

SOUTH AFRICA / JUDGMENT

Mabuse and Others v Minister of Justice and Correctional Services and Others (21/59508) [2024] ZAGPJHC 345; 2024 (2) SACR 81 (GJ) (12 April 2024)

[2024] ZAGPJHC 345

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

21/59508

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

Case

No. 21/59508

(1)

REPORTABLE: No

(2)

OF INTEREST TO OTHER JUDGES: No

(3)

REVISED.

DATE: 12 April 2024

SIGNATURE

In

the matter between: PATRICK
MABUSE
First Applicant
VINCENT
MAKAFANE
Second Applicant
KENNETH
NKOSI
Third Applicant
JUSTICE
MAHOMANE
Fourth Applicant
ZAKHELE
NKOSI
Fifth Applicant
and
MINISTER
OF JUSTICE AND CORRECTIONAL SERVICES
First Respondent
NATIONAL
COUNCIL ON CORRECTIONAL SERVICES
Second Respondent
CHAIRPERSON
OF THE
CASE
MANAGEMENT
COMMITTEE
Third Respondent
CHAIRPERSON
OF THE CORRECTIONAL
SUPERVISION
AND PAROLE BOARD
Fourth Respondent
HEAD
OF KRUGERSDORP
PRISON
Fifth Respondent

JUDGMENT

WILSON J:

1 Each of the applicants in this matter was serving a life sentence when they approached the court. They had each completed the non-parole portion of their sentence. The applicants applied in person for relief which was, at core, designed to compel the respondents to process their applications for parole, which they complained had been unreasonably delayed.

2 The road to release for a prisoner serving a life sentence is not an easy one. Nor is it meant to be. The default position is that

lifetime incarceration means just that: the prisoner will spend the rest of their natural life in prison. However, a prisoner serving a life sentence may be considered for release on parole after 25 years (section 73 (6) (b) (iv) of the Correctional Services Act 111 of 1998). For prisoners sentenced to a life term on or before 30 September 2004, the non-parole period is 20 years (see *Phaahla v Minister of Justice and Correctional Services* 2019 (2) SACR 88 (CC)). In addition, a scheme of remissions and credits for good behaviour appears to have been held over from earlier iterations of the Correctional Services Act, which may sometimes reduce the non-parole period further (see, for example, *Groenewald v Minister of Correctional Services* 2011 (1) SACR 231 (GNP) paragraph 10).

3 Once the non-parole period of incarceration has been completed, the assessment of a prisoner's suitability for release follows an intensive process of training and evaluation, together with the compilation of sociological and psychological reports. Where appropriate, a victim-offender dialogue must take place. The situation of each prisoner is unique and undoubtedly complex. A prisoner serving a life sentence must undergo evaluation by a case management committee, a correctional supervision and parole board, the National Council for Correctional Services and the Minister of Justice and Correctional Services before they will be considered fit for release. All four of these decision-makers must generally agree that the prisoner is likely to lead "a socially responsible and crime-free life in the future" (section 36 of the Correctional Services Act) before the prisoner is released.

4 The law nonetheless recognises that incarceration, even incarceration of people who have committed very serious offences, ought not to continue for longer than it can be justified. The necessary complexity of the process for considering the fitness for release of a person serving a life sentence ought not to be allowed to obscure the need for prompt and diligent attention to their circumstances. In each of the applicants' cases, there is reason to believe that the necessary complexity of the task the respondents face has not been met with the level of care, administrative capacity or attention to detail the law requires (see, in this respect, section 237 of the Constitution, 1996).

5 This is clear from the behaviour of the respondents over the course of the fourteen months, between 26 January 2023 and 28 March

2024, during which I supervised the applicants' case. In this period, all but one of them was set free. Only the second applicant,

Mr. Makafane, remains incarcerated. This is on the basis that the second respondent, the National Council, has declined to recommend

that he be released.

6 At the end of this period I dismissed each of the applicants' cases as moot, either because they had been released, or, in Mr. Makafane's case, because a clearly reasoned decision declining to recommend their release had been produced. I ordered each of the parties to pay their own costs. I should record my gratitude to Mr. Nxumalo, who appeared for the respondents, and his instructing State Attorney, for the courteous and highly professional assistance they provided throughout this process. Mr. Nxumalo, in particular, performed his function with diligence, fairness and compassion.

7 At the time I made the last of my orders, I indicated that my reasons for making each of them would follow in due course. These are

my reasons.

The management of the applicants' cases

8 The applicants instituted proceedings in December 2021. But the matter was first enrolled in my opposed motion court on 26 January

2023. At that point, the applicants' complaints were not readily apparent from their papers. However, as the applicants each appeared in person, and were litigating under the obvious constraints of incarceration, I was under a duty both to construe their affidavits generously, in the light most favourable to them (*Xinwa v Volkswagen of South Africa (Pty) Ltd*

[2003] ZACC 7; 2003 (4) SA 390 (CC) (at paragraph 13), and to question them closely on the precise contours of their complaints.

9 This having been done, the gravamen of each of the applicants' cases became clear enough. The first applicant, Mr. Mabuse, had been recommended for release on parole, but the first respondent, the Minister, had rejected that recommendation. The Minister had not given reasons for that decision. It appeared that he had merely ticked a "not approved" box on a document recommending

that Mr. Mabuse be released.

10 The remaining applicants had also been considered for parole, but the second and fourth respondents, the National Council and the

Correctional Supervision and Parole Board ("CSPB"), had declined to recommend any of them for parole, on the basis that they had failed to fulfil the conditions set for their rehabilitation. These applicants nevertheless complained that their parole applications were being delayed by the reimposition of essentially the same conditions each time they were considered for release. There was no indication given, these applicants said, of what more they were expected to do to demonstrate their fitness for release. These applicants were particularly aggrieved by what they said was the irrational insistence that they undergo a dialogue with the victims of their crimes, in circumstances where those victims could not be traced, or had made clear, for reasons anyone can understand, that they had no interest in a dialogue with the applicants.

11 Having extracted the essence of each the applicants' cases, I postponed their applications to 14 April 2023. This was to give the respondents and their counsel a fair opportunity to deal with the complaints as they had matured at the hearing, and to report

on each of the applicants' readiness for parole. I also directed the Minister to give reasons for his refusal to accept the

recommendation that Mr. Mabuse be released on parole.

12 On the morning of 14 April 2023, Mr. Mabuse approached me in my chambers. He had, apparently, been released on parole, and wondered whether he still had to appear before me on that date. It seemed that the Minister, when asked to give reasons for refusing to release Mr. Mabuse, had simply reversed his view, and approved Mr. Mabuse's release. Mr. Mabuse went on his way. I dismissed his application as moot.

13 The parole application of the fifth applicant, Mr. Zakhele Nkosi, also appeared to have been expedited between 26 January and 14

April 2023. He, too, was recommended for release by 14 April. I dismissed his application as moot too.

14 On 14 April 2023, I postponed the remaining three applicants' applications, with directions for further reports to be provided as to their fitness for parole. In the case of the second and fourth applicants, Mr. Makafane and Mr. Mahomane, a victim-offender dialogue had not been arranged, and I required a report on the status of that process. In the case of the third applicant, Mr. Kenneth Nkosi, the National Council had not yet produced a recommendation for the Minister to consider. I directed the National Council to produce that recommendation.

15 By 12 June 2023, Mr. Kenneth Nkosi had been assessed as fit for release, and his application was dismissed as moot. However, the

National Council had failed to comply with my order in respect of Mr. Makafane and Mr. Mahomane. I gave the National Council a further week to comply, failing which it would have to show cause why it should not be held in contempt.

16 Happily, my order was then complied with, and, on 20 June 2023, I was told that Mr. Makafane's and Mr. Mahomane's applications for parole, including the outcome of any victim-offender dialogue, would be considered at meetings of the CSPB to be held during September and October 2023. I postponed Mr. Makafane's and Mr. Mahomane's applications to 1 December 2023 with directions that the outcome of the meetings be set out on affidavit.

17 On 1 December 2023, I was informed that CSPB recommendations in respect of Mr. Makafane and Mr. Mahomane had been forwarded to the

National Council for consideration at its meeting on 11 to 13 December 2023. I again postponed Mr. Makafane's and Mr. Mahomane's applications to 2 February 2024 to await the outcome of that meeting.

18 On 2 February 2024, it turned out that Mr. Mahomane's application had been successful, and that the Minister had approved his release. His application was dismissed as moot. Mr. Makafane's release was, however, not recommended, and he was referred for further treatment by a psychologist. Further attempts to trace his victims were also recommended.

19 The Council provided no reasons for its decision in Mr. Makafane's case. Accordingly, I postponed Mr. Makafane's application to 28 March 2024, and directed that those reasons be placed before me. On that date, a fully-reasoned recommendation was produced. It had unfortunately not been given to Mr. Makafane, and I directed the registrar of this court to print out the document and hand it to Mr. Makafane before he was allowed to leave the courtroom.

20 The production of the reasoned decision did, however, bring Mr. Makafane's case to an end. On receipt of that decision, he

could have been left in no doubt about the status of his parole application, and what he had to do to be reconsidered for release. I should record that Mr. Makafane has still not undertaken a victim-offender dialogue, because his victims cannot be traced. However, the Council specially undertook that if, once he had completed the required steps, his victims still could not be traced, the absence of a victim-offender dialogue would not be held against him. If Mr. Makafane wishes to challenge the decision not to release him, he must do so in separate proceedings. For these reasons, I dismissed Mr. Makafane's application as moot.

21 It seems clear that from all of this that, in the year that it took for the application to get into my court, very little was done

to identify and deal with the applicants' true complaints, and to process their parole applications expeditiously. The respondents'

answering affidavit, in particular, was formulaic and technical. There was no effort to deal with the applicants' circumstances,

or the issue of whether they were actually fit for parole, until their cases became the focus of judicial attention.

22 Four out of five of the applicants were fairly promptly assessed as fit for release once it became clear that I was prepared to oversee their cases. It seems clear that this process of judicial case management was an essential ingredient of the respondents'

ultimate willingness to address the applicants' grievances fully and appropriately. That was unfortunate. The applicants were entitled to have their fitness for parole assessed at the earliest reasonable opportunity. It seems clear from the fact that my intervention was necessary that this entitlement was not fulfilled.

S D J WILSON

Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 12 April 2024.

HEARD ON: 28 March 2024 DECIDED ON: 12 April 2024 For the Applicants: In person For the Respondents: NS Nxumalo Instructed by the State Attorney

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Prepared on 11 October 2026 · Esheria