

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

CASE NO: 40175/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

[7 JUNE 2023]

SIGNATURE:

In the matter between:

NNYADI BOITUMELO LYDIA BOSHEGO

Applicant

and

**THE CORRECTIONAL SUPERVISION AND PAROLE
BOARD: KGOSI MAMPURU II**

First Respondent

**THE CASE MANAGEMENT COMMITTEE:
KGOSI MAMPURU II**

Second Respondent

**THE NATIONAL COMMISSIONER: CORRECTIONAL
SERVICES**

Third Respondent

**THE MINISTER OF CORRECTIONAL SERVICES AND
CONSTITUTIONAL DEVELOPMENT**

Fourth Respondent

J U D G M E N T

NEL AJ

[1] This is an opposed application in terms of which the Applicant seeks, *inter alia*, an order reviewing the decision of the First Respondent (the Correctional Supervision and Parole Board of the Kgosi Mampuru II Correctional Facility) (“Parole Board”) to refer the Profile Report of the Applicant back to the Second Respondent (the Case Management Committee of the Kgosi Mampuru II Correctional Facility) (“the Committee”), and reviewing the decision of the Parole Board’s failure to consider the Applicant for parole.

[2] In the alternative to the review relief sought, the Applicant seeks the declaration of clause 5.3.1 of Circular 13 of 2019/20: Granting of Special Remission of Sentence Amnesty (“the Circular”) as being irrational and unlawful.

[3] The Applicant also seeks an order directing the Parole Board to accept the Profile Report of the Applicant and to consider the Applicant for parole.

[4] At first glance it appears that a crucial aspect of this Application relates to the interpretation of clause 5.3.1 of the Circular. However, for the reasons I set out below, the determination of the applicable Minimum Detention Period plays a far greater role than an interpretation of clause 5.3.1.

THE SPECIAL PAROLE DISPENSATION

[5] On 16 December 2019 the President of the Republic of South Africa announced the grant of a special remission of sentences for certain categories of incarcerated offenders. The remission of sentences, up to a maximum of 24 months for the qualifying offenders, was intended to, and did, impact on the eligibility of certain offenders for parole, and the release of certain prisoners on parole, earlier than the offenders would have been entitled to, but for the remission of sentences.

[6] In terms of Section 84(2)(j) of the Constitution of the Republic of South Africa, as read with Section 82(1)(a) of the Correctional Services Act, No. 111 of 1998 (“the Correctional Services Act”), and for the purposes of combatting the spread of the Covid 19 virus in correctional service facilities, the President authorised the consideration for parole, and the placement on parole, of qualifying incarcerated offenders, who were incarcerated as at 27 April 2020. The special authorisation of

the remission of sentences, and the effect on the granting and consideration of parole is referred to herein as the Special Parole Dispensation.

[7] On 8 May 2020, the Minister of Justice and Correctional Services (“the Minister”) announced the authorisation by the President of consideration for parole for “*selected low risk qualifying sentenced offenders who have or will reach their minimum detention period within five years*”.

[8] The Minister emphasised in the relevant press release that the process is different to a normal remission of sentence and entails the bringing forward of the period of incarcerated offenders’ date for consideration for parole, and does not alter the sentence of any convicted offenders.

[9] It appears that this statement led to some confusion within the Correctional Services as to how the Special Parole Dispensation should be applied.

THE RELEVANT SUBMISSIONS

[10] The Applicant submits that the Special Parole Dispensation announced by the President was to be applied to those incarcerated offenders who qualified for the special remission, whose Minimum Detention Period dates would arise on or before 26 April 2025. The Respondents are in agreement with such contention but disagree with the Applicant as to the Applicant’s Minimum Detention Period date.

[11] The parties were in agreement that the offences of which the Applicant was convicted, would entitle her to a remission of 24 months, but as already indicated above, the parties were in dispute as to how such remission period should be applied.

[12] The Applicant submits that the Minimum Detention Period applicable to her would expire on 1 March 2025, and that she therefore qualifies for the special remission, and should be considered for parole.

- [13] The Respondents contend that the Applicant's Minimum Detention Period will expire on 26 February 2026, which falls outside the remission threshold period, and that she therefore does not qualify for the special remission.
- [14] The Respondents contend that the Special Parole Dispensation would only be applied to those incarcerated offenders, whose minimum detention period would arise on or before 8 May 2025.
- [15] It is accordingly necessary to determine the threshold date of the remission period, and the Applicant's Minimum Detention Period, prior to considering the grounds of review in order to determine whether the Applicant qualified for the Special Parole Dispensation.

BRIEF RELEVANT BACKGROUND

- [16] The Applicant was found guilty on 22 counts of different offences, including fraud, corruption, racketeering and money laundering. In respect of 21 of the counts the Applicant was sentenced to 15 years imprisonment for each count, and in respect of one of the counts, the Applicant was sentenced to an imprisonment term of 10 years.
- [17] The High Court ordered that the sentences are to be served concurrently, with an "*Effective sentence of 15 years imprisonment*".
- [18] The Applicant commenced her incarceration period at the Kgosi Mampuru II Correctional Facility on 30 August 2018.
- [19] On 25 May 2020, and after the implementation of the Special Parole Dispensation as announced by the President and the Minister, the various Correctional Facilities commenced the process of giving effect to the announcements.
- [20] The Committee, after compiling the Applicant's Profile Report, advised her that she qualified for the Special Parole Dispensation, and accordingly qualified for consideration for parole.

- [21] The Committee submitted the Applicant's Profile Report to the Parole Board, which was to consider the Applicant for parole on 29 May 2020.
- [22] However, on 29 May 2020, the Applicant was advised that she would not be considered for parole, as she did not qualify for the Special Parole Dispensation.
- [23] The Parole Board submitted that the Committee erred in calculating the Applicant's Minimum Detention Period, in that the Committee ought not to have deducted a period of 24 months from the Applicant's sentence period, but ought rather to have pro-rated the 24-month period over the 21 counts of 15 years each, which would equate to one month and 21 days for each of the 15-year sentences running concurrently.
- [24] On such basis the Parole Board determined that the Applicant's Minimum Detention period would expire on 13 February 2026, and that accordingly the Applicant could not benefit from the Special Parole Dispensation.
- [25] On 24 February 2021, the Parole Board met with the Applicant, in order to explain the Parole Board's interpretation of the Special Parole Dispensation, and to explain to the Applicant why the Parole Board was of the view that the Special Parole Dispensation was not applicable to the Applicant.

THE APPLICANT'S MINIMUM DETENTION PERIOD

- [26] The date from which the 60-month period referred to in the Dispensation is to be calculated is 27 April 2020, and accordingly the threshold date for applying a convicted offender's minimum detention period is 26 April 2025.
- [27] In terms of Section 73(6) of the Correctional Services Act, a sentenced offender serving a determinate sentence of more than 24 months, may not be placed on parole until such sentenced offender has served either the stipulated non-parole period, or if no non-parole period was stipulated, half of the sentence.

- [28] In respect of the Applicant a non-parole period was not stipulated, and accordingly the Applicant's Minimum Detention Period would equate to half of her effective sentence.
- [29] The Applicant calculates her Minimum Detention Period date as being 1 March 2025. Such date is calculated by deducting the 24-month sentence remission period from the effective sentence of 15-years, and then dividing such period of 13-years in half, which equates to six years and six months. If the period of six years and six months is added to the Applicant's incarceration commencement date of 30 August 2018, the Applicant's Minimum Detention Period would expire as at the end of February 2025, and it is presumably for such reason that the Applicant calculated her Minimum Detention Period date as being 1 March 2025.
- [30] The Respondents have calculated the Applicant's Minimum Detention Period date as being February 2026. There is some conflict as to the precise date in February 2026 that the Respondents contend for, but the conflict is of no relevance.
- [31] The Respondents' calculation of the Applicant's Minimum Detention Period date appears to simply be the calculation of half of the effective sentence of 15 years, being 7 years and six months, which period is then added to the commencement date of the Applicant's incarceration on 30 August 2018. Despite the reference to the apportionments on a pro rata basis of the 24 month period over the 21 counts of 15 years each, it appears that such period has not been included in the Respondents' calculation.
- [32] It appears that the Respondents have considered the views expressed by the Minister, particularly those pertaining to the Special Parole Dispensation not being a remission of sentence quite literally, without carefully considering the purpose and effect of the granting of the special remission of sentence.

- [33] It is clear from the Circular that the President granted a special remission of sentence in respect of certain categories of sentenced offenders.
- [34] It is also clear from the Circular that what was intended was a 12 month or 24-month remission of sentence (depending on the category of incarcerated offender), and that the applicable period should be deducted from the offender's original sentence expiry date, in order to determine a recalculated sentence expiry date taking into account the special remission period.
- [35] The Profile Report prepared by the Committee in respect of the Applicant determined the Applicant's Minimum Detention Period date as 28 February 2025, based on the special remission of 16 December 2019.
- [36] The Respondents contend that the 24-month remission period applies only to parole, and not to a sentence. Such contention is however in conflict with the clear wording of the remission period as contained in the Circular, and there is no explanation as to how a period of 24-months as referred to in the Circular would apply to parole, when it is clearly intended to apply to a determination of the maximum sentence period of an incarcerated offender.
- [37] In the unreported matter of *Smith v Minister of Justice and Correctional Services & Others*¹, which I was referred to by the Applicant's legal representatives, it was held at paragraph [7] of the Judgment that the calculation of the minimum detention period is affected by the effect that the 24 months remission of sentence had on the incarcerated offender's sentence.
- [38] It is accordingly clear, and I am in agreement with Strydom J (the Judge in the *Smith* matter) in such regard, that the remission of sentence period, whether it be 12-months or 24-months, must be deducted from the full incarceration period, prior to the applicable minimum detention period being determined.

¹ Unreported Judgment, case number 35658/2021 (Strydom J).

[39] I am accordingly of the view that the Applicant's calculation of her Minimum Detention Period date is the correct calculation, and that the Parole Board's calculation, being to the effect that the Applicant does not benefit from the Special Parole Dispensation, as her Minimum Detention period would only expire in February 2026, is not correct.

[40] In the circumstances I must find that the Parole Board erred in its methodology of determining whether or not the Applicant was eligible for consideration for parole, and in failing to consider the Applicant for parole.

THE NATURE OF THE RELIEF SOUGHT

[41] in paragraph 1 of the Notice of Motion the Applicant seeks an order for the review and setting aside of the decision of the Parole Board to refer the Profile Report of the Applicant back to the Committee and/or the Parole Board's decision to not consider the Applicant for parole.

[42] For the reasons already set out above, I am satisfied that the Parole Board erred in failing to consider the Applicant for parole, and I accordingly intend to set aside such decision.

[43] The decision of the Parole Board to refer the Applicant's Profile Report back to the Committee will become irrelevant, having regard to the Order I intend to make, as I can only assume that the Committee will have to prepare an updated Profile Report for the Applicant.

[44] In paragraph 2 of the Notice of Motion the Applicant seeks an order directing the Parole Board to accept the Profile Report of the Applicant and to consider the Applicant for parole within 30 days of the grant of this order.

[45] I am firstly of the view that I would be interfering with the discretion of the Parole Board in determining whether or not to grant a convicted offender parole, by directing the Parole Board to accept the Profile Report, and secondly, I am of the view, as already expressed above, that the Committee will be required to prepare an

updated Profile Report for the Applicant. I am accordingly of the view that it would be inappropriate for me to make an order as sought in paragraph 2 of the Notice of Motion.

[46] I am however satisfied that I can order the Parole Board to consider the Applicant's parole application afresh, and to give effect to such order within 30 days of the grant of this Order. Naturally, such order does not and cannot in any manner infringe on the Parole Boards discretion in determining whether or not to grant the Applicant parole.

[47] In paragraph 3 the Applicant seeks an order, alternatively to the relief sought in paragraph 1, that to the extent that clause 5.3.1 of the Circular applies to the Applicant, that such clause be declared irrational and unlawful.

[48] I am satisfied that clause 5.3.1 of the Circular is not applicable to the Applicant, as the various counts do not need to be determined separately, as it is only one sentence, being an effective period of 15-years, that needs to be taken into account. Clause 5.2.1 of the Circular would only apply to convicted offenders who are convicted of more than one offence, at different times, and in respect of separate warrants of sentence.

[49] In the circumstances, there is no basis for me to declare clause 5.3.1 of the Circular to be irrational and unlawful, or to order that the Circular be referred to the Fourth Respondent (the Minister of Correctional Services and Constitutional Development) for reconsideration.

[50] In paragraph 4 of the Notice of Motion the Applicant seeks an order for costs as against any Respondent who opposes the relief sought in the Application.

[51] It appears from the Notice of Opposition filed, that all four of the Respondents opposed the Application, through the offices of the State Attorney.

[52] In the circumstances, any cost order would be applicable to all four of the Respondents.

[53] Having regard to the nature of the Order I intend to make, there is no reason why the normal costs order of the costs following the result should not apply.

THE ORDER

[54] In the circumstances, I make the following order:

[54.1] The decision of the First Respondent to not consider the Applicant for parole is set aside;

[54.2] The First Respondent is ordered to take all such steps that are necessary in order to consider the Applicant for parole, within 30-days of the granting of this Order:

[54.3] In considering the Applicant's entitlement for parole, the First Respondent is to accept that the Applicant qualifies for the Special Parole Dispensation, and that the Applicant's Minimum Detention Period date is 1 March 2025;

[50.3] The Respondents, jointly and severally, are ordered to pay the costs of the Application.

G NEL

**[Acting Judge of the High Court,
Gauteng Division,
Pretoria]**

Date of Judgment: **7 June 2023**

APPEARANCES

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