REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE No: 13908/21

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

2022 .....

In the matters between: -

PATRICK MOYO **Applicant**

And

THE MINISTER OF JUSTICE & CORRECTIONAL SERVICES **1st Respondent**

COMMISIONER OF CORRECTIONAL SERVICES **2nd Respondent**

THE CHAIRPERSON OF THE PAROLE BOARD **3rd Respondent**

MR VIVIAN HAWKINS NO **4th Respondent**

JUDGMENT

BAQWA, J

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on 13 June 202**2.**

Introduction

[1] In this review application the applicant seeks relief in terms of which the inclusion of a non-parole period in the sentence meted out in terms of section 276B of the Criminal Procedure Act 51of 1977 (The Act) against the applicant by the fourth respondent is declared invalid.

[2] He further seeks the review and setting aside of the third respondent's decision that the applicant was or is not eligible for parole on the basis of the non-parole period included in his sentence.

[3] Lastly, the applicant seeks an order that the first and second respondents be ordered to urgently consider processing the applicant for placement on parole by the board in terms of the policy and guidelines applied by the former parole boards prior to the commencement of chapter 4, 6 and 7 of the Correctional Services Act 111 of 1998 (The 1998 Act).

The Facts

[4] The applicant was arrested in February 2001 after committing several robberies. He was tried and found guilty and in 2011 he was sentenced to twenty years imprisonment which included a non-parole period in terms of section 276B of the Act.

[5] The respondents contend that the review application is flawed in that the application has been brought out of time and that no adequate explanation has been provided for the delay by the applicant.

[6] They further contend that the applicant was duly processed and that his application for parole was duly considered resulting in a decision that he does not qualify for release on parole.

[7] The respondents argue that the applicant ought to have appealed the decision of the fourth respondent and not approached it by way of a review application. In the same breath they submit that though the Phaahla Judgment is relevant, it is distinguishable and should be argued in a court of appeal.

Inordinate delay

[8] It is not disputed that the application was brought 180 days from the decision making dates by the third and fourth respondents. The date of sentence by the fourth respondent was 2011 whilst the third respondent's decision was on 2 October 2019.

[9] I accept the respondents' submission that the applicant has brought a somewhat generalised application in that it does not specify the reasons for lateness and merely refers to the fact that he has been imprisoned since 2001 and that he and his family are indigent and not possessed of the necessary financial resources to litigate.

[10] It remains true however that each application for condonation has to be judged on its own circumstances and facts and that the court has to exercise its discretion whether or not to consider it favourably.

[11] More pertinently, however, the interest of justice plays a pivotal role in the exercise of the court's discretion. In the present case it is common cause that the application was triggered by the Constitutional Court judgment in *Phaahla v Minister of Justice and Correctional Services and Another*[1] *(Tlhakanye Intervening)* (the *Phaahla* case) which forms the basis of this application.

[12] It is common cause that a copy of that judgment was circulated to all the correctional services centres with a view to giving guidance to the relevant Correctional Services authorities in the execution of their duties with regard to grating or refusing parole applications brought by the inmates. The need to give a proper consideration to the judgment was implicit in the circulation of the judgments and it gives context to this application in the sense that the 180 day period prescribed in terms of PAJA only runs from the date of circulation of the *Phaahla* judgment to the Correctional Services centres.

[13] Whilst the *Phaahla* judgment was handed down in November 2019 and this application was launched on 16 March 2021, I do not consider that the delay was inordinate when one considers that after the circulation of the judgment, the third respondent still had to set in motion the parole process and give its decision prior to the launch of the application.

---

[1] *2009 ZACC 18.*

[14] The implications of the *Phaahla* judgment not only for the applicant but also for the respondents are self evident and in that context I find that it is in the interests of justice that condonation for the late filing of this application by the applicant be condoned. Potential prejudice would affect the applicant if condonation were to be granted whereas the respondent would suffer no prejudice.

The Law

[15] In the introductory paragraph of the *Phaahla* judgment the following is said:

> "*Introduction*
>
> *Parole is an acknowledged part of our correctional system. It has proved to be a vital part of reformative treatment for the paroled person who is treated by moral suasion. This is consistent with the law: that everyone has the right not to be deprived of freedom arbitrarily or without just cause and that sentenced prisoners have the right to the benefit of the least severe of the prescribed punishments."*

[16] The Constitutional Court goes on to make the following order at paragraph 72 of the judgment:

> "[72] In the result I make the following order:
>
> 1. The application for condonation is granted.

2. Mr Makome Stefanas Tlhakanye is admitted as an intervening party.

3. The application …

4. The order of invalidity of the High Court is confirmed and paragraph 1 is varied to read:

‘Sections 136(1) and 73(6)(b)(iv) of the Correctional Services Act 111 of 1998 (Correctional Services Act) are declared inconsistent with section 9(1) and (3) and section 35(3)(n) of the Constitution.’

5. Parliament must, within 24 months from the date of this order, amend section 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 Chapters 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 chapte.rs."

[17] Section 136(1) of the 1998 Act provides:

"Transitional provision

136(1) Any person serving a sentence immediately before the commencement of this Act will be subject to the provisions of the Correctional Services Act, 1959 (Act No. 8 of 1959), relating to his or her placement under community corrections but the Minister may make such regulations as are necessary to achieve a uniform policy framework to deal with prisoners who were sentenced immediately before the commencement of this Act and no prisoner may be prejudiced by such regulations.

(2) For the purposes of considering the placement of such person under community corrections, the relevant authority provided for in this Act will have the power to consider such a placement."

[18] I pause here to note that the above provision is not applicable to the applicant as he was not serving a sentence prior to commencement of The 1998 Act. The reliance placed on paragraph 28 of their answering affidavit by the respondents on the section is, in the circumstances misplaced and unsustainable.

[19] In the same vein, the respondents seek to justify their decision by relying in paragraph 30 of their affidavit on section 73(6)(a) of the 1998 Act which provides:

> *"6(a) Subject to the provisions of paragraph (b), a prisoner serving a … sentence may not be placed on parole until such prisoner has served either the stipulated non-parole period, or the rest of the sentence, but parole must be considered whenever a prisoner has served 25 years of a sentence or cumulative sentence."*

[20] Equally the reliance on the above quoted section cannot apply to the applicant as it is part of Chapter VII of The Act which is part of the order in the *Phaahla* judgment.

[21] Section 276B finds its origin in section 22 of the Parole and Correctional Supervision Amendment Act 87 of 1997 under the heading "Fixing of the non-parole period".

Section (1) provides:

> *"(a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence fix a period during which the person shall not be placed on parole.*

(b) Such period shall be referred to as the non-parole period and may not exceed two thirds of the term of imprisonment imposed or 25 years whichever is the shorter."

[22] Section 276B of the CPA provides:

"(a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.

(b) Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter."

Decision of the Fourth Respondent

[23] The applicant seeks *inter alia* to obtain an order setting aside the fourth respondent who is the person who sentenced the applicant to serve a non-parole period in terms of section 276B of the CPA which was applied retrospectively to the applicant.

[24] The fourth respondent has filed a notice to abide the decision of this court.

[25] The respondent contends that the appropriate procedure for the applicant to follow is to appeal the decision of the fourth respondent and not to bring it by way of review.

[26] I do not propose to consider the relief sought against the fourth respondent at any length in that it has not been brought before this court regularly. Rule 53 triggers a duty on the decision maker to deliver a record of proceedings sought to be impugned or set aside. Such record has not been brought before this court. Absent a rule 53 record, no review hearing can be held and any such application stands to be dismissed on that ground only.

The Applicant's case

[27] Prior to this application an inmate sentenced under section 276B to serve no less than two thirds of his sentence before parole could not be considered for parole before such term was completed due to the fact that the correctional services department (DCS) could not alter or amend court orders. This section was however superseded by the *Phaahla* decision referred to (*supra*) in terms of which the DCS is now empowered to utilise the Constitutional Court to override the determination of the lower court by placing the inmate for parole under the policies and guidelines of Act 8 of 1959.

[28] Notably, in their answering affidavit the respondent simply noted the contention by the applicant without pleading why the communication by the Constitutional Court communique was wrong.

[29] Absent any countervailing evidence that the applicant qualifies and ought to be placed on parole, it seems that the respondents concede the correctness thereof. The respondents which include the DCS officials seem to labour under the impression that until the judgment of the fourth respondent is set aside in an appeal court it cannot simply be superceded or overridden by a directive emanating from the judgment of the Constitutional Court. This is a misdirection by the DCS officials.

[30] The DCS officials ought to have interpreted the facts and the law as follows. The Constitutional Court confirmed the decision of the High Court in terms of which section 136(1) of The 1998 Act was declared invalid on the grounds that Mr Phaahla's right to equality and equal treatment by the law and not to be discriminated against unfairly had been violated.

[31] The majority of the Constitutional Court held that the impugned provisions were invalid on the ground that the use of the date of sentence in section 136(1) of the 1998 Act, rather than the date of the commission of the offence violated his fair right to trial, which is the constitutional right to equal protection of the law and the right to the benefit of the least severe punishment. The court held that it amounts to retroactive application of the law, which violates section 35 of the Constitution and the principle of legality.

[32] The *Phaahla* judgment was disseminated to the various centres of the department of correctional services including the Zonderwater Medium B prison where the applicant was incarcerated. This ought to have enabled the DCS officials to not only to read and understand the judgment but also to implement it in respect of the relevant inmates in their centres.

[33] It is common cause that Mrs Fredda Baloyi, the head of Case Management Coordinators (CMC) at the Zonderwater Medium B Prison, compiled and structured release schedules for the list of those inmates who qualified to be considered for placement and release on parole as consequence of the *Phaahla* judgment.

[34] The said list was allocated to different CMC's to profile the files of the inmates to be handed to the parole board for consideration.

[35] A list which included the applicant was compiled and dispatched together with the relevant records to the parole board for consideration and release on parole.

[36] On 2 October 2019 the applicant and the three other inmates were considered in accordance with the *Phaahla* judgment for possible parole.

[37] The outcome of that parole board sitting was that the three inmates excluding the applicant, who did not have the section 276B court order attached to their sentences were recommended for placement and release on parole by the parole board.

[38] The applicant's consideration was not successful due to the fact that the inclusion of the section 276B order to his sentence precluded him from a successful consideration.

[39] Applicant's subsequent attempts to convince the DCS officials that the decision not to release him were in vain.

[40] Counsel for the third respondent in addressing this court conceded that the *Phaahla* judgment also ordered that any person serving a sentence of incarceration for an offence committed before the commencement of chapter 4, 6 and 7b of the 1998 Act is subject to the provisions of The 1959 Act relating to his placement under community corrections and is to be considered for such release and placement by the corrections supervision and parole board in terms of the policy guidelines applied by the former parole boards prior to the commencement of those chapters.

[41] The error of the third respondent's counsel creeps in when he goes on to argue, similarly to the DCS officials that the applicant was precluded from consideration by the section 276B order from parole consideration.

[42] This error originates in their failure to consider that the said chapters were not in operation when the applicant committed the offenses for which he was charged and subsequently convicted by the fourth respondent. The result was a retrospective application of those chapters to the applicant by the fourth respondent when he sentenced the applicant. In other words, the applicant

was in exactly the same position as *Phaahla* in the Constitutional Court judgment and ought not to have been treated differently.

[43] In the circumstance, I find that the decision of the third respondent is reviewable in terms of section 6 of PAJA in that:

43.1 It was made because irrelevant considerations were taken into account or relevant considerations were not considered, within the meaning of section 6(2)(e)(iii);

43.2 It was irrational within the meaning of section 6(2)(f)(ii); and

43.3 It was unreasonable within the meaning of section 6(2)(h).

[44] In light of the above, I make the following order:

Order

44.1 The late filing of this application by the applicant is condoned.

44.2 The decision of the third respondent that the applicant is not eligible for parole on the basis of the non-parole period prescribed on his sentence be and is hereby reviewed and set aside.

44.3 That the first and second respondents be and are hereby ordered to urgently consider processing the applicant for placement on parole by

the Board in terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of Chapter 4, 6 and 7 of the Correctional Services Act.

44.4 The application to declare the judgment of the fourth respondent invalid is dismissed.

44.5 The first respondent be and is hereby ordered to pay the costs of this application.

_____

SELBY BAQWA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 5 MAY 2022

Date of judgment: 13 JUNE 2022

Appearance

On behalf of the Applicants	Adv C Muza
Instructed by	Nandi Bulabula Inc
	Tel: 012 342 6465
	Email: munyai@nandibulabulainc.co.za

On behalf of the Respondents | Adv R Tsele

Instructed by | The State Attorney

Tel: 0871 933 9000

Email: tsele@counsel.co.za