



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 5876/2022

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

Date: 15 March 2024

In the matter between:

MBATHA: SIBINISO WELCOME

APPLICANT

And

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

1st RESPONDENT

NATIONAL COUNCIL FOR CORRECTIONAL SERVICES

2nd RESPONDENT

JUDGMENT

ALLY AJ

INTRODUCTION

[1] This is an opposed review application launched against the decision by the First Respondent, hereinafter referred to as 'the Minister', not to parole the Applicant.

[2] The issue of the late filing of the application was dealt with at the beginning of the proceedings. Counsel for the Respondents had no objection to the granting of condonation and I accordingly granted condonation in the interest of justice.

[3] The Applicant seeks an order substituting the decision of 'the Minister' and placing the Applicant on parole within a prescribed period and on conditions that the Court deems meet as well as further ancillary relief.

[4] This application has been brought in terms of Section 33 of the Constitution of the Republic of South Africa¹, hereinafter referred to as 'the Constitution' and Section 6 of the Promotion of Administrative Justice Act², hereinafter referred to as 'PAJA', to review the decision of 'the Minister' taken on 12 November 2021 wherein parole was denied.

[5] During the hearing of the application Counsel for the Applicant submitted that the applicant would not be persisting with the relief for the Court to substitute the decision of 'the Minister'.

[6] The answering affidavit of the Respondents is deposed to by a member of the Second Respondent and no affidavit whatsoever has been deposed to by 'the Minister', the First Respondent.

¹ 108 of 1996, as amended

² 3 of 2000, as amended

BACKGROUND AND FACTUAL MATRIX

[7] The Applicant is a sentenced prisoner and currently incarcerated at Barberton Prison where he is serving a life sentence imposed on 26 January 2004.

[8] The facts of this matter are largely common cause and not contentious.

[9] On the 20th and 21st of May 2021³, members of the Second Respondent met to make a recommendation to ‘the Minister’ on the eligibility of the Applicant to be granted parole. The Second Respondent recommended that the Applicant was not recommended for parole at that stage and this recommendation was approved by ‘the Minister’ on 12 November 2021. It is this decision that the Applicant seeks to have set aside.

[10] On 23rd January 2022 the Applicant had served 17 years and 10 months in prison. This date is important, so the Applicant submits, because it determines whether on his interpretation of the law, he is eligible for parole.

LEGAL FRAMEWORK

[11] Section 136 of the Correctional Services Act⁴ provides:

“136. Transitional provisions—

(1) Any person serving a sentence of incarceration immediately before the commencement of Chapters IV, VI and VII is subject to the provisions of the Correctional Services Act, 1959 (Act No. 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

³ Caselines: Section 001-62

⁴ 111 of 1998, as amended

and guidelines applied by the former Parole Boards prior to the commencement of those Chapters.

(2) When considering the release and placement of a sentenced offender who is serving a determinate sentence of incarceration as contemplated in subsection (1), such sentenced offender must be allocated the maximum number of credits in terms of section 22A of the Correctional Services Act, 1959 (Act No. 8 of 1959).

(3) (a) Any sentenced offender serving a sentence of life incarceration immediately before the commencement of Chapters IV, VI and VII is entitled to be considered for day parole and parole after he or she has served 20 years of the sentence.

(b) The case of a offender contemplated in paragraph (a) must be submitted to the National Council which must make a recommendation to the Minister regarding the placement of the offender under day parole or parole.

(c) If the recommendation of the National Council is favourable, the Minister may order that the offender be placed under day parole or parole, as the case may be.

(4) If a person is sentenced to life incarceration after the commencement of Chapters IV, VI and VII while serving a life sentence imposed prior to the commencement, the matter must be referred to the Minister who must, in consultation with the National Council, consider him or her for placement under day parole or parole.”

ANALYSIS AND EVALUATION

[12] As stated above the facts of this case are largely common cause. However, the Respondents submit that a person whilst being eligible for parole is not entitled

to be placed on parole and that certain procedures⁵ need to be followed before a decision to place a person on parole is made.

[13] On the basis of this submission, the Respondents argue that the Applicant's parole was reasonably and justifiably denied.

[14] The common cause fact remains, however, that the Applicant is eligible for parole and the question that begs answering by this Court is whether there was something untoward in the 'decision' taken by 'the Minister' not to place him on parole.

[15] The following issues warrant determination:

15.1. was there a decision taken by a public functionary;

15.2. is the 'decision' rational;

15.3. can the decision be set aside on the grounds of rationality and/or legality;

15.4. is the Court entitled to substitute the decision of the public functionary;

[16] As stated above, there is no need to determine whether this Court should substitute its decision for that of 'the Minister' because the Applicant has abandoned that relief.

[17] The Applicant maintains that 'the Minister' did not take a decision but merely repeated what the Second Respondent had indicated in the recommendation. Respondent's Counsel further submits that the 'grounds' for the recommendation do not constitute reasons for the denial of parole. This, the Applicant submits is not

⁵ Caselines: Section 005 – 8 at para 2.5

rational and cannot be accepted as being rational. If that is so, then the 'decision' falls to be set aside.

[18] If one has regard to Annexure "SM3"⁶ then it becomes clear that 'the Minister' himself, *ex facie* "SM3", does not engage with the contents of "SM3" at all and pens an approval. In this regard, it is ineluctable that the only inference that can be drawn from "SM3" is that 'the Minister's' 'decision' cannot be said to be rational.

[19] In dealing with applications of this nature where a Court is requested to adjudicate upon a decision of the executive or a functionary, the guidance given by the Constitutional Court⁷ is appropriate, namely:

*'It is a requirement of the rule of law that the exercise of public power by the executive and other public functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement.'*⁸

[20] A disconcerting feature in this application is that the Minister has not deemed it necessary to depose to an affidavit and explain his 'decision'. This Court has not been privy to what went through 'the Minister's' mind when the decision not to parole the Applicant was taken. Our Courts⁹ have frowned on situations such as this where one a word from the decision-maker is non-existent.

⁶ Caselines: Section 001-62

⁷ Pharmaceutical Manufacturers Association of SA case 2000 at para 85

⁸ This is an incident of the "culture of justification" described by Mureinik in "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 SAJHR 32, which is referred to in *Prinsloo*, above n 106.

[21] It is important to deal with another issue that arose during the hearing. The deponent to the answering affidavit requests the Court to accept hearsay evidence where no confirmatory affidavit has been filed. No explanation is given as to why 'the Minister' has not deposed to the answering affidavit nor why no confirmatory affidavit by him has been filed. The exceptions to the hearsay rule do not cater for circumstances wherein a person could have deposed to an affidavit and one wherein a reasonable explanation has been provided for the failure to depose to an affidavit. In my view, the request to accept hearsay evidence in this matter cannot be acceded to for the reason that it is clearly prejudicial to the Applicant and sufficient grounds have not been provided for the acceptance of such hearsay evidence.

[21] Taking into account the above, has the Applicant made out a case for the relief sought. As stated above, the Applicant abandoned the relief for a substitution of 'the Minister's' decision. It is clear from the facts of this case that denial of the Applicant for parole is an administrative decision which is reviewable by the Courts should same be found to be unlawful, irrational and infringing the principle of legality.

[22] The submission by Counsel for the Respondents that there are certain procedures to be undergone in terms of the policy of the Department of Correctional Services and accordingly, the denial of parole to the Applicant was correct.

[23] Counsel for the Applicant contended that the circumstances of the Applicant fall within the regime as espoused in the Constitutional Court case of **Van Vuuren v**

⁹ Minister of Home Affairs an Another v The Helen Suzman Foundation & Others 2023 GPPHC @ para 12;

Freedom Under Law v Judicial Services Commission 2023 SCA 103 at para 27

Minister of Correctional Services¹⁰. The following passage is appropriate and, in my view, applies to this application:

“In essence, this application concerns the proper interpretation of section 136 of the Act. The application also raises the question whether the applicant is eligible for consideration for placement on parole. In particular, the question is whether the provisions of the Correctional Services Act, 1959 (Old Act) and the policy and guidelines applied by the former Parole Boards apply to the applicant, or whether the applicant is entitled to be considered for placement on parole only after completing 20 years in detention in terms of section 136(3)(a) and the new policy and guidelines of the Department of Correctional Services (Department).”

[24] As I understand Counsel for the Applicant’s reliance on the abovementioned case, it is to counter the argument by the Respondents that they were entitled to postpone the parole application until the victim/offender dialogue had been finalised. The reliance by the Respondents on Section 74 (5) of the Correctional Services Act,¹¹ is misplaced, the Applicant submits. The Applicant submits that Section 74(5) came into operation on 1 October 2004 and is of no application to prisoners/lifers sentenced before that date. Accordingly, so the Applicant submits, his rights are those existing and applied in 2000 and this is in accordance with the **Van Vuuren case** mentioned above. I agree with these submissions.

[25] Returning to the question whether the decision of ‘the Minister’ is reviewable in terms of Section 6 of PAJA, the answer is in the affirmative. The decision as contained in ‘SM3’ is irrational in that he failed to apply his mind to the relevant

¹⁰ 2010 CC 17

¹¹ supra

issues in accordance with the applicable statutory provisions and the requirements of natural justice.

[26] The Applicant has requested that should this application be successful, that 'the Minister' be given 30 days to reconsider placing the applicant on parole and the Respondent submitted that the period for reconsideration should be 90 days. In my view, a period of 30 days is sufficient for 'the Minister' to come to a decision.

[27] In conclusion therefore, the Applicant has made out a case for the setting aside of 'the Minister's' decision not to parole the Applicant as well as the other relief in the Draft Order provided to the Court.

COSTS

[28] There is no reason why this Court should deviate from the norm that costs follow the result and none were submitted.

[29] In the result, the following order will issue:

1. The Draft Order marked X is made an order of Court.

G ALLY

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be **15 March 2024**.

Date of virtual hearing: 7 August 2023

Date of judgment: 15 March 2024

Appearances:

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