

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) **NOT** REPORTABLE
(2) **NOT** OF INTEREST TO OTHER JUDGES

CASE NO: 2024-134587

DATE: 9 December 2024

In the matter between:

ZIGGY XOLANELE NDHLOVU	Applicant
and	
THE CORRECTIONAL SUPERVISION AND PAROLE BOARD, KGOSI MAMPURU II CENTRAL	First Respondent
THE HEAD OF PRISON, KGOSI MAMPURU II CENTRAL	Second Respondent
THE AREA COMMISSIONER, KGOSI MAMPURU II CENTRAL	Third Respondent
THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	Fourth Respondent
THE MINISTER OF CORRECTIONAL SERVICES	Fifth Respondent
THE MINISTER OF HOME AFFAIRS	Sixth Respondent
THE DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS	Seventh Respondent

Neutral Citation: *Ndhlovu v The Correctional Supervision and Parole Board,
Kgosi Mampuru II Central and Others (2024-134587) [2024]*
ZAGPJHC --- (9 December 2024)

Coram: Adams J

Heard: 28 November 2024

Delivered: 9 December 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 12:30 on 9 December 2024.

Summary: Civil procedure – urgent application – for final relief –

Application for the judicial review and setting aside of decision by the Parole Board not to release the applicant on parole – application furthermore for an order directing the respondents to remove from his Correctional Services profile the 'foreign national' classification and to replace same with the correct classification, that being one of 'South African national' –

Factual dispute to be decided on the basis of the *Plascon-Evans* rule – respondents' version cannot and should not be rejected on the papers –

PAJA judicial review application not to be granted if available internal remedies had not been exhausted –

Urgent application dismissed – applicant granted alternative relief to progress his matter further.

ORDER

- (1) The first to fifth respondents are ordered and directed to comply fully within one month from date of this order with the order of this Court (per Du Plessis AJ) dated 22 August 2024.
 - (2) Save as aforesaid, the applicant's urgent application is dismissed with no order as to costs.
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JUDGMENT

Adams J:

[1]. This is an opposed urgent application by the applicant, a serial urgent applicant in this court, for an order reviewing and setting aside an alleged decision taken by the first respondent (Parole Board) on 12 November 2024 in terms of which the applicant's application to be released on parole was allegedly denied. The applicant is presently serving a sixteen-year sentence at the Kgosi Mampuru Central (Medium) Prison in Pretoria, which sentence was imposed during 2014, after his conviction on charges of attempted murder, impersonating a police officer and possession of an unlawful firearm. He also applies for an order directing the second, third, fourth and fifth respondents to remove from his Correctional Services profile the 'foreign national' classification and to replace same with the correct classification, that being, according to the applicant, one of 'South African national'. Lastly, the application is for an order that the first respondent be directed to release the applicant on parole within seven days.

[2]. It is the case of the applicant that a meeting was scheduled for 12 November 2024 between himself and the Parole Board at which meeting he was to be considered for release on parole after having served almost eleven years of his sixteen years sentence. However, at the meeting he was informed

that his parole application would not be considered because his address had not been verified. Moreover, so the applicant was informed, he could not be considered for release on parole as he was still classified as a foreign national, which disqualifies him from consideration for release on parole.

[3]. The applicant is aggrieved by the foregoing stance of the Parole Board, as, according to him, the real reason for him not being considered for release on parole is the fact that, according to the records of the Correctional Services, he is incorrectly classified as a foreign national. This means, according to the Parole Board, that the applicant is not eligible for release on parole and that he is to be deported to his country.

[4]. The applicant is adamant that he is a South African national and that the records of Correctional Services incorrectly reflect him as being a foreign national. In support of his foregoing contention, the applicant drew the court's attention to the fact that during August 2024, this court (per Du Plessis AJ) issued an order which 'required' the respondents to verify whether the identity document of the applicant is indeed a valid South African identity document. Once the Applicant's nationality is verified, so the order reads, this should reflect correctly on the correctional services system.

[5]. The applicant alleges that such verification was in fact subsequently done by an official from Kgosi Mampuru Prison, but despite such verification, the respondents refuse to accept that he is indeed a South African National.

[6]. The difficulty with the applicant's case is that, despite the tedious history of the dispute between the applicant and the Correctional Services authorities, there presently remains a factual dispute between them in relation to a material aspect, that being the applicant's nationality. Despite applicant's protestations to the contrary, that is not a dispute that can, without more, be decided on the papers. The respondents aver that the documentary evidence in support of the applicant's claim – such as his abridged birth certificate, his smart identity card and the confirmation from the Department of Home Affairs that he is indeed a

South African national – that he is a South African, born and bred, are questionable. The allegation in the respondents' answering affidavit in this application is that the applicant's claim that he is a South African national is negated by the fact that, according to their records and presumably that of the Department of Home Affairs, the person who the applicant alleges to be his mother does not have a son by the name of that of the applicant. Therefore, so the contention on behalf of the respondents goes, the applicant's claim that he is South African is false, despite all of the documentary evidence which the applicant came up with in this and other applications before this court.

[7]. For this reason alone, the applicant's application should fail. The simple point being that, applying the so-called *Plascon Evans*¹ rule, I have to accept the version of the respondents as it cannot be said with any conviction that such version in relation to the disputed issue is so far-fetched and untenable that it can be rejected on the papers.

[8]. The second difficulty with the applicant's cause, which he says is an application for a judicial review of the decision by the Parole Board, is that, even if one is to accept that they made a reviewable decision on 12 November 2024 not to consider that the applicant should be released on parole, the applicant failed to exhaust the available internal remedies. This point is closely related to the requirement that an applicant for final interdictory relief is required to demonstrate that he or she has no alternative remedy available to him or her.

[9]. As correctly contended by the respondents, the Correctional Services Act 111 of 1998 (the Correctional Services Act) provides that inmates who are

¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) Sa 623 (A) at pp 634 and 635 held as follows: -

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact ... Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers ...'.

dissatisfied with any decision of the Parole Board should approach the Parole Review Board to have reviewed such a decision. Section 75 of the said Act deals with the powers, functions and duties of Correctional Supervision and Parole Boards and s 75(8) provides as follows:

‘8 A decision of the Board is final except that the Minister, the National Commissioner or the Inspecting Judge may refer the matter to the Correctional Supervision and Parole Review Board for reconsideration in which case –

- (a) the decision of the Board is suspended pending the outcome of the Correctional Supervision and Parole Review Board; and
- (b) the record of the proceedings before the Board must be submitted to the Correctional Supervision and Parole review Board.’

[10]. Section 77 of the Act provides, under the heading ‘Powers of Correctional Supervision and Parole Review Board in respect of cases decided by Correctional Supervision and Parole Board’, as follows: -

‘(1) On consideration of a record submitted in terms of section 75 and any submission which the Minister, National Commissioner, Inspecting Judge or the sentenced offender concerned may wish to place before the Correctional Supervision and Parole Review Board must –

- (a) confirm the decision; or
 - (b) substitute its own decision and make any order which the Correctional Supervision and Parole Board ought to have made.
- (2)’.

[11]. The simple point is that, in order for the matter to reach the Parole Review Board, the Record and formal decision taken by the Parole Board must be sent to the Parole Review Board to review the Parole Board's decision substituting its own decision prior to approaching this Court. That applies even in the case of the Parole Board refusing to take a decision as the applicant alleges is the case *in casu*. The respondents, on the other hand, contend that no such formal hearing by the Parole Board has taken place resulting in no formal decision being made.

[12]. Section 7(2) of the Promotion of Administrative Justice Act² (PAJA), provides as follows: -

‘(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.’

[13]. On the basis of this provision of PAJA, the applicant is not entitled to the relief sought by him.

[14]. Having said that, I am of the view that, under the heading ‘Further and/or alternative relief’, the applicant is entitled to an order placing the first to fifth respondents on terms to comply with the order of this Court (per Du Plessis AJ) dated 22 August 2024. That order reads as follows: -

- ‘(1) The First to Fifth Respondents are required to verify whether the identity document of the Applicant is indeed a valid South African identity document. Once the Applicant’s nationality is verified, this should reflect correctly on the correctional services system.
- (1) The application is postponed sine die for First to Fifth Respondents to provide proof clarifying Applicant’s prison status, whether Applicant is classified as a medium or maximum offender in terms of its Records.’

[15]. It is, as submitted by the applicant, that the respondents appear to be dragging their heels in that some three months from the date on which the said order was granted, there has been little progress in the verification of the nationality of the applicant. I therefore think that the respondents should be ordered to comply with Du Plessis AJ’s order within a reasonable specified period of time, which, in my view, should be one month.

² Promotion of Administrative Justice Act 3 of 2000.

[16]. For all of these reasons, subject to the granting of the aforesaid compelling order, the applicant's urgent application must fail.

[17]. I conclude, in sum, that the applicant's application falls to be dismissed.

Order

[18]. In the result, I make the following order:

- (1) The first to fifth respondents are ordered and directed to comply fully within one month from date of this order with the order of this Court (per Du Plessis AJ) dated 22 August 2024.
- (2) Save as aforesaid, the applicant's urgent application is dismissed with no order as to costs.



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	28 November 2024
JUDGMENT DATE:	9 December 2024 – Judgment handed down electronically
FOR THE APPLICANT:	Q Khumalo
INSTRUCTED BY:	Quinton Khumalo Incorporated, Germiston
FOR THE RESPONDENTS:	M Ali
INSTRUCTED BY:	The State Attorney, Johannesburg