

Reportable	YES / NO
Circulate to Judges	YES / NO
Circulate to Magistrates	YES / NO
Circulate to Regional Magistrates:	YES / NO



IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]

CASE NUMBER: KS 56/00

DINGAAN ALPHEUS KHALO

APPLICANT

AND

THE STATE

RESPONDENT

Date heard : 07/11/2013
Date of judgment : 08/11/2013
Coram: : Olivier J et Phatshoane J

JUDGMENT

OLIVIER J.

1. On 21 June 2001 the applicant, Mr DA Khalo, was sentenced to a total of 84 years imprisonment on charges of theft, robbery with aggravating circumstances, attempted murder and the illegal possession of fire-arms. An order that some of the sentences be served concurrently resulted in an effective sentence of 56 years. It was recommended that the applicant not be considered for parole before having served 35 years imprisonment.
2. On 9 September 2002 a Full Bench of this Court confirmed these sentences, but made a different order regarding the concurrent serving of sentences,

resulting in an effective term of 41 years imprisonment. It was recommended that the applicant serve at least 20 years of the effective period of imprisonment before being considered for parole.

3. The judgment of the Full Bench (under case number KS 56/00) has been reported in SAFFLII under the neutral citation [2002] ZANCHC 26. In view of what follows I quote the relevant part of this judgment, which can be found on page 27 immediately after the orders in respect of the applicant (who was the fourth appellant in that matter):

“Die Vierde Appellant word dus ‘n effektiewe vonnis van 41 jaar gevangenisstraf opgelê. Dit word **aanbeveel** dat die Vierde Appellant nie vir parool oorweeg word alvorens hy 20 jaar van die gevangenisstraf uitgedien het nie.”

(my emphasis)

4. On petition by the applicant and some of his co-accused the Supreme Court of Appeal on 1 April 2003 refused leave to appeal against the sentences.
5. In January 2009 the applicant filed an application for leave to appeal (apparently against his convictions) to the Constitutional Court. On 5 November 2010 the Chief Director in the office of the Chief Justice informed the applicant as follows:

“This is not a matter to be considered by the Constitutional Court at this stage. If you feel that your constitutional rights have been infringed we would advise you at this stage to rather approach the relevant High Court or the Supreme Court of Appeal for relief.

If you want to bring a direct application to this Court, you have to do so in terms of the Rules of the Court “

6. The papers in the present application also include what purports to be a notice of motion¹ dated 22 June 2009, and a number of annexures thereto, in which the applicant sought condonation for the late noting of that application and the antedating of his sentences² to 21 June 2001³, based on the fact that he had spent a period of one year and four months in custody awaiting trial. It appears as if that “*application*” never proceeded to Court.

¹ Not in the proper form and without any founding affidavit

² Presumably with reference to the sentences as they appeared after the judgment of the Full Bench.

³ Being the date on which the applicant’s sentences were originally imposed upon his convictions.

7. On 25 September 2012 the applicant filed another notice of motion, this time with a founding affidavit by himself. According to its introductory paragraphs it was intended to be “*an application for reconsideration of sentence*” and for “*relief against a non-parole order of the full bench*”.
8. From heads of argument signed by the applicant himself on 14 October 2013 and from his affidavits it appears that his submissions are basically
 - 8.1. that the Full Bench erroneously “*imposed*” or “*fixed*” a non-parole period of 20 years;
 - 8.2. that his sentences should be antedated (according to the submission in his personal heads of argument to the date of his arrest⁴); and
 - 8.3. that this Court has the jurisdiction to entertain such an application.
9. As regards the last submission Mr Van Tonder, who appeared before us on behalf of the applicant, correctly conceded that this Court does in fact not have such jurisdiction. The applicant has exhausted the remedies provided by way of appeal and there simply is no procedural provision for an application like this. It constitutes a challenge to orders made by both the trial Court and the Full Bench and could and should have been raised on appeal to the Full Bench and on petition to the Supreme Court of Appeal.
10. This should really be the end of the present application, but I will very briefly deal with the two other submissions.
11. As regards the issue of antedating, the provisions of s 282 of the Criminal Procedure Act⁵ make it absolutely clear that a sentence can only be antedated as far back as the date on which the original sentence was imposed. It is equally clear that even this could only be done by a Court on appeal or on review, which is not the case here.

⁴ And not just to the date of his sentences, as sought in the papers of June 2009.

⁵ 51 of 1977

12. The provisions of s 282 make it equally clear that antedating would in any event only be possible where a sentence of imprisonment is “*set aside*” and a sentence of imprisonment is “*thereafter imposed ... in respect of such offence in place of the sentence of imprisonment imposed on conviction*”.
13. The Full Bench did not set aside any of the applicant’s original sentences and did not impose new sentences in their place. In fact, it appears⁶ that the individual sentences and the findings (where applicable) that there were no substantial and compelling circumstances were not challenged by the appellants, but rather the cumulative effect of the sentences.
14. The applicant’s reliance on s 1(11) of the Criminal Law Amendment Act⁷ is misplaced. That section deals with sentences of imprisonment substituted for death sentences, which is obviously not the case here, and it in any event provides that such a sentence cannot be antedated to a date “*earlier than the date on which the sentence of death was imposed*”⁸.
15. This brings me to the submission regarding the issue of parole.
16. Neither the trial Court nor the Full Bench “*imposed*” or “*fixed*” a non-parole period and neither Court made an order purporting to “*prescribe to the Executive Branch of Government as to how and how long convicted person be detained*”, as put by the applicant in paragraph 4 of his own heads of argument. Both Courts made it clear that it was merely recommended that parole not be considered before the applicant had served a certain portion of his effective term of imprisonment.
17. In his judgment for the Full Bench Majiedt J (as he then was) in fact distinguished between a recommendation and the actual imposing or fixing of a so-called non-parole period:

⁶ See para 17.2 of that judgment.

⁷ 105 of 1997

⁸ Which would in any event have made antedating to the date of arrest impossible.

“‘n Aanbeveling is egter allermens ‘n voorskrif of lasgewing.‘n Geregshof wat ‘n aanbeveling doen ten aansien van parool poog nie om ‘n bevoegdheid uit te oefen nie. Sien **S v Maseko** 1998(1) SASV 451(T) te 459h-i waar Swart R hom soos volg uitlaat:

‘Grobelaar R was natuurlik bewus daarvan dat die appellant op parool uitgelaat kon word. Ek dink nie dat hy, soos beweer, misgetas het nie. Ek dink nie hy wou aan die gevangenisowerhede voorskryf nie. **Hy het ‘n aanbeveling gemaak, wat nie bindend is nie**, maar wat aanduidend is van sy mening oor die verloop van tyd voordat parool oorweeg moet word.’

Ek vereenselwig my met respek met hierdie siening.”⁹

(My emphasis)

18. The applicant is correct in his submission that the Full Bench would not before the coming into operation of s 276B of the Criminal Procedure Act¹⁰ have been competent to fix a period during which an accused would not be eligible for parole, but as already said this is not what was done here.
19. In a letter dated 4 September 2013 the chairperson of the relevant Case Management Committee, which has to report to the Correctional Service and Parole Board on the possibility of the placement of a prisoner on parole¹¹, stated that the applicant would in the normal course of events be entitled to be considered for parole after having served a third of his effective term of imprisonment and that:

“The court on sentencing has recommended that the offender be placed out after serving three quarter ($\frac{3}{4}$) of his sentence. We request that the honourable court reconsider the recommendation or instruction to make it easy for correctional services to apply its policies.”
20. The period recommended by the Full Bench is obviously not three quarters of the effective sentence of 41 years. It would amount to just more than half of the effective sentence.
21. More importantly, however, the Full Bench did not issue any instruction in this regard. It would not have been competent to do so. It merely made a recommendation, after in fact confirming the difference between making such

⁹ Sien para 15.2 van die uitspraak, op bladsye 17-18 daarvan.

¹⁰ Inserted by s 22 of Act 87 of 1997 with effect from 1 October 2004.

¹¹ See s 42 of the Correctional Services Act, 111 of 1998.

a recommendation, on the one hand, and making an order that parole not be considered for a certain period of time, on the other hand .

22. Although the desirability of such a recommendation may be debateable¹², this has with the introduction of s 276B of the Criminal Procedure Act to a large extent become a moot issue. The fact remains, however, that it has to my mind never been held to be wrong in law or unconstitutional to make such a recommendation.
23. It was not in the letter explained why or how the recommendation made by the Full Bench would complicate the consideration of parole once the applicant has served a third of the effective term of imprisonment, but not yet the recommended period of 20 years imprisonment.
24. It was, as already pointed out, made very clear by the Full Bench that it was not issuing an instruction, but merely making a recommendation which would not in itself be binding on the relevant authorities.
25. The applicant has also not in any of his affidavits or in his personal heads of argument explained how the mere existence of a non-binding recommendation would be an obstacle when his placement on parole is considered.
26. In fact, and as already indicated, he appears to labour under the erroneous impression that the Full Bench made an order to the effect that he should not be considered for parole before having served a period of 20 years imprisonment.
27. Mr Van Tonder has conceded that the application for “*reconsideration*” is based on a misinterpretation of the Full Bench judgment.
28. To the extent that this may also be the impression of the chairperson of the relevant Case Management Committee it would in my view be in the interests

¹² Compare **S v Makena** 2011 (2) SACR 294 (GNP); **S v Stander** 2012 (1) SACR 537 (SCA) para [11].

of justice if an order is made that this judgment be brought to the attention of the chairperson and of that committee.

In the premises the following orders are made:

- 1. The application is dismissed.**
- 2. The Registrar shall furnish a copy of this judgment to the chairperson of the Case Management Committee at JHB Correctional Central B, Private Bag X04, Mondeor, 2110 and to the applicant himself.**

CJ OLIVIER
JUDGE

I agree.

MV PHATSHOANE
JUDGE

For the applicant:	Mr A van Tonder <i>instructed by</i> Justice Centre, Kimberley
For the respondent:	Adv. T Barnard <i>instructed by</i> DPP, Kimberley

