

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 35658/2021

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED NO

30/09/2021


Judge Dippenaar

In the matter between:

ERWIN SMITH

Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

1st Respondent

**NATIONAL COMMISSIONER FOR THE DEPARTMENT
OF CORRECTIONAL SERVICES**

2nd Respondent

**DEPARTMENT OF CORRECTIONAL SERVICES
GAUTENG MANAGEMENT AREA, REGIONAL
MANAGER**

3rd Respondent

DEPARTMENT OF CORRECTIONAL SERVICES

**KRUGERSDORP CORRECTIONAL CENTRE
HEAD OF PRISON**

4th Respondent

**DEPARTMENT OF CORRECTIONAL SERVICES
LEEUEWKOP CORRECTIONAL CENTRE HEAD OF PRISON**

5th Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 14h00 on the 30th of September 2021.

DIPPENAAR J:

[1] This an opposed urgent application, conducted via a virtual hearing, in which the applicant, Mr Smith, presently incarcerated at the Leeuwkop Correctional Centre, seeks orders: (i) declaring and confirming that the applicant qualifies for the Covid-19 special remission of sentence and (ii) granting the respondents one month to complete the parole release process of the applicant.

[2] The matter was first enrolled for hearing on 17 September 2021, at which time the respondents sought a postponement of the application as their legal representatives had been instructed late and had no opportunity to deliver answering papers. Pursuant to argument from the parties an order was granted, inter alia setting time periods for the delivery of affidavits and heads of argument, requiring an explanation for the delay and directing the provision of certain documents considered at the time a decision was made that the applicant did not qualify for the special remission of sentence.

[3] In terms of the explanatory affidavit, the regrettable and inexcusable delay and the respondents' failure to comply with the directives set by the Judge President and this court, was occasioned by the negligent conduct of the acting deputy state attorney, who

had delayed in appointing the present attorney of record of the respondents and administrative delays in obtaining the necessary authority to instruct counsel due to “human error”. I return to this issue later in considering an appropriate order for costs.

[4] A measure of latitude must be afforded to the applicant who is not legally trained and did not have the benefit of legal representation. In essence his application amounted to a review of the decision that the applicant did not qualify for a special parole dispensation granted by President Ramaphosa under s84(2)(j) of the Constitution pursuant to the National State of Disaster and the Covid 19 pandemic (“the special parole dispensation”). It was not clear from the founding affidavit which aspects fell under the auspices of the Promotion of Administrative Justice Act¹.

[5] The central issues which arise for determination are: first, whether the applicant had launched a valid application under the Promotion of Access to Information Act² (“PAIA”), for access to the confidential memorandum pertaining to the special parole dispensation in which confidentiality was claimed and to which no response was provided; and second, whether the applicant qualifies under the special parole dispensation and is entitled to the relief sought in his notice of motion.

[6] The first issue can be disposed of succinctly. Although the applicant may have been under the impression that his former legal representatives had launched an appropriate application under PAIA to obtain access to the confidential memorandum indicating the criteria for eligibility for the special parole dispensation, the purported application was fatally defective. I agree with the respondents that the application for access to the memorandum did not comply with the peremptory³ procedural requirements envisaged in s18 as read with s11(1)(a) of PAIA and was also defective in various additional respects. It is not for present purposes necessary to set out all the defects in

¹ 3 of 2000

² 4 of 2000

³ President of the Republic of South Africa v M&G Media Ltd 2012 (2) SA 50 (CC) para [9]

the application as the issue has become moot and the documentation sought by the applicant has been provided by the respondents.

[7] Two documents, the one styled “Circular 13 of 2019/20 Granting of Special Remission of Sentence (Amnesty)” and the other styled “Branch Incarceration and Corrections Circular 10 of 2020/2021 (“the circular”) were produced in the respondents’ answering papers and reliance was placed on their contents in support of their contention that the applicant did not meet the eligibility criteria set out therein. Suffice it to state that it cannot be concluded that the respondents ignored the applicant’s PAIA application and disregarded the applicant’s rights in relation to this issue as it was fatally defective.

[8] The central focus of the parties’ respective arguments at the hearing pertained to whether the applicant qualified for the special parole dispensation and met the relevant eligibility criteria. The point of departure between the parties was how the relevant time periods should be calculated to determine the applicant’s eligibility.

[9] It was common cause that the applicant was serving sentences under two different warrants. The first, a period of fifteen years under four different counts of fraud under s 280(2) of the Criminal Procedure Act⁴, in terms of a warrant dated 31 January 2018. In terms of that warrant, certain of the sentences were to run concurrently⁵, with an effective incarceration period of fifteen years. The second, a period of three years in terms of s276(1)(i) of the CPA in terms of a warrant dated 6 December 2018. It was common cause that the applicant is thus serving a total of eighteen years imprisonment before the remission of sentence of twenty four months received by the applicant during 2019.

[10] The circular authorised the placing on parole of qualifying sentenced offenders in terms of the certain criteria mentioned therein, who are or who would have been incarcerated on 27 April 2020, subject to such conditions as may be approved by the

⁴ 51 of 1977

⁵ The 15 years imposed under counts 2 and 4 ran concurrently with the 15 year sentence imposed in count 1 and a suspended sentence was imposed in count 3

head of a correctional centre or a correctional supervision and parole board under whose jurisdiction such sentenced offenders may fall. In terms of the circular, considered in context, a final determination on the eligibility of the applicant to be released on parole is to be made by the parole board.

[11] Under paragraph 2.1 of the circular:

“The following category of low risk sentenced offenders would qualify for the presidential placement on parole, subject to the exclusions in paragraph 3:

2.1.1 sentenced offenders who have or have reached their minimum detention periods within a period of 60 months from the 27th of April 2020”.

[12] Under paragraph 4.2 of the circular:

“This means that sentenced offenders who have served their minimum detention period and those who have reached their minimum detention on or before 26 April 2025 may qualify to be placed on parole”.

[13] The respondents' case was that at the time he was considered, the applicant's profile indicated that his minimum detention date was 30 January 2026 and he was thus disqualified from the dispensation as he did not reach his minimum detention period by 26 April 2025 as the warrants indicated that he was effectively serving an eighteen year sentence. On the other hand, the applicant's case was that he was left with four years, ten months and three days, being less than five years to his eligible parole date as at 27 April 2020 and thus that he qualified for the special parole dispensation.

[14] Prior to the hearing of the application and on 27 September 2021, the case management committee again considered the applicant's eligibility and concluded that he did not meet the requisite threshold date of 26 April 2025, as he would only be eligible on 30 September 2026.

[15] The case management committee found⁶:

“3 Calculation

Offender must serve half of 15 years sentence as the remission cannot be deducted from warrant 1 (see explanation of Mr Twala attached) which makes his minimum detention period for warrant 1 2025-07-30. When the twenty four months special remission is deducted from the three (3) years the offender is left with one (1) year which he must only serve two (2) months of. Adding it to first sentence takes his minimum detention period to 2025-09-30.

Recommendation

The offender is currently serving fifteen (15) years imprisonment for 4x counts of fraud and three (3) years imprisonment for fraud into (sic) section 276(i) (sic). His minimum detention period is 2025/09/30. For an offender to qualify for Special Parole Dispensation his minimum detention period must be before 26 April 2025. Therefore the offenders (sic) does not qualify to be considered for parole”.

[16] The applicant only became aware of this information and the recommendation of the case management committee shortly before the hearing of the application on 29 September 2021. He confirmed that he had not had the opportunity to make submissions to the case management committee.

[17] In terms of s73(1)(a) of the CSA, subject to the provisions of that act, a sentenced offender remains in a correctional centre for the full period of sentence. S 73(6)(a) and s73(7)(a) of the CSA prescribes the minimum periods of incarceration before a sentenced offender may be placed on parole, being in the applicant’s case one half of the fifteen year sentence and one sixth of the 3 year sentence.

[18] As envisaged by s42(2)(c) and (d) of the Correctional Services Act⁷ (“CSA”), the case management committee must make preliminary arrangements, in consultation with

⁶ The document is erroneously dated 27 09 2020

⁷ 111 of 1998

the head of community corrections for possible placements of a sentenced offender under community corrections. The case management committee must further submit a report, together with the relevant documents, to the correctional supervision and parole board traversing various requirements.

[19] In terms of s42(3) of the CSA,:

“A sentenced offender must be informed of the contents of the report submitted by the Case Management Committee to the Correctional Supervision and Parole Board or the National Commissioner and be afforded the opportunity to submit written representations to the Correctional Supervision and Parole Board or National Commissioner, as the case may be.

[20] The subsequent events have in my view to a large extent superceded the state of affairs at the time the application was launched. As matters presently stand, it is unclear whether the applicant has been furnished with the entire report of the case management committee as envisaged by s42(3) of the Act. The applicant has further not been afforded an opportunity to make any submissions to the case management committee.

[21] At present there are also certain discrepancies between the applicant's SAPS 69 and the actual position as explained by the applicant during the hearing, which requires clarification. During the hearing, the applicant indicated that he had no pending trial matters, whereas the SAPS 69 document indicated various matters outstanding.

[22] Under those circumstances it is not appropriate at this stage to consider whether the decision of the case management committee should stand or whether the applicant is entitled to the relief sought, which would amount to a substitution of the determination whether the applicant is eligible for the special parole dispensation. The applicant must further still be assessed and considered by the correctional supervision and parole board and consideration must be given to the relevant provisions of the Act including those in s75 and the mechanisms provided therein. These procedures must be followed prior to the consideration of any review proceedings.

[23] The applicant urged me to now make a decision regarding his eligibility for the special parole dispensation. I decline to do so for the following reasons. First, it would be premature for the reasons already advanced. The applicant has not been furnished with the report as envisaged by s42(2) (d) of the Act, he is still to be afforded an opportunity to make submissions under s42(3) of the Act and the matter is to receive attention from the parole board. As such any review proceedings are premature and not ripe for hearing. Second, the applicant has not in his papers made out any clear case for exceptional circumstances, applying the principles enunciated by the Constitutional Court in *Trencon Construction v Industrial Development Corporation of South Africa (Pty) Ltd*⁸.

[24] In my view it would be appropriate to order a remittal to the case management committee so that the relevant procedures envisaged by the CSA can be pursued. Considering the substantial delays which have occurred in the matter it would be appropriate to set reasonable timelines so that any further delays can be avoided.

[25] The applicant sought a costs order against the respondents based on what he termed their “mala fide conduct” in relation to the matter. Although the respondents’ conduct can be characterised as negligent and remiss, specifically in relation to this application, I am not persuaded that the conduct was mala fide. There is however merit in the applicant’s contention that the matter was only progressed once he approached court for relief. Had the applicant been legally represented, the granting of a punitive costs order against the respondents would have been warranted. However, as the applicant appeared in person and was not legally represented, I am not persuaded that such an order would be appropriate and I shall make no order as to costs.

[26] I grant the following order:

[1] The matter is remitted back to the case management committee for the consideration of any submissions to be made by the applicant, Mr Smith, pertaining

⁸ 2015 (5) SA 245 (CC) paras [47]-[55]

to the recommendation made by the case management committee on 27 September 2021, contained in “MM19” of the papers;

[2] The report envisaged by s42(2)(d) of the Correctional Services Act 111 of 1998 is to be provided to the applicant, Mr Smith, within 10 days of its compilation and in any event no later than 20 days from date of this order;

[3] The applicant, Mr Smith, is to make his submissions within 10 days of date of receipt of the report in [2] above;

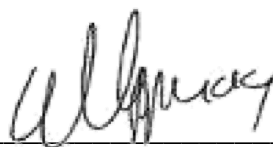
[4] The case management committee is to consider any submissions made by the applicant, Mr Smith, and is directed to make its determination within 30 days of date of receipt of Mr Smith’s submissions and to provide him with such determination, together with reasons, in writing within five days of the determination;

[5] The case management committee is directed to refer the matter to the relevant correctional supervision and parole board within five days of making its determination and providing the applicant, Mr Smith, with its determination and written reasons;

[6] The correctional supervision and parole board must consider the applicant, Mr Smith, and assess whether or not he qualifies for the special dispensation parole release within fifteen days of referral of the matter to it and must provide the applicant, Mr Smith with its written decision, together with reasons, within five days of making the decision.

[7] If the applicant, Mr Smith is dissatisfied with the determination, he is authorised to approach the court on the same papers, duly supplemented, for appropriate relief.

[8] A copy of this judgment and order must be served forthwith on the applicant, Mr Smith, by (i) personal delivery to him at the Leeuwkop Correctional Centre and (ii) via email to sashley884@gmail.com.



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 17 and 29 September 2021
DATE OF JUDGMENT	: 30 September 2021
APPLICANT'S COUNSEL	: In person
RESPONDENT'S COUNSEL	: Adv. M. Sekhethela
RESPONDENT'S ATTORNEYS	: State attorney Mr T Masete