IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 052550/2024

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

[redacted]

03 JUNE 2026

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SIGNATURE **DATE**

In the matter between:

LUPHONDO, DESAI Applicant

and

MINISTER OF JUSTICE First Respondent

PRESIDENT C M RAMAPHOSA Second Respondent

JUDGMENT

LABUSCHAGNE J:

[1] The applicant is a prisoner at Leeuwkop Maximum Security Facility sentenced to 35 years imprisonment for, inter alia, attempted murder. At the time this application was heard, he had served 10 years.

[2] The applicant seeks a remission of sentence from the President in terms of his powers under the Correctional Services Act (Correctional Services Act), [1] and the Constitution of the Republic of South Africa, 1996 (Constitution).

[3] He drafted papers for the President to consider remission and was advised by representatives of the Office of the President that the President would only respond to a recommendation by the Minister of Justice before he exercised his powers in terms of section 84(2)(j) of the Constitution.

[4] The applicant brought the current proceedings but was not assisted by the Minister of Justice. The Minister of Justice contends that the President, when granting remission of sentence, does so by means of Proclamation. In the last Proclamation, which was published in August 2024, the President excluded certain categories of convicted prisoners from consideration. The applicant, being convicted of serious offences including attempted murder, was in an excluded category. The Minister consequently refused to consider the application or to make a recommendation to the President regarding the remission of sentence.

[5] The applicant brings a review application in which he seeks an order setting aside the Minister of Justice's failure or refusal to furnish the President with

[1] 111 of 1998.

the recommendation as required by the regulations and/or guidelines made under section 82(1)(b) of the Correctional Services Act read with section 84(2)(j) of the Constitution.

[6] The applicant seeks an order setting aside the failure by the Minister to decide to give effect to the applicant's section 33 rights. He seeks such relief in terms of section 6(2)(i) of Promotion of Administrative Justice Act[2] (PAJA).

[7] The substantive order that the applicant seeks is an order directing the Minister of Justice to consider the applicant's application and, within 14 days to make a recommendation to the President, either for or against the granting of the remission of the remaining portion of the sentence of the applicant. The applicant further seeks an order that the President is directed within 30 days of receipt of the recommendation to decide whether or not to grant the remission applied for and for reasons to be provided to the applicant in the event that the second respondent declines the application. During the course of the hearing, it became apparent that this latter relief was abandoned by the applicant.

[8] Both the Minister of Justice and the President were represented by counsel.

[9] Counsel for the Minister of Justice reiterated that the President's Proclamations on remission exclude persons like the applicant by virtue of the nature of the offence for which he was convicted. The Minister cannot make recommendations outside of the Proclamations and the categories of

[2] 3 of 2000.

prisoners in respect of whom the President is prepared to exercise his powers to grant remission.

[10] The relief aimed at an order setting aside the President's failure to exercise his powers are further not competent. The President's exercises of public power are required by law to be in writing (See section 101(1)(a) of the Constitution)

[11] The applicant has in the course of his address disclosed that he is a party to proceedings before the Constitutional Court in which he seeks to introduce new evidence aimed at a remittal to trial.

[12] The applicant is also on the list of witnesses for the Madlanga Commission before whom he intends making disclosures.

[13] None of the evidence or the intended disclosures before the Madlanga Commission serves before this court.

[14] It is for the Minister of Justice to decide whether he intends making a recommendation or not, and quite clearly the applicant has failed to pass muster in this regard.

[15] Further, despite the court asking whether the applicant's purposes would not better be served by awaiting the proceedings before the Constitutional Court and his evidence before the Madlanga Commission and then to introduce whatever disclosures are contained therein for purposes of his application to

be favourably considered for remission. The applicant requested the court to decide the matter on the papers as they are.

[16] DISCUSSION:

Section 82(1)(a) of the Correctional Services Act provides that:

"(1) Despite any provision to the contrary, the President may –

(a) At any time authorise the placement on correctional supervision or parole of any sentenced offender, subject to such conditions as may be recommended by the Correctional Supervision and Parole Board under whose jurisdiction such sentenced offender may fall or in the case of a person serving a life sentence, by the Minister; and

(b) Remit any part of a sentenced offender's sentence."

Section 84(2) (j) of the Constitution provides that:

"(2) The President is responsible for-

(j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures; and

[17] The Court stated the following in *Chonco*:[3]-

"The powers granted by section 84(2) are now clearly original constitutional powers. Section 84(2)(j) is the source of the power, function and obligation to

[3] *Chonco n1* at para 30.

> decide upon applications for pardon. Though there is no right to be pardoned, the function conferred on the President to make a decision entails a corresponding right to have a pardon application considered and decided upon rationally, in good faith, in accordance with the principle of legality, diligently and without delay. That decision rests solely with the President."

[18] The power to grant a remission of sentence vests in the President. He may be petitioned for the exercise of such powers. Where the President has decided to act on recommendation of the Minister, even if this is not prescribed in the empowering statute, the applicant may approach the Minister for such a recommendation. The decision on whether to make such a recommendation or not is the decision of the Minister on the facts provided. A Court will defer to the Minister in this regard. Deference is not a courtesy. It is a product of the rule of law.

[19] The court expressed the following view on deference in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (Bato Star Fishing)*,[4]

> "A judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and

[4] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 46.

> maladministration. It ought to be shaped not by an unwillingness to scrutinize administration action, but by a careful weighing up of the need for and the consequences of judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal." Schutz JA continues to say that "judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function". I agree. The use of the word "deference" may give rise to misunderstanding as to the true function of a review court. This can be avoided if it is realised that the need for courts to treat decision makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself."

[20] The applicant has asserted various grounds which he contends are sufficient for a recommendation. I do not repeat them but do not find them compelling. The Minister has not considered these grounds as he has excluded the applicant on policy grounds. It suffices to state that the court will defer to the Minister. However, a cautionary comment is apposite. A rigid adherence to policy may be irrational where compelling evidence is disregarded. I do not regard this as one of those instances, as the grounds advanced would be insufficient to warrant a positive recommendation. Further, the period served is inadequate to trigger intervention on humanitarian grounds. Justice and mercy are kinsmen, but the interests of society are best served by the rule of law. Where compelling grounds are advanced but are not considered, the applicant may have a cause of action.

[21] The applicant has not utilised whatever information he seeks to introduce through the proceedings in the Constitutional Court and before the Madlanga

Commission to try and bolster his chances for obtaining remission. Had compelling evidence served before this court which the Minister refused to consider on policy grounds, then his inaction may be irrational. In the absence of compelling evidence, the application fails to gain traction.

[22] In the light thereof, the application must fail.

[23] As the applicant is asserting his constitutional right to freedom of the person, I am satisfied that the **Biowatch** principle finds application.

[24] In *Biowatch Trust v Registrar Genetic Resources and Others (Biowatch)*[5] the Constitutional Court found:

> "If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door"

[25] In the premises I make the following order:

1. The application is dismissed.

2. No order as to costs.

[5] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) at para 23.

[redacted]

LABUSCHAGNE J

JUDGE OF THE HIGH COURT

APPLICANT: IN-PERSON MR LOPHONDO

COUNSEL FOR FIRST RESPONDENT: ADV MASHELE

COUNSEL FOR SECOND RESPONDENT: ADV MAGANO