

**NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

DATE 5/10/2011 SIGNATURE [Signature]

In the matter between:

CASE NO: 15991/2011

5/10/2011

ABEL ZANELE MBONANI Applicant

And

THE MINISTER OF CORRECTIONAL SERVICES 1st Respondent

THE COMMISSIONER OF CORRECTIONAL SERVICES 2nd Respondent

**THE HEAD OF THE CORRECTIONAL CENTRE:
ZONDERWATER MEDIUM CORRECTIONAL
FACILITY** 3rd Respondent

**CORRECTIONAL SUPERVISION AND PAROLE
BOARD: ZONDERWATER MEDIUM
CORRECTIONAL FACILITY** 4th Respondent

JUDGMENT

MATOJANE J

[1] This is an application to review and set aside the decision of the fourth respondent (Correctional Supervision and Parole Board) dated

17 February 2011 to place applicant on parole but postpone his release for one year to 17 February 2012. The applicant seeks a further order that fourth respondent's decision to postpone applicant's release, should be set aside and replaced with a decision that the applicant is to be released immediately on the normal parole conditions.

[2] On 15 September 1998 the applicant was found guilty of murder, unlawful possession of a firearm and ammunition. He was sentenced to an effective sentence of 35 years imprisonment.

[3] On 16 March 2010 applicant appeared before the Correctional Supervision and Parole Board (the parole board) for Zonderwater Medium Correctional Centre, for consideration of his release on parole. Applicant was not placed on parole and his further parole consideration was remanded to 16 March 2012.

[4] Applicant obtained an order of this court reviewing and setting aside the decision of the fourth respondent taken on 16 March 2010. The court ordered the case management committee of the respondent to prepare the applicant's profile including a psychologists report, within 60 days from the date of the order and to reconsider the applicant for parole by 7 January 2011.

[5] The applicant was only called to appear before the fourth respondent on 27 January 2011 but the hearing was postponed to 2 February 2011, then to 3 February and finally to 9 February 2011 when the hearing was again postponed by the fourth respondent, purportedly, in order for the victim's family to attend the hearing.

[6] The fourth respondent only considered the applicant for parole on 17 February 2011 after the applicant through its attorney had sent a letter of demand to the fourth respondent on 10 February 2011 demanding compliance with the court order of 16 March 2010. The chairman of the case management committee and fourth respondent told the applicant that the board was satisfied with applicant's profile and with his rehabilitation and he will be placed on parole but the implementation date will be deferred to 17 February 2012 because a "victim mediation programme" was still outstanding.

[7] The applicant takes the view that once a decision was taken by the fourth respondent to place applicant on parole, he obtained a right to be released, the deferring of such release for a year is consequently unlawful and in breach of his right to a fair administrative action that is lawful, reasonable and procedurally fair.

[8] Section 73(1)(a) of the Correctional Services Act No. 111 of 1998 provides that subject to the provisions of the Act a sentenced prisoner remains in prison for the full period of the sentence, and section 73(3) provides that a sentenced prisoner must be released from prison, and from any form of community corrections imposed in *lieu* of part of a sentence of imprisonment, when the term of imprisonment imposed has expired. Section 73(4) permits the release of a prisoner on correctional supervision or day parole or parole before the expiration of the term of imprisonment. Section 73(5)(a)(i) provides:

"Subject to the conditions of community corrections set by such Board or court:

(i) a prisoner must be placed under correctional supervision or on day parole or on parole on a date determined by the Correctional Supervision and Parole Board."

[9] Section 73(5)(a)(i) peremptorily authorises the release of a prisoner out on parole on the date determined by the parole board. When viewed against the provisions of section 12(1)(a) of the Constitution which stipulates that everyone has the right to freedom and security of person, which includes a right not to be deprived of freedom arbitrarily or without just cause, it follows that the date of release to be determined by the parole board must be as soon as

reasonably possible. It follows that any deferment of the release of the prisoner must be lawful, reasonable and procedurally fair.

[10] In my view, the further incarceration of the applicant after a decision was taken on 17 February 2011 that he qualifies to be released on parole is unreasonable and unlawful. The fourth respondent states its reasons as follows:

"The offender challenged the CSPB's decision and was given an order to be seen within three months. He initially appeared at the end of January 2011 but for purposes of victim involvement he was postponed (sic) for two weeks which he also challenged through legal attorney who threatened us with contempt of court."

"CSPB was not yet satisfied that the sentence served was properly accounted for as the victim involvement process was cut short. CSPB will however approve for placement on parole on 17.02.2012 until 14.03.2033."

[11] After he was informed by the chairman of the fourth respondent that the parole board has a mandate to consider the views of the victims with regards to the offender's placement on parole, applicant gave the chairman of the fourth respondent the telephone numbers of the victims' neighbour to contact them so that he could subject himself to the restorative justice program. To date, nearly six months since the parole hearing, neither of the

respondents has contacted applicant about meeting the victim's family, nor has any official contacted him about the so-called victim mediation program or have made any effort to assist him in completing such a program. No evidence was placed before the court about what the "victim program" entailed, when it must be done and how long does it take. It must be mentioned that section 73(5)(a)(1) makes no reference to "victim program" as a prerequisite for a prisoner to be released on parole. It follows, in my view, that the decision to delay applicant's release on parole is irrational, capricious and arbitrary and is accordingly reviewable in terms of Rule 53 of the rules of court and also in terms of section 6(2) of the Promotion of Administrative Justice Act, 3 of 2000.

[12] Organs of state are not free to act as they please. It is expected of organs of state that they treat people with whom they deal with, with dignity, honesty, openly and fairly. This is particularly so in the case of the applicant, a prisoner who is in a position of weakness in relation to the respondents. It is evident that the fourth respondent would not have held a parole hearing, if it had not been for the pressure placed on them by the applicant's attorney.

[13] I agree with counsel for the applicant that applicant was entitled to be released from prison once a decision was taken by the fourth respondent that he should be released on parole.

[14] In the result the applicant has established that he was entitled to be released on parole immediately under the conditions as approved by fourth respondent on 17 February 2011. The respondents are ordered to pay costs.

[15] Accordingly the following order shall issue:

1. It is ordered that the applicant be released on parole immediately under the conditions as approved by the parole board on 17 February 2011.
2. The respondents are ordered to pay the costs of this application.


K E MATOJANE
JUDGE OF THE HIGH COURT