



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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE: 15 December 2022

Case No. 21/53385

In the matter between:

DONOVAN SAMUEL MOODLEY

Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES First Respondent

**DIRECTOR-GENERAL: DEPARTMENT OF JUSTICE
AND CORRECTIONAL SERVICES** Second Respondent

**NATIONAL COMMISSIONER: DEPARTMENT OF JUSTICE
AND CORRECTIONAL SERVICES** Third Respondent

**JOHANNESBURG AREA COMMISSIONER:
DEPARTMENT OF CORRECTIONAL SERVICES** Fourth Respondent

**HEAD OF PRISON: JOHANNESBURG
CORRECTIONAL CENTRE B** Fifth Respondent

**PAROLE BOARD: JOHANNESBURG CORRECTIONAL
CENTRE B** Sixth Respondent

JUDGMENT

WILSON J:

- 1 The applicant, Mr. Moodley, is serving an effective life sentence for the kidnapping and murder of Leigh Matthews, and the extortion of her family. Labuschagne J imposed that sentence on 4 August 2005.
- 2 Mr. Moodley's minimum detention period, after which he became eligible to be considered for release on parole, expired on 3 June 2018. There was, however, a significant delay in considering Mr. Moodley's fitness for parole. Aggrieved by that delay, on 22 November 2021, Mr. Moodley applied urgently and in person to this court for a wide range of relief aimed at speeding up the process. Mr. Moodley's application came before my brother Wright J, who removed the matter from the roll and reserved the question of costs.
- 3 On 24 November 2021, Mr. Moodley approached the Deputy Judge President of this Division, and asked that his application be allocated a hearing date on the ordinary roll. The Deputy Judge President set the matter down for hearing on 28 January 2022. The Judge President of this Division then specially allocated Mr. Moodley's application to me.
- 4 By 24 January 2022, it became clear that the matter would not be ripe for hearing on 28 January, because the necessary papers had not been filed. I convened a pre-hearing conference in open court to case manage the matter. By that time, Mr. Moodley's efforts to catalyse the parole process had achieved their purpose. He had been summoned to a hearing before the sixth respondent, the Correctional Supervision and Parole Board ("the Parole Board"). That hearing took place on 21 January 2022. It lasted six-and-a-half

hours. The parties agreed that the outcome of the hearing ought to be addressed in further papers. They agreed a timetable for the filing of those papers. I removed the matter from the roll for 28 January 2022, and set it down for hearing before me on 18 February 2022.

5 On 18 February 2022, it emerged that the Parole Board had declined to recommend Mr. Moodley's release. It had instead recommended that the issue of Mr. Moodley's eligibility for parole be referred for further examination by a psychologist and a social worker. Mr. Moodley objected to this outcome. He sought an interdict restraining the first respondent, the Minister, from considering or acting on the Parole Board's recommendation pending the outcome of an application to review the recommendation and set it aside. The interdict was granted by agreement between the parties.

6 The parties also agreed that I should remain seized with the matter for the purposes of case managing and deciding the review application. It seemed to me that this was the sensible way forward. Mr. Moodley is litigating this matter in person while incarcerated. It would not be fair to require him to take the ordinary administrative steps necessary to secure a hearing of his review application in these circumstances.

7 The parties exchanged further papers in terms of case management orders I made between 18 February and 21 October 2022, when the matter was finally heard. At my request, the Johannesburg Society of Advocates appointed Mr. Kerr-Philips and Mr. May to appear and make submissions to assist the court. I am particularly grateful to them for their thoughtful and concise argument. In

the best traditions of advocacy, their argument isolated the true issues in this case with insight and dexterity.

8 Although he has two degrees in law, Mr. Moodley is a lay litigant. He has himself drawn all the papers on which he relies. Although his oral submissions before me were lucid and well-presented, his papers do not focus attention on the material issues in the normal manner of documents drawn by qualified legal practitioners.

9 I have accordingly approached Mr. Moodley's case as required by the Constitutional Court's decision in *Xinwa v Volkswagen of South Africa (Pty) Ltd* 2003 (4) SA 390 (CC) (at paragraph 13). I have construed his affidavits generously, in the light most favourable to him. I have also been assisted by very fair and able advocacy from Mr. Malema, who appeared for the respondents. In the end, it was possible to chart a path through the papers that identifies Mr. Moodley's true complaint, and to assess and remedy that complaint in a manner that is fundamentally fair to all the parties.

The Review

10 The issue now before me is whether the outcome of the 21 January 2022 Parole Board hearing falls to be reviewed and set aside. The hearing and its outcome play a critical role in the process that may eventually lead to Mr. Moodley's release. That process commences with a series of interventions and reports meant to provide a meaningful assessment of whether a prospective parolee is fit for release – whether, in other words, they are likely to be able “to lead a socially responsible and crime-free life in the future” (section 36 of the Correctional Services Act 111 of 1998).

- 11 The relevant material is considered by a Case Management Committee in terms of section 42 of the Correctional Services Act. The Case Management Committee compiles a report which covers the ground specified in section 42 (2) (d) of the Act. The report deals with the offence the prospective parolee committed; their criminal record; their disciplinary record, attitude, conduct and physical and mental state while in prison; any training programmes in which they have participated; their immigration status; the risk they may pose to the community if released; and their progress in implementing a correctional sentence plan against which all prisoners are periodically assessed in terms of section 38 of the Act.
- 12 Having taken all of this into account, and recorded it in a report, the Case Management Committee produces a recommendation. In Mr. Moodley's case, the Case Management Committee produced a report on 14 March 2021. The Case Management Committee took into account what it considered to be Mr. Moodley's genuine remorse for the crimes he committed; the fact that he can expect to benefit from a strong social support structure if and when he is released; the fact that he had, at the time, an offer of employment on release; the fact that he had obtained a full matric exemption, a Bachelor of Laws degree and a Master of Laws degree while incarcerated; his co-operation with the psychologist and social workers assigned to assist him; and his good (though not spotless) disciplinary record.
- 13 The only fact the Case Management Committee held against Mr. Moodley is that he had not participated in a victim-offender dialogue with the Matthews

family. While Mr. Moodley was open to this, the Matthews family understandably had no interest at all in participating in such a dialogue.

14 After weighing the various considerations before it, the Case Management Committee recommended that Mr. Moodley be placed on parole.

15 The Case Management Committee's report was then transmitted to the Parole Board. The Parole Board convened to consider Mr. Moodley's case on 21 January 2022. While a Case Management Committee is composed entirely of correctional officials, a Parole Board, constituted under section 74 of the Correctional Services Act, includes representatives from the broader community. Mr. Moodley's Parole Board also included a representative from the South African Police Service.

16 The function of the Parole Board is to review the Case Management Committee's report and to assess whether the prospective parolee should be placed on parole. Where the prospective parolee is serving a life sentence, that assessment takes the form of a recommendation to the National Council for Correctional Services, which in turn makes a recommendation to the Minister (section 78 (1) of the Correctional Services Act). It is the Minister who takes the final decision on whether parole should be granted (section 73 (5) (a) (ii) of the Correctional Services Act).

17 Mr. Moodley's papers are sharply critical of the way the Parole Board conducted the hearing of 21 January 2022. He alleges that he was deprived of the information necessary to meaningfully prepare for and participate in the hearing. In his oral submissions before me, Mr. Moodley argued that the Parole Board proceedings were a sham, in that he was given no meaningful

opportunity to make submissions in support of his case for parole, and in that no serious effort was made to consider his fitness for parole objectively and fairly.

18 These are far-reaching criticisms, but I need not ultimately determine whether they are well-made.

19 The more fundamental problem is that it is impossible to evaluate what happened at the Parole Board hearing of 21 January 2022, because the minutes of the Parole Board hearing are incoherent. They consist of three and a half pages of scattershot notes. The hearing lasted for six and a half hours. Even if anything meaningful could be deciphered from the minutes (not much can), it is inconceivable that the minutes constitute a fair reflection of what happened at the hearing.

20 The Parole Board ultimately recommended that Mr. Moodley be referred for what it calls a “further profile”. The “further profile” process the Parole Board recommended would consist of additional interactions with social workers and a psychologist to address what the Parole Board refers to as Mr. Moodley’s “abnormal love of money” and what the Board characterises as his insensitivity to gender-based violence.

21 These conclusions cannot be reconciled with the reports of the psychologist and the social workers upon which they apparently rely. There was of course a financial motive to Mr. Moodley’s crime, and that crime was a particularly horrific act of gender-based violence. But neither the psychologist nor the social workers who assessed Mr. Moodley stated that Mr. Moodley currently

tends toward excessive greed or currently has a propensity to commit acts of gender-based violence.

22 The Parole Board's conclusions appear to me to confuse the nature of and motive for Mr. Moodley's offence with the social workers' and psychologist's considered views about the extent to which Mr. Moodley has been rehabilitated while serving his sentence. The psychologist who assessed Mr. Moodley was apparently so impressed with Mr. Moodley's rehabilitation that he recommended that Mr. Moodley be placed on parole. While the social workers' report concluded that Mr. Moodley had not been "entirely truthful" in his interactions with the social workers who compiled it, no reasons are given for that conclusion, and the report otherwise concludes that the "necessary interventions [have] been made to prepare [Mr. Moodley] to be a responsible and productive citizen again".

23 The Case Management Committee, having considered the social workers' report and the psychologist's report, took the view that Mr. Moodley should be placed on parole. The Parole Board's contrary view does not appear to be based on the Case Management Committee's report, or on the material on which that report was based, or on any other evidence discernible from the record. It is possible that there was material before the Parole Board that might have justified its recommendation, but without an adequate minute of the hearing, that conclusion cannot be drawn.

24 In my view, the statutory scheme set up by the Correctional Services Act establishes the Case Management Committee's recommendations as a baseline, to be departed from only where justified by reasons grounded in

established facts. Such documentary insight as I have been given suggests either that the Parole Board's conclusions were entirely subjective impressions, unrelated to anything the Case Management Committee had found when it considered the material generated by the various programmes in which Mr. Moodley participated, or that the Parole Board's conclusions are backed-up by evidence that, for whatever reason, was not recorded in the minutes of the Parole Board hearing.

25 The matter was argued before me on the basis that the Parole Board's recommendation to the National Council constitutes "administrative action" within the meaning of section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Even though the Parole Board's decision is preparatory in character, in that it constitutes a recommendation to the final decision maker, I am satisfied that the recommendation is administrative action. It is a decision taken by an organ of state in terms of legislation that plainly "has the capacity" to affect Mr. Moodley's rights, in the sense conveyed by Nugent JA in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) (at paragraph 23).

26 The impact on Mr. Moodley's rights arises from the way in which the Parole Board's recommendation undercuts the ability of the National Council or the Minister to act rationally in light of it. Because the Parole Board's recommendation has no discernible rational basis, there is no prospect that any recommendation or decision taken by the National Council or the Minister will be rationally grounded. Those recommendations or decisions will of necessity rely on, and be tainted by, the Parole Board's recommendation.

Even if they decline to adopt the Parole Board's recommendation, the National Council and the Minister will do so without any real insight into the Parole Board's proceedings and rationale. The Parole Board's proceedings and recommendation are mandated and controlled by statute. They play a critical role in the parole process. The Minister may not release a prisoner unless the Parole Board has convened, considered the prisoner's fitness for parole and made a recommendation to which the Minister must then have careful regard. Without a transparent recommendation from the Parole Board, rationally grounded in established facts, the Minister cannot himself exercise his decision-making power lawfully and rationally.

- 27 For all these reasons, the Parole Board's recommendation constitutes unlawful administrative action. The recommendation is not rationally connected to the information placed before the Board (section 6 (2) (f) (ii) (cc) of PAJA), and it renders the lawful and rational exercise of the Minister's power to grant or refuse parole to Mr. Moodley practically impossible. The recommendation must accordingly be reviewed and set aside.

Remedy

- 28 Section 8 of PAJA requires me to grant just and equitable relief. It was agreed between the parties that, if I set the Parole Board hearing aside, the appropriate further remedy would be to refer the matter back to the Board for a further hearing. Mr. Malema submitted that the remedy should end there. Mr. Kerr-Philips and Mr. Moodley, however, sought to persuade me that I should set a timetable for the new hearing, and that I should supervise the process to the extent necessary.

- 29 Mr. Moodley has, it is true, endured significant and largely unexplained delays in the process of considering his fitness for parole. I am convinced that, had he not brought the urgent application that he enrolled before Wright J in November 2021, the Parole Board hearing would not have taken place as soon as it did.
- 30 I am accordingly satisfied that it would be just and equitable to put the respondents to terms in preparing for and holding the new hearing that must follow upon my order setting aside the hearing of 21 January 2022. Mr. Kerr-Philips also submitted that I should require that Mr. Moodley be afforded copies of various policy manuals, standing orders and other documentation necessary to allow him to prepare for the new hearing. There was no real resistance to an order of that nature.
- 31 It was further submitted that I should place the Minister and the National Council on terms to consider and decide upon the Parole Board's recommendation within a specific period. I am not satisfied that there should be an order of that nature, because the National Council has not been joined to these proceedings, and because there is no suggestion that the Minister will not process the Parole Board's recommendation promptly and in good faith once he receives it.
- 32 In the event, however, that there is an unreasonable delay in processing the Parole Board's new recommendation, I will retain the supervisory jurisdiction necessary to remedy any such delay.

The Interim Interdict

33 Shortly before this matter was heard, Mr. Moodley brought an urgent application to interdict and restrain the respondents from harassing, intimidating or subjecting him to new conditions of incarceration in retaliation for what appears to have been his unauthorised recording of utterances made by the Parole Board Chairperson and Deputy Chairperson.

34 It is not clear what these recordings show, or when they were taken. Nor was it clear at the time the papers were filed whether Mr. Moodley had actually suffered any retaliation.

35 However, Mr. Moodley stated that the urgent application was about his “personal safety” and was a “matter of life and death”. His application was not opposed or answered by any of the respondents. Accordingly, out of an abundance of caution, I issued an interim order directing the fourth, fifth and sixth respondents to take the necessary steps to protect Mr. Moodley from unlawful assault, threats, harassment or intimidation pending the hearing of this application.

36 Mr. Moodley conceded at the hearing that he had not been subjected to any harsh treatment as a result of his conduct. Considering that concession, my interim order should plainly be discharged.

Order

37 For all these reasons, I make the following order –

- 37.1 The recommendation made by the sixth respondent on 21 January 2022 in respect of the applicant's fitness for parole is reviewed and set aside.
- 37.2 The sixth respondent is directed to hold the applicant's parole hearing afresh by no later than 31 March 2023.
- 37.3 All reports and other preparatory steps necessary to hold the hearing on or before 31 March 2023 must be completed on or before 28 February 2023.
- 37.4 Not less than two weeks before the hearing is held -
- 37.4.1 the applicant is to be informed of the date and time of the hearing;
 - 37.4.2 the applicant is to be afforded access to all the material that will be placed before the Parole Board at the new hearing; and
 - 37.4.3 the applicant is to be afforded access to all the applicable Parole Board manuals, practice directives, policies and other material relevant to the process by which the Parole Board will consider the applicant's fitness for parole.
- 37.5 The applicant is to be afforded a reasonable opportunity to present his own evidence and argument at the new Parole Board hearing, including access to any equipment that may reasonably be necessary to present his case.

- 37.6 The first to fifth respondents are directed to take all the administrative and other steps necessary to enable the sixth respondent to comply with this order.
- 37.7 In the event of non-compliance with this order, or of unreasonable delay in the further processing of the Parole Board's recommendation on the applicant's fitness to be placed on parole, the applicant is authorised to re-enrol this matter before Wilson J on five days' notice to the respondents and the *amicus curiae* for such further relief as may be necessary.
- 37.8 Paragraph 4 of this court's order dated 10 October 2022 is discharged.



S D J WILSON
Judge of the High Court

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| HEARD ON: | 21 October 2022 |
| FURTHER SUBMISSIONS ON: | 28 October 2022 |
| DECIDED ON: | 15 December 2022 |
| For the Applicant: | Donovan Moodley in person |
| For the Respondents: | JMV Malema Instructed by the State Attorney |
| For the <i>amicus curiae</i> : | GE Kerr-Phillips SG May At the request of the court |