

**IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)**

CASE NO: 46475/2012

BENJAMIN MOHALE BALOYI

Applicant

and

THE MINISTER OF CORRECTIONAL SERVICES

1st Respondent

THE NATIONAL COMMISSIONER

2nd Respondent

(CORRECTIONAL SERVICES)

GAUTENG REGIONAL COMMISSIONER

3rd Respondent

(CORRECTIONAL SERVICES)

THE AREA COMMISSIONER

4th Respondent

(JOHANNESBURG MANAGEMENT AREA)

THE HEAD OF PRISON

5th Respondent

(JOHANNESBURG MEDIUM "B" CENTRE)

CORRECTIONAL SUPERVISION & PAROLE BOARD

6th Respondent

(JOHANNESBURG MEDIUM "B" CENTRE)

CASE MANAGEMENT COMMITTEE

7th Respondent

(JOHANNESBURG MEDIUM "B" CENTRE)

JUDGMENT

SATCHWELL J

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	YES/NO
(2) OF INTEREST TO OTHER JUDGES	YES/NO
(3) REVISED	
<div style="font-size: 1.2em; font-weight: bold;">19/4/12</div> <div style="font-size: 0.8em;">DATE</div>	<div style="font-size: 0.8em;">SIGNATURE</div>

Introduction

1. Mr. Benjamin Mohale Baloyi was sentenced, on 9th June 2000, to serve a term of life plus twenty three years imprisonment arising out of convictions for murder, robbery with aggravating circumstances, malicious damage to property and unlawful possession of a firearm and ammunition. He was subsequently convicted on 16 August 2000 on a charge of housebreaking and sentenced to serve eight years imprisonment. He now brings an application against the Minister of Correctional Services and other respondents for orders which would result in a reduction of the period of imprisonment which he is currently required to serve.
2. When convicted and sentenced, the legal regime applicable to Mr. Baloyi's imprisonment was the Correctional Services Act, 8 of 1959, ('1959 Act'). That Act has been repealed and the Correctional Services Act, 111 of 1998, ('1998 Act') has regulated his imprisonment since 1st October 2004. However, any rights which Mr. Baloyi may have acquired in terms of the 1959 Act or the transitional process introduced in section 136 of the 1998 Act are preserved. This would include, for instance, the entitlement of a person sentenced to life imprisonment to be considered for parole on completion of a minimum detention period of twenty years.¹

Antedating of Sentence to Date of Arrest

3. Mr. Baloyi was arrested on 19th February 1999 and incarcerated as an awaiting trial prisoner for a period of some one year and four months until conviction and sentence. He seeks an order that his sentence be calculated as from the date of his arrest. He submits that "*during the awaiting trial my freedom was deprived and so the said period should form part of the sentence*".

¹ Contra the provisions of section 75 of the 1998 Act which requires a mandatory twenty five years imprisonment to be served before being eligible for consideration for placement on parole.

4. It is trite that² the sentencing court is required to take into account all relevant mitigating and aggravating factors when determining an appropriate sentence. These factors generally encompass all those which relate to the crime which has been committed, the personal circumstances of the accused and the interests of society. Amongst the personal circumstances of the accused, a sentencing court has regard to the time spent in custody by the accused as an awaiting trial prisoner. There are many authorities to this effect and, indeed, failure to take into account any significant time spent in custody has frequently provided grounds for a successful appeal against sentence. In short, the time which Mr. Baloyi spent in custody prior to sentence was a matter for consideration by the sentencing court at his trial.
5. Section 39 of the Correctional Service Act 111 of 1998 provides that a sentence of incarceration takes effect from the date on which that sentence is passed. Where Mr. Baloyi referred this court to the provisions of section 282 of the Criminal Procedure Act,³ he should have noted that this is a provision which enables an appeal court to antedate the sentence imposed by the appeal court to the date on which the sentence originally commenced, i.e. the date of sentencing by the trial court. It cannot be relied upon by Mr. Baloyi in this application.

Special Remission for ‘Highly Meritorious Service’

6. Mr. Baloyi claims that he is entitled to be considered for special remission of his sentence. He refers to Section 70 of the 1959 Act⁴ which permitted the Commissioner to

² Notwithstanding any minimum sentence provisions which may be applicable by reason, for example, of the provisions of Act 107 of 1998.

³“Section 282: Whenever any sentence of imprisonment, imposed on any person on conviction for an offence, is set aside on appeal or review and any sentence of imprisonment or other sentence of imprisonment is thereafter imposed on such person in respect of such offence in place of the sentence of imprisonment imposed on conviction, or any other offence which is substituted for that offence on appeal or review, the sentence which was later imposed may, if the court imposing it is satisfied that the person concerned has served any part of the sentence of imprisonment imposed on conviction, be antedated by the court to a specified date, which shall not be earlier than the date on which the sentence of imprisonment imposed on conviction was imposed, and thereupon the sentence which was later imposed shall be deemed to have been imposed on the date so specified.”

⁴ Section 70 of the 1959 Act provides: “(1) Notwithstanding the prisons of the Chapter and the provisions of the regulations governing the grant of remission of sentence, the Commissioner may, when in his opinion any prisoner has rendered highly meritorious service, submit the case with a recommendation for special remission of sentence to

grant remission of sentence where “*highly meritorious*” service has been performed. He submits that no particular actions or category of actions are specified in the legislation but that “*it is common practice that the Department of Correctional Services at different institutions grants or recommends inmates for remission of the sentences for actions that they regard as highly meritorious*”. In this regard, Mr. Baloyi argues that one of the functions of the Department is “*the rehabilitation of inmates*”, that he has participated in all “*rehabilitation activities*” whilst he has been serving his sentence and that his achievements should be regarded as “*highly meritorious*”.

7. Mr. Baloyi has detailed these “*achievements*”. During the eleven years and ten months Mr. Baloyi has been serving his sentences he:
 - a. Completed Senior Certificate (2002);
 - b. Was awarded a Certificate in Recognition of Excellent Performance in Grade 12 by the Prison Authorities at Kutuma Sintumule Maximum Security Prison (2003);
 - c. Completed a six month course in Basic Computer Skills with Stanford Business College (2003);
 - d. Completed several social programs such as Life Skills, Substance Abuse, HIV and AIDS awareness, Conflict Resolution, Personal Power Control, Anger Management, Team Work and Problem Solving;
 - e. Completed the Bachelor of Laws degree (LLB) with the University of South Africa (2005 to 2009); and
 - f. Is currently registered for a Masters of Law (LLM) with the University of South Africa.

8. With regard to his studies, Mr. Baloyi motivates for his early release as follows: firstly, he cannot utilize his degree without completing articles or serving pupilage before he can practice as either an attorney or advocate and he has obtained an indication from a firm of attorneys that they would consider him for the post of candidate attorney upon release

the Minister. (my underlining).(2) The Minister may, if he deems fit, grant to such prisoner special remission of sentence not exceeding ninety days, either unconditionally or on such conditions as he may determine.”

from prison; secondly, he cannot complete his current degree without opportunities to conduct research; thirdly, he owes the National Student Financial Aid Scheme a considerable sum of money which was loaned for his studies and this can only be repaid once he commences employment.

9. With regard to his rehabilitation generally, Mr. Baloyi motivates for his early release as follows: firstly, prior to commission of the offences of which he was convicted, he was less than 25 years old, without education and employment and associated with “wrong people”; secondly, he voluntarily assists other inmates with “*their appeals and studies*”; thirdly, he has “*learnt a lesson*” and believes he ought to be given “*a second chance*”. Finally, Mr. Baloyi advises that the observation of a number of officials is “*that they are convinced that there are prospects of success for my rehabilitation*” and he has referred the court to the recommendations of Mr. Mwandla, Mr. Maluleke, Mr. Mohlaudi and Ms Ebrahim.

10. I consider Mr. Baloyi’s resume whilst in prison to be indicative of many admirable qualities on his part.

- a. He has clearly shown himself to be determined upon a new life outside prison. He has been highly disciplined and applied himself to the tasks which he has set himself. It should be noted that everything which Mr. Baloyi has achieved has been voluntary – the Department and the individual Correctional Services Centres can encourage inmates to carry out courses or study but it is up to the prisoner, himself or herself, to actually perform. Mr. Baloyi is clearly intelligent and has been successful under quite difficult circumstances.
- b. Mr. Baloyi has attached an extract from the Sowetan newspaper of 9th September 2010 and, although he does not submit or argue this point, it would certainly seem that the Department of Correctional Services is pleased to rely upon his success as their own. Indeed, the Department and the respective centres where he has been incarcerated should certainly take some credit for enabling Mr. Baloyi to attain these heights.

- c. He has also engaged in activities for the benefit of other prisoners – helping them with their appeals and liaising with court officials in this regard is an important step in ensuring that the so-called criminal justice system is available to those who require access thereto.

11. Section 70 of the 1959 Act has now been repealed and it is now section 80 of the 1998 Act which provides for such remission where “*highly meritorious action*” has been performed.⁵ The 1998 Act specifically provides that such remission may be granted “*except to a person serving a life sentence*”. Noticeably, section 70 of the 1959 Act contained no special reference to persons serving a life sentence and such persons were not precluded from this benefit.

12. At the time of sentencing in 2000, Mr. Baloyi was subject to the regime provided for in terms of the 1959 Act. It seems to be common cause that any rights which he acquired in terms of that Act could not, with the repeal of that Act and the introduction of the 1998 Act, deprive him of any entitlements which he had acquired under the 1959 Act. On the face of it, it would seem that he is entitled to be considered for remission in terms of section 70 of the 1959 Act which does not exclude a prisoner who has been sentenced to and is serving life imprisonment.

13. However, I think that this would not be the correct approach to follow. Mr. Baloyi cannot claim that his entire incarceration is governed by the provisions of repealed legislation. It is only those rights which he acquired which cannot be removed from him. The question then becomes whether or not he had carried out any “*highly meritorious*” services during or prior to the repeal of the 1959 Act which would entitle him to be considered for special remission in terms of that Act.

⁵ Section 80 of the 1998 Act provides “*Special remission of sentence for highly meritorious service: (1) A Correctional Supervision and Parole Board may, on the recommendation of the National Commissioner, grant to a sentenced offender, except to a person serving a life sentence or a sentence in terms of section 286A of the Criminal Procedure Act, who has acted highly meritoriously, special remission of sentence not exceeding two years either unconditionally or subject to such conditions as the Board may determine.(2) Special remission in terms of this section may not result in the sentenced offender serving less than a stipulated non-parole period or, if no such period has been stipulated, the period determined by the National Council in terms of section 73A.*” (my underlining)

14. Between the years 2000 and 2004 (the date of application of the 1998 Act) Mr. Baloyi completed the senior certificate (2002), was awarded a Certificate in Recognition of Excellent Performance in Grade 12 by the Prison Authorities at Kutuma Sintumule Maximum Security Prison (2003), completed a six month course in Basic Computer Skills with Stanford Business College (2003) and completed several social programs such as Life Skills, Substance Abuse, HIV and AIDS awareness, Conflict Resolution, Personal Power Control, Anger Management, Team Work and Problem Solving.
15. Advocate Hlam has submitted that these endeavours and achievements of Mr. Baloyi are 'self enhancement' and cannot be considered to fall into the category of '*highly meritorious*' services.
16. There is not a great deal of authority on this issue but that which there is, is of assistance. In Mohammed v Minister of Correctional Services & others [2002] JOL 9698 (SE), a prisoner had already been granted special remission due to "*several meritorious actions performed by him while in prison*" which included: he had assisted a fellow prisoner who was choking on a chicken bone by, inter alia, administering a life-saving procedure; he had assisted a prison warder who had sustained a gunshot wound during a hostage situation; he had advised the authorities that gates had been left unlocked. The court ordered that consideration be given to his warning of a planned escape. In SDTU obo Makaka / Department of Correctional Services [2007] JOL 20458 (GPSSBC), a prisoner was granted special remission for informing the authorities that a master key had been made available to prisoners and advised the correctional officer who had done this. In Henry v Minister of Correctional Services & others [2006] JOL 18079 (W), the prisoner was granted special remission for working with other inmates starting a hand skills project which contributed towards the rehabilitation of other inmates.⁶

⁶ It is of interest that "According to the reports we received he had been an exemplary and model prisoner...was recruited to teach with effect from 1998. At the same time he enrolled for an LLB degree through UNISA and in May 2000 he became the first inmate in South Africa to be awarded a Criminon 'The Way to Happiness' rehabilitation certificate by Criminon International in Gauteng...The inmate has managed to adjust remarkably well to prison life. He is not a gang member and has had no disciplinary action against him; his attitude has been positive and satisfactory...He managed to deal with matters culminating in his crime openly and honestly. Resolving the original motive for the crime is obviously a key

17. What is common to all these examples is that they consist in ‘services’ rendered to other people or to the institution in which the prisoner is incarcerated. The use of the word ‘service’ is indicative of the type of action or behavior which the Legislature had in mind: some act of helpfulness to another, some deed towards the benefit of the institution. Actions or endeavours for one’s own benefit cannot fit into this category. The academic and technical and personal achievements of Mr. Baloyi are not specifically directed outwards of himself. They may ultimately benefit third parties but that is not the notable aspect thereof.
18. I do not think that fulfillment of these courses can be considered to be highly meritorious in the sense of being unusually commendable. Of course, when one has regard to Mr. Baloyi’s background of the convictions and sentencing, his discipline and application are laudable. But this is not out of the ordinary. This is not behaviour above and beyond what one would expect of any person and in particular a person who is attempting to rehabilitate himself.
19. In the result I do not find that this part of Mr. Baloyi’s application should either be acceded to by this court or referred back to the relevant authorities for further consideration.
20. In respect of the period subsequent to the introduction of the 1998 Act, the provisions of Section 80 of the 1998 Act are applicable:

“Special remission of sentence for highly meritorious service: (1) A Correctional Supervision and Parole Board may, on the recommendation of the National Commissioner, grant to a sentenced offender, except to a person serving a life sentence or a sentence in terms of section 286A of the Criminal Procedure Act, who has acted highly meritoriously, special remission of sentence not exceeding two years

aspect of rehabilitation...He arrived at Medium 'C' and continued to teach and I have noticed a marked improvement in his attitude towards others and the members. I can acknowledge that he completed a degree in law (LLB) and the certificate was awarded to him on the 28th May 2003. I am also aware that he is currently registered for a Master of Laws degree (LLM)...He has completed various other religiously based courses like the 12-steps recovery programme known as the Recovery Anonymous Programme offered by the Bryanston Methodist Church. In 2001 he teamed up with six other inmates and out of their own pockets started a very successful hand skills project called Tsoelopele Skills and Talents Project. For this rewarding effort they were each recognised by the head of prison and each granted a 3 months special remission for meritorious service to the department towards rehabilitation of other inmates.” He has been involved in other prison activities and spends a lot of time and effort on his teaching as well as his involvement in his studies.”

either unconditionally or subject to such conditions as the Board may determine. (2) Special remission in terms of this section may not result in the sentenced offender serving less than a stipulated non-parole period or, if no such period has been stipulated, the period determined by the National Council in terms of section 73A.”(my underlining)

21. The Statute is clear – persons sentenced to life imprisonment are not eligible for consideration for this special remission.
22. However, I have heard no argument on the construction thereof or the context within which it operates nor given any reason why I should or not fail to apply these provisions of the Statute.

State President’s Pardon of 2005

23. Further Mr. Baloyi submits that he accumulated a six months reduction in his sentence by reason of a Presidential Pardon granted to all prisoners in 2005.
24. Section 84 (2) (j) of the Constitution provides that *“The President is responsible for- (j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures;”* Section 82 (1) (b) of the 1998 Act empowers the President to remit any part of a sentenced offender’s sentence: *“the President may- (b) remit any part of a sentenced offender’s sentence.”*⁷
25. Mr. Halam argued that the legislatively determined period of incarceration for a person sentenced to life imprisonment (i.e. twenty years) cannot be decreased by such an amnesty.
26. Attached to Mr. Baloyi’s papers is a document emanating from the Department of Correctional Services re “Granting of Special Remission of Sentence (Amnesty)” which

⁷ Section 82: *“Powers of President (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; (b) remit any part of a sentenced offender’s sentence. (2) Nothing in this Act affects the power of the President to pardon or reprieve sentenced offenders.”*

is a directive on how to deal with the special remission granted by the President on 24 May 2005. Paragraph 2.5 of that directive specifically states:

“With regard to prisoners serving life imprisonment.... The applicable period special remission of sentence must be reflected on the warrant and special documents. However, because such prisoners are serving imprisonment for an indefinite period, it will have no effect on their release dates”.

Special provisions pertaining to persons sentenced to Life Imprisonment

27. Mr. Halam, who appeared for the respondents in this matter has argued that various provisions in the Correctional Services Acts of 1956 and 1998 and in the regulations and the policy documents issued by the Department of Correctional Services, preclude a person sentenced to serve a term of life imprisonment from benefitting from these special remissions for “*highly meritorious*” service and also from benefitting from Presidential pardons.
28. Save for the reference to the “*indefinite period*” of life imprisonment in paragraph 2.5 of the directive referred to above, I have no knowledge of the rationale, if any, for any such distinction to be drawn between sentenced prisoners. I have no knowledge of the rationale, if any, for the denial to persons sentenced to life imprisonment of the same amnesties and remissions granted to all other persons sentenced to determinate sentences of imprisonment.
29. This application was not brought as a challenge to provisions of the legislation or policy based on Constitutional or any other rights. The matter was argued by Mr. Baloyi himself and, with all due respect to him, he has not practiced law and is a layperson representing himself. Mr. Halam, was not presented with a case involving the consideration of a challenge to the legislation or policy and was not required to prepare or argue on that basis.
30. I have some difficulty in seeing why persons sentenced to serve terms of life imprisonment may not be the recipients of the special remission provisions of section 80

of the Act or the Presidential pardons permitted in terms of the Constitution of South Africa.

31. It is appreciated that a sentencing judge who determines that an offender should be incarcerated to imprisonment for life may take the view that this sentence means that this offender shall remain in prison for the rest of his or her natural life, never be released again into society and should die in prison.⁸ Literally, that is exactly the wording of the sentence imposed. That may be exactly what the sentencing judges intends to be the case.
32. However, both legally and factually, the situation is somewhat different. It is irrelevant what the views of myself or other sentencing judicial officers may be with regard to implementation of the sentences we have imposed in respect of those extremely serious crimes such as murder, robbery, rape. It turns out, regrettably we discover in court, that a life sentence does not mean “*for life*” but for a limited period.
33. Section 78 of the 1998 Act provides that the Minister of Correctional Services, having considered the records of the proceedings of the Parole Board and its recommendations, may grant parole to a person who has been sentenced to serve a term of life imprisonment.⁹ Section 136 of the 1998 Act creates certain transitional regimes which are applicable to Mr. Baloyi. The import of section 136(3)(a) is that an offender serving

⁸ *S v Tcoeb* (SA 4/93) [1996] NASC 1; 1996 (1) SACR 390 (NmS) at 394 b-c “...the fact that an accused may be sentenced to imprisonment for life in Namibia does not mean that such an accused is thereby never able to regain his or her freedom. Life imprisonment may mean imprisonment for the rest of the natural life of the accused, but this is not always the position” quoted with approval in *R v Mzwakala* 1957 (4) SA 273 (A). *S v Tuhadeleni & Others* 1969 (1) SA 153 (A); *S v Whitehead* 1970 (4) SA 424 (A); *S v Sibiyi* 1973 (2) SA 51 (A).

⁹ Section 78 “Powers of Minister in respect of offenders serving life sentences (1) Having considered the record of proceedings of the Correctional Supervision and Parole Board and its recommendations in the case of a person sentenced to life incarceration, the National Council may, subject to the provisions of section 73 (6) (b) (iv), recommend to the Minister to grant parole or day parole and prescribe the conditions of community corrections in terms of section 52. (2) If the Minister refuses to grant parole or day parole in terms of subsection (1), the Minister may make recommendations in respect of treatment, care, development and support of the sentenced offender which may contribute to improving the likelihood of future placement on parole or day parole. (3) Where a Correctional Supervision and Parole Board acting in terms of section 73 recommends, in the case of a person sentenced to life incarceration, that parole or day parole be withdrawn or that the conditions of community corrections imposed on such a person be amended, the Minister, on advice of the National Council, must consider and make a decision upon the recommendation. (4) Where the Minister refuses or withdraws parole or day parole the matter must be reconsidered by the Minister, on advice of the National Council, within two years.”

a sentence of life incarceration is entitled to be considered for early release once he has completed twenty years of his sentence.¹⁰

34. Notwithstanding, the provisions of the legislation and, as a result of various legislative and policy amendments, on 5th August 2011 the Minister issued an internal memorandum determining the minimum detention dates for offenders sentenced to life imprisonment prior to 1st October 2004 to be calculated as thirteen years and four months. In other words, Mr. Baloyi, a person sentenced to serve a time of life imprisonment, shall be entitled to be considered for release on parole once he has served a period of thirteen years and four months.
35. The upshot of these developments is that a life sentence is not what the general public or the sentencing judicial officer considers it to be. It is not an indeterminate sentence of imprisonment which will only terminate on the death of the prisoner. It is not necessarily an open-ended sentence which will never end. It is not a period which is beyond calculation. It is not a period in respect of which no calculation has been or ever shall be made.
36. At the present time, the life sentence being served by Mr. Baloyi may well result in release on parole. He has already been granted certain benefits in that his minimum sentence is not the remaining period of his life and not a period of twenty years but thirteen years and four months. Of course he may not be considered eligible for early release on parole once he has served thirteen years and four months or even fifteen years or even twenty or twenty five years. That is a matter for decision by the parole board.
37. In these circumstances it is difficult to even postulate the argument that no special remissions or amnesties can be deducted from an indeterminate sentence such as life imprisonment. ‘Lifers’ are eligible for release on parole and there appears to me, though without having heard argument, no reason why they are disentitled to benefit from these remissions and amnesties – either as a means of bringing forward the date when they are

¹⁰ Section 136(3)(a): “Any sentenced offender serving a sentence of life incarceration immediately before the commencement of Chapters IV, VI and VII is entitled to be considered for day parole and parole after he or she has served 20 years of the sentence.”

entitled to be considered for release on parole or as a means of reducing the actual sentence itself.

Conclusion

38. I have found that Mr. Baloyi's sentence cannot be antedated to the date of his arrest.

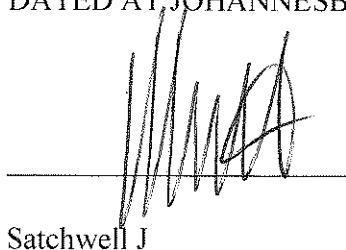
39. I have found that there is no basis upon which Mr. Baloyi's case should be referred back for reconsideration of '*highly meritorious*' services carried out prior to the introduction of the 1998 Act.

40. I find that I am unable to determine whether or not a different regime should or can or does apply to life sentenced prisoners in respect of '*highly meritorious*' services. I find that I am unable to determine the manner in which the benefit of the amnesties granted by the State President should be implemented, if at all, to persons sentenced to life imprisonment.

41. Without full and considered argument on these issues I am constrained by the provisions of the Statute as also the Departmental regulations and policies. Without argument I cannot give consideration to any other decision than to find that the provisions of the Statute are binding.

42. I am postponing this matter for hearing in the opposed motion court of the week of the 14th May 2012. Mr Baloyi will be requisitioned to appear at court on 16th May (Wednesday) and I shall arrange for counsel to represent the interests of Mr. Baloyi.

DATED AT JOHANNESBURG 19TH APRIL 2012



Satchwell J

Date of Hearing: 29 March 2012
For Applicant: Mr. Baloyi
For Respondent: State's Attorney
Adv. Halam
Date of Judgment: 19 April 2012