and, if so, whether to assist the applicant.

(c) whether the matter can be dealt with by the Court without the hearing of oral evidence and, if it cannot,
(d) how such evidence should be adduced and conflicts of fact resolved.

(3) Any person or party wishing to oppose the application shall, within 10 days after the lodging of such application, notify the applicant and the Registrar in writing of his or her intention to oppose.
(4) After such notice of intention to oppose has been received by the Registrar or where the time for the lodging of such notice has expired, the matter shall be disposed of in accordance with directions given by the Chief Justice, which may include–
(a) a direction calling upon the respondents to make written submissions to the Court within a specified time as to whether or not direct access should be granted; or
(b) a direction indicating that no written submissions or affidavits need be filed.
(5) Applications for direct access may be dealt with summarily, without hearing oral or written argument other than that contained in the application itself: Provided that where the respondent has indicated his or her intention to oppose in terms of subrule (3), an application for direct access shall be granted only after the provisions of subrule (4)(a) have been complied with.

[4] See *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 8; see also *Ex parte Omar* 2003 (10) BCLR 1087 (CC) at para 4; *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA 266 (CC); 2004 (1) BCLR 1 (CC) at para 6; *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC); 1998 (12) BCLR 1449 (CC) at para 4.

[8] The following order is made:

1. The application for direct access is dismissed.

2. The registrar is directed to draw this judgment to the attention of the Law Society for the Northern Provinces.

Langa CJ, Moseneke DCJ, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J participated in the decision of the Court.