Mazibuko v Minister of Correctional Services & others [2007] JOL 18957 (T)

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Case No:	38151 / 05
Judgment Date(s):	07 / 12 / 2005
Hearing Date(s):	07 / 12 / 2005
Marked as:	Reportable
Country:	South Africa
Jurisdiction:	High Court
Division:	Transvaal Provincial Division
Judge:	Makhafola AJ
Bench:	Makhafola AJ
Parties:	S Mazibuko (At); Minister of Correctional Services (1R), National Commissioner: Department of Correctional Services (2R), Provincial/Regional Commissioner: Correctional Services Gauteng (3R), Area Commissioner: Department of Correctional Services for the Baviaanspoort Management Area (4R), Chairperson of the Parole Board, Baviaanspoort (5R)
Appearance:	Adv HP Joubert, Julian Knight & Associates (At); Adv J Roux, The State Attorney (R)
Categories:	Application – Civil – Substantive – Private
Function:	Confirms Legal Principle

Key Words

Administrative law – Correctional services – Refusal of parole – Review

Mini Summary

The applicant sought the review of the respondents' decision not to grant him medical parole. The applicant had been convicted of murder, assault with intent to do grievous bodily harm, robbery, theft and unlawful possession of a firearm and ammunition. He was sentenced to an effective life imprisonment.

Held that the medical condition of the applicant was satisfactorily proved. He was dying of Aids and his condition was deteriorating daily. The court found no reason for his further incarceration, and set aside the decision not to release him on parole.

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MAKHAFOLA AJ: This is the matter of *Simon Musi Mazibuko v The Minister of Correctional Services and Four others*. This matter appeared in this Court, on 29 November 2005, whereby the applicant, on an urgent basis, sought an order to

review and set aside the decision of the respondents, for refusing to release him on medical parole.

The application was opposed and a point *in limine* was taken by the respondents, as it will clearly appear hereinafter, under the case for the respondents.

The matter did not proceed on that date, because the first respondent had not given his decision. The first respondent has now given a decision, and the reason for disapproving the applicant's release on the document signed by him, on 5 December 2005.

For the purposes of this application, the parties are in court again, on the same papers and the matter is heard on the basis of urgency.

Case for the applicant. The applicant is 32 years of age. He was convicted in the Transvaal Provincial Division of the High Court, sitting in Pietersburg, on the following crimes and sentenced as follows:

Murder: Life imprisonment.

Assault with intent to do grievous bodily harm: Ten years' imprisonment.

Robbery: 15 years' imprisonment.

Theft: 15 years' imprisonment.

Possession of unlicensed firearm: Eight years' imprisonment.

Possession of ammunition: 15 years' imprisonment.

The above offences, for which the applicant was convicted and sentenced, are gleaned from the memorandum report signed by the director, pre-release settlement EJ Kriek, which was annexed to the respondent's papers, dated 1 December 2005.

The applicant was sentenced on 20 March 2002. On 22 September 2003, the applicant was diagnosed as being HIV positive. And he was admitted at Baviaanspoort Maximum Correctional Centre, on 17 December 2004, after he had been transferred from the Kutama-Sinthumule Correctional Centre.

On 19 May 2005, his CD4 count was 189, on 9 September CD4 count was 143, indicating a decline, because on 10 November 2005, his CD4 count was 96. He states further that he was infected with tuberculosis and diarrhea, and suffers from vomiting.

On 3 September 2005, his condition deteriorated, and as a result, he was admitted at the medium hospital, at Baviaanspoort. He had also complained of dizziness and lack of energy.

Chest x-rays and a CT scan was conducted, which identified a lesion in his lung. At the time of the launching of this application the applicant suffered severe pains and disabilities, as a result of which he is unable to bathe himself and get to the toilet by himself. He is wheel-chair bound.

He further avers that he does not receive proper medical care and adequate pain control system. He is unable to receive anti-retro

viral treatment, alleging that same are not available in the prison. He cannot combine anti-retro viral with any tuberculosis treatment, because he has been informed that the side effects can be fatal.

On 5 October 2005, a medical parole board was constituted and it recommended that the applicant be placed on medical parole. The applicant has annexed to his founding papers, annexures SM1, SM2 and SM3, relating to his health, by a medical doctor and a chief professional nurse, respectively.

For the sake of completeness, the applicant's annexures SM1 and SM2 placed before the medical parole board, state the following:

> "1.
> Diagnosis: Patient is retro positive, with a lesion on the lung, suggestive of cancer. His condition is deteriorating daily.
>
> 2.
> Prognosis: Poor.
>
> 3.
> Life expectancy: Not sure.
>
> 4.
> Proposed accommodation: Home.
>
> 5.
> Recommendation by medical officer treating the client: Medical release, because his condition is deteriorating daily. Patient is retro positive, with a lesion suggestive of cancer.
>
> Signed by a medical officer, or doctor on the 4 October 2005."

Annexure SM3, was prepared by Janky Aphane, a chief professional nurse, attached to the Baviaanspoort Maximum Correctional centre.

It details the deteriorating health of the applicant, and refers extensively to the various treatments given to the applicant and the

comments of the doctors.

The applicant avers that it is quite clear, from annexure SM1 and SM2 and SM3, that he is dying. On 14 November 2005, his attorney of record had applied to the regional commissioner of correctional services, in Gauteng, through annexure SM8, on medical grounds, which application was declined despite the recommendations by a medical officer and the medical board.

He states that his release was declined because the commissioner wanted a second opinion which may be ready by 5 January 2006. He further avers, very interestingly, and importantly, on page fifty, paragraph [8.27] of the founding affidavit, by saying:

> "No second opinion is going to change the fact that I am currently dying of Aids. And my health is steadily worsening, and as of 10 November 2005, my CD count was 96. As previously stated, in May this year it was 189, in September 143, and in October 138."

According to him, he was not furnished with the reasons for refusing the application, except to be told that the department was awaiting a second opinion.

The applicant suggests that the medical report and his actual state of health, indicate proper grounds, that he be released.

Case for the respondents. In essence, the case for the respondents in the answering affidavit, is based on a point taken *in limine*.

In the main, their contention is that the application was premature, because in the case of the applicant who has been

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sentenced to life imprisonment, the first respondent, needs to decide and that he did not give any decision, positive or negative.

The record of the parole board, marked annexure A, annexed to the answering papers of the respondents had been sent to the first respondent on 28 November 2005, on an urgent basis, to enable the minister to give a decision.

The first respondent is awaiting the results from Kalafong hospital, which are expected by 5 January 2005, which would enable the first respondent to take a decision.

The minutes of the correctional supervision and parole board hearing. This board was chaired by Mr Mavundla, on 25 November 2005. This document, which is attached to the answering papers of the respondents, depicts an applicant, who "was just crying and staring at the chairperson, during the hearing". Again: "The offender struggled to talk, he is very emotional, and throughout the hearing, he cried non stop".

At the end of the hearing, the board recommended the applicant's release in terms of the relevant Correctional Services Act, which speaks of placement on parole on medical grounds.

The Correctional Services Act 8 of 1959, section 69 thereof, and Act 111 of 1998, section 79, are to the same effect, and read as follows:

> "A prisoner serving any sentence in a prison:
>
> (a)
> who suffers from dangerous infectious or contagious disease, or

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> (b)
> whose placement on parole is expedient on the grounds of his physical condition, or in the case of a woman, her advanced pregnancy, may at any time, on the recommendation of the medical officer, be placed on parole by the commission, provided that a prisoner sentenced to imprisonment for life, shall not be placed on parole, without the consent of the Minister."

In terms of the above provision, the decision lies with the Minister of Correctional Services. In a document paginated at 128–134, at 6 thereof, and attached to the answering papers, the first respondent does not approve of the applied release. At 131 of the same document, the reasons of the disapproval, by the Minister are: "at this stage, is the outcome of the pending medical tests". In these particular circumstances of the applicant, it is clear from all medical reports, the recommendations of the parole board, and the averments by the applicant, that he suffers from a terminal disease, which has no cure to date.

The physical condition of the applicant, is undoubtedly, what it is depicted to be, and it is expedient to qualify him to meet the requirements of placement, as this is also met by the recommendations of the medical officer.

In my view, there is nothing in the Act, which requires the first respondent, to base his decision on a second opinion, of any medical officer. For the purposes of the relevant section of the Act, the applicant is entitled to release on medical grounds. The applicant, in

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his own words, is dying of Aids.

The purposes of punishment by imprisonment, or otherwise to a convicted person, are: "Two deter, prevent, reform, and retribute the offender and would-be offenders".

In the circumstances, one is at pains to ask the following: is the continued incarceration of the applicant serving any purpose in terms of imprisonment; if the applicant is released in terms of the Act, is he going to enjoy life at his home when in his own words, he is a spent-force? The answer is no.

It is clear and lucid that the applicant has been convicted of very serious crimes, and that by law, he is required to serve his sentences lest a wrong message be sent out to the community, that when you are sick, you will be released to go home and continue to enjoy life, as if nothing had happened.

But this is not the case with the applicant. There is no good life for him outside prison when his health is deteriorating daily. 5 January 2006, may be too long a period to wait for the second opinion, of pending results. The sooner he leaves prison, in terms of the act, will serve him, his relatives and the community well. In this way the applicant will be accorded his right to security and control over his body (see section 12(2)(b) of the constitution).

The applicant has averred that he is dying of Aids. To deny him a release under medical parole, is to deny him his dignity and respect, which he requires to enforce by being allowed to go home and complete his life there. *Vide*: section 10 of the constitution.

I also had the pleasure of reading the following decided cases:

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Standfield v Minister of Correctional Services and others 2004 (4) SA 43 (C), *Du Plooy v Minister of Correctional Services and others* [2004] 3 All SA 613 (T), *Morant v Roos and Bateman* 1912 AD 92.

Where the learned judges had clearly spelled out the true interpretations of section 69 of Act 8 of 1959, together with the relevant sections of the constitution. I align myself fully, with these decisions, because this is also my view of what the Act requires.

As early as 1912, our courts had already decided about wrongfulness and intentional interference with rights relating to respect and personality of those who are detained, saying they are entitled to their personal rights and personal dignity. Vide: *Whittaker v Roos and Bateman and Morant v Roos and Bateman* 1912 AD 12.

I interpose to say, that this is indeed the position in the common law, which requires that human beings be treated with respect and dignity.

I quote from the case of *Morant v Roos and Bateman* 1912 AD 12 at 93, which reads as follows:

> "During the whole of this period, he suffered the following treatment:–
>
> (a)
> He was prevented from exercising himself outside his cell save and except by walking in solitariness in a restricted space within the precincts of the said gaol for periods not exceeding two hours each day.
>
> (b)
> From the 18–30 May 1911, the

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> plaintiff was prevented from smoking, and thereafter he was similarly prevented save and except when exercising himself outside his cell.
>
> (c)
> He was prevented from receiving or reading any newspapers from 18–30 May, and from receiving or reading any books other than books from the Prison Library.
>
> (d)
> He was prevented from seeing or conferring in the said gaol with his legal adviser William James MacIntyre or any other legal adviser from 18 May to 14 June 1911.
>
> (e)
> He was prevented from seeing or talking to visitors.
>
> (f)
> He was prevented from wearing boots save and except when exercising himself outside his cell.
>
> (g)
> Articles other than prohibited articles in his possession at the time of his arrest were taken from him and retained in custody by the gaol authorities.
>
> (h)
> He was placed in handcuffs on 18 May, 20 May and 30 May 1911, and on those dates he was escorted through the precincts of the said gaol in handcuffs followed by an armed warder.
>
> (i)
> He was tormented by the sound occasioned by the administration of corporal punishment to prisoners

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> at various times whilst he was confined in the said punishment cell.
>
> (j)

From 18 May to 7 June, he was prevented from shaving.

> The plaintiff was so treated at the instance and command of the defendant, Roos, who was director of prisons in the Transvaal, and the defendant Bateman, who was governor of the Johannesburg goal, and in spite of complaints made to them by himself and his attorneys. It was only in consequence of obtaining an order of court on 26 June, that the treatment was discontinued."

I do not in any way suggest that the applicant herein, was subjected to any treatment like in the quoted case.

I want only to indicate the courts' vigilance towards the treatment of prisoners, by quoting this case, that it is by common law, and decided cases, as early as 1912, that they had been vigilant about the treatment of prisoners, and that this is part of the bill of rights in our constitution.

It is my view, that refusing to release the applicant, who has complied with the requirements of the Act, amounts to an infringement of section 33(1) of the constitution.

Mercy is a hallmark of a civilised and democratic country. The applicant in the circumstances that he finds himself in, requires to be treated with mercy, within the precincts of the law.

In conclusion, therefore, I find that the refusal to release the

applicant on medical parole, is unjust, unlawful, unreasonable, and procedurally unfair.

The applicant has made a case on papers for a relief, and he is entitled to the assistance of this Court, by granting him prayers 1, 2, 2.1, 2.2, and 3 of the notice of motion.