REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNEBURG

CASE NO: 2022/048802

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

[12 December 2022] **……..**
SIGNATURE

In the matter between:

LISTON CHOLOGI **Applicant**

and

CHAIRPERSON: CORRECTIONAL SUPERVISION
AND PAROLE BOARD **First Respondent**

MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES **Second Respondent**

J U D G M E N T

MUDAU, J:

[1] The applicant, Mr Liston Chologi ("Chologi") is a sentenced prisoner. He seeks relief on an urgent basis in terms of Rule 6 (12) (a) of the Uniform Rules of Court of compelling the first respondent, the Correctional Supervision and

Parole Board (“the Parole Board”) to consider the applicant’s eligibility for placement under parole. Ordinarily, matters, which pertain to potential contraventions of a person's fundamental rights and freedoms, in particular the right to liberty are inherently urgent.

In *limine*

[2] In opposing this application, the deponent of the respondents’ answering affidavit conceded that this answering affidavit is late for filing. The answering affidavit had to be delivered on the 28 of November 2022, but eventually on 2 December 2022, four days late in respect of which condonation was sought. There is no prejudice suffered by the applicant's legal team as they had a chance to peruse this answering affidavit and file their replying affidavit, which they did. Condonation was not opposed and accordingly granted.

Background facts

[3] On 31 March 2011, Chologi and his co-accused, Moyo were each sentenced to an effective 20 years’ imprisonment sentence, upon conviction on inter alia, various charges of armed robbery with aggravating circumstances by the Gauteng Regional Court. The trial regional magistrate had ordered that some of the sentences to run concurrently pursuant to section 280 of the Criminal Procedure Act 51 of 1977 (“the CPA”). The court a quo, relying on s 276B of the CPA, directed that the applicant and Moyo were to serve a minimum of two third of their respective sentences before they could be considered for parole. Moyo had since been released on parole. The relevant crimes had been committed before 1 October 2004, the date of promulgation of s 276B between the years 2000 and 2001.

The merits

[4] On 28 September 2021, the applicant obtained an order from this court on urgent basis, per Mdalana-Mayisela J in which the respondents were directed to within 14 (fourteen) days of the service of the court order "*to take a decision in respect of the applicant's previous parole application in February 2021, and advise the applicant of the full reasons thereof in intelligible written form".*

[5] The court order was obtained against the following background. On 17 February 2021, the Chairperson of the Parole Board considered whether the applicant should be considered for possible parole. A decision was arrived at to the effect that further parole was requested for 17 February 2023 for consideration for the reason that the sentencing order per the trial magistrate indicated that the applicant was required to serve two thirds ("2/3") of the sentence as a non- parole period which would only expire on 30 March 2023.

[6] Consequently, the Parole Board decided without more, that the applicant's profile for 17 February 2023, was approved for the consideration of his parole status. According to the applicant, pursuant to the grant of the Court Order, it was despatched to the respondents with a demand that full written reasons in writing be provided. Despite several written follow ups in that regard this was not forthcoming.

[7] The application was then launched, a date for that application was secured for July 2022. However, the matter was removed from the roll, as the candidate attorney in charge of setting down the application had failed to invite the Registrar's office personnel. Further exchanges of correspondence followed between the applicant's attorneys of record and the first respondent's officials. On 10 October 2022, Mr Khampa of the first respondent, in e-mail correspondence confirmed that the respondents would not be changing their

stance and would profiling the applicant again in March 2023. It is this decision that the applicant is aggrieved about, hence the launch of the urgent application. Applicant contends that he has a clear right to have his parole application_considered. Also that, he is also entitled to a decision, whatever it may be, against the background the Court has ordered that the applicant be provided with full written reasons.

[8] The Respondents admit that the applicant became eligible for consideration for parole, however "*there are other factors which the parole Board considers before an applicant is considered for parole, to mention a few of these factors; pending cases, previous convictions, behavior whilst in prison and the degree of violence used in committing an offence*". In a nutshell, the respondents allege that, the applicant was furnished with reasons as to why he was not eligible for parole, such communication was done by a member of the Legal Services. However, no reference is made to such communication in the answering affidavit. This remains nothing more than a bold assertion.

[9] The respondents further allege "applicant has a pending matters which still needs to be investigated before the parole Board can consider him for parole "(sic). However, annexure "SP1" reflects that applicant was on 9 February 2001, convicted for carjacking and consequently sentenced to undergo 10 years' imprisonment. Allegations pertaining pending cases, are not supported by any documentary proof or evidence. The respondents contend *that "the applicant has to serve two thirds of his sentence, as per the provisions of section 65(4) (a) of the Correctional Services Act he will be eligible for parole in the 2024*", contrary to an earlier recommendation, the subject of this application. The respondents are presumably relying on section 65 (4) (a) of the Correctional Services Act 8 of 1959, that the applicant relies upon.

[10] Section 65 (4) relied upon provides that:

'(a) A prisoner serving a determinate sentence or any of the sentences contemplated in subparagraphs (ii) and (iii) of paragraph (b) shall not be considered for placement on parole until he has served half of his term of imprisonment: Provided that the date on which consideration may be given to whether a prisoner may be placed on parole may be brought forward by the number of credits earned by the prisoner'.

The law

[11] On the authority Phaahla v Minister of Justice and Correctional Services and Another[1], which the applicant places a heavy reliance on, the Constitutional Court found with regards to eligibility of prisoner for placement on parole that the Provisions of ss 136(1) and 73(6)(b)(iv) of Correctional Services Act 111 of 1998, in adopting date of sentence rather than commission of offence for coming into operation of harsher parole regime, inconsistent with ss 9(1) and (3) and s 35(3)(n) of Constitution. This is where the applicant fits in consideration being had to the date of the offences that were committed.

[12] Parliament was accordingly required to amend provisions within 24 months amend s 136(1) of the Correctional Services Act to apply parole regimes on the basis of date of commission of an offence, pending which the section shall read as follows:

'Any person serving a sentence of incarceration for an offence committed before the commencement of chs 4, 6 and 7 of the Correctional Services Act is subject to the provisions of the Correctional Services Act 8 of 1959, relating to his or her placement under community corrections, and is to be considered for such release and placement by the Correctional Supervision and Parole Board in terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of those chapters'.

[1] 2019 (2) SACR 88 (CC)

[13] The Constitutional Court further held that, on a broad interpretation of s 35(3)(n) of the Constitution, at the very least, the legislated preconditions for parole eligibility in s 276B of the Criminal Procedure Act 51 of 1977 fell within_the ambit of 'prescribed punishment' as intended by the section. In addition, it was held that further in respect of the right to a fair trial, that, since the rules lengthening parole non-eligibility periods resulted in an increase of the severity of imprisonment, the impugned provisions clearly had the effect of imposing a more severe punishment, and thereby also contravening s 35(3)(n) of the Constitution.

[14] In S v Stander[2], the Supreme Court of Appeal stated that, "*when making an order in terms of s 276B (1), the sentencing court, in effect, makes a "present determination" that the convicted person will not merit being released on parole in the future, notwithstanding that the decision as to the suitability of a prisoner to be released on parole involves a consideration of facts relevant to his conduct after the imposition of sentence. It is thus a "predictive judgment" as to the likely behaviour of the convicted person in the future, reached on the basis of the facts available to the sentencing court at the time of sentence.'*

[15] Recently, the Constitutional Court confirmed in S v Senwedi [2021] ZACC 12 (unreported, CC case no CCT 225/20, 21 May 2021) at [24]) that:

'The fixing of a non-parole period constitutes an increased sentence. In accordance with the general principle, it cannot operate retrospectively. Absent any legally recognised special circumstances, no departure from this principle is warranted, and the fixing of a non-parole period that purports to operate retrospectively, is impermissible in law.'

Discussion

[2] S v Stander 2012 (1) SACR 537 (SCA)

[16] The applicant does not seek from this court in order to be released on parole, but to be considered for parole. On the common cause facts, the applicant has applied for his release on parole on three occasions and was recommended for_release on parole on two of those occasions. The Constitutional Court has long pointed out that prior to the promulgation of s 276B, a court's imposition of a non-parole period 'amounted to an encroachment on the functions of the executive by the judiciary'[3].

[17] The simple objection to judicial interference per Snyders JA in S v Stander with parole matters remains the same, namely that 'the consideration of the suitability of a prisoner to be released on parole requires the assessment of facts relevant to the conduct of the prisoner after the imposition of sentence'.[4]

[18] Reliance by the respondents on 65(4) (a) of Act 8 of 1959 does not come to their aid, but that of the applicant. An important element of the principle of legality (*nullum crimen sine lege)* is that no court may impose a sentence more severe than the sentence legally permitted at the time of the commission of the relevant crime *(nulla poena sine lege).* This principle is entrenched in the Constitution: s 35(3)(n) determines that the right to a fair trial includes the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

[19] The common law also insists on no retrospectivity in respect of penal provisions: liability for a penalty is linked to the time of the commission of the crime and not to the date of either conviction or sentence [5]. In any

[3] See Phaahla v Minister of Justice and Correctional Services & another 2019 (2) SACR 88 (CC) at [37]. See also S v Makhokha 2019 (2) SACR 198 (CC) at [11

[4] S v Stander 2012 (1) SACR 537 (SCA) at [12]; See also S v Jimmale & another 2016 (2) SACR 691 (CC) at [14];

[5] (see *S v Mpetha* 1985 (3) SA 702 (A); *S v Mvubu* [2016] ZASCA 184 (unreported, SCA case no 518/2016, 29 November 2016) at [9]; and Phaahla v Minister of Justice and Correctional Services & Another, supra at note 3.

construction, which is not disputed in relation to the proper interpretation of sections 65 (4) (a) of the_Correctional Services Act, No.8 of 1959, the applicant has served half of his sentence.

[20] Accordingly, I come to the ineluctable conclusion that the decision of the first respondent is reviewable in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") in that relevant considerations were not considered, within the meaning of section 6(2)(e) thereof. Also, it was irrational within the meaning of section 6(2)(f)(ii); and lastly unreasonable within the meaning of section 6(2)(h) of PAJA.

Order

[21] 1.The decision of the first respondent that the applicant is not eligible for consideration of parole on the basis of the non-parole period prescribed on his sentence be and is hereby reviewed and set aside.

2.That the first and second respondents be and are hereby ordered to urgently consider processing the applicant for placement on parole by the Beard in terms of the policy Parole Boards prior to the commencement of Chapter 4, 6 and 7 of the Correctional Services Act 111 of 1998.

3.Directing the first and second respondents, to jointly and severally pay the costs of the application.

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MUDAU J

[Judge of the High Court]

APPEARANCES

For the Applicant:	Adv A E AYAYEE
Instructed by:	MAJAVU ATTORNEYS
For the Respondent:	Adv. T MALULEKA

Instructed by:	STATE ATTORNEYS
Date of Hearing:	6 December 2022
Date of Judgment:	12 November 2022