

Releasing terminally ill prisoners on medical parole in South Africa

Jamil Ddamulira Mujuzi, LLD (Western Cape), LLM (Pretoria), LLM (Free State), LLB (Hons)

Doctoral Researcher, Civil Society Prison Reform Initiative (CSPRI), Community Law Centre (CLC), University of the Western Cape (UWC)

The release on medical parole of a prominent and influential South African businessman, Mr Schabir Shaik, who served less than 3 years of his 15-year prison term, put the issue of medical parole under the spotlight with several newspaper articles, radio stations and television channels expressing different views regarding his release. There were also allegations that the medical officers who had recommended his release had acted unprofessionally – until they were vindicated by the Health Professions Council of South Africa. This article discusses the law relating to medical parole in South Africa and cases where courts have released offenders on medical parole, and gives statistics of offenders who have been released on medical parole since 1996. It also highlights some of the contentious issues relating to medical parole.

The release of prisoners on parole is an issue of interest to both scholars and the public. Those in the former category are aware that there are laws, regulations and policies in place that must be adhered to before prisoners may be released on parole. The public's knowledge and awareness of parole is generally restricted to when high-profile prisoners are released¹ or when a particular offender is released and the victim or family of the victim are approached by the media for comment on the release. Those of us who are aware that a prisoner expects to be considered for parole at a particular stage of his or her sentence start to doubt the effectiveness of the criminal justice system when this time comes, the prisoner is not considered for parole, and the authorities do not provide satisfactory reasons for this. The Correctional Services Act² provides a detailed but rather confusing parole regime.³

This article looks at medical parole and in particular how courts in South Africa have interpreted it. It also provides the statistics of prisoners who have been released on medical parole between 1996 and 2008.

Medical parole

The '... general rule [is that] an offender cannot expect to escape punishment or seek an adjustment of his term of imprisonment because of ill health'.⁴ However, some prisoners have been released on medical parole before they have spent the minimum period required under the relevant laws under which they were sentenced. Under section 79 of the Correctional Services Act,

any person serving *any* sentence in a prison and who, based on the written evidence of the medical practitioner treating that person, is diagnosed as being in the final phase of any terminal disease or condition may be considered for placement under correctional supervision or on parole, by the Commissioner, Correctional Supervision and Parole Board or the court, as the case may be, to die a consolatory and dignified death.⁵

While commenting on the rationale behind this provision, the Chairperson of the National Council on Correctional Supervision, Judge Siraj Desai, reportedly said that medical parole 'is only available in circumstances where the offender is in the final stages of a terminal illness – the idea being that the offender should be

permitted to die a dignified death outside of prison'.⁶ This means that prisoners living with chronic ailments who are on medication will ordinarily not qualify for release on medical parole unless it is abundantly clear that such prisoners have no chance of recovering from their ailments and that their state of health has deteriorated to such an extent that their death is imminent. In other words, their health should be such that there is no chance that they would not meet their death.⁷ While interpreting section 69 of the 1959 Correctional Services Act,⁸ which was repealed by section 79 of the 1998 Correctional Services Act, although the wording in some respects remained the same, Judge Van Zyl of the High Court of the Cape of Good Hope Provincial Division observed, in the case where the Department of Correctional Services was ordered to place a prisoner on parole who was suffering from incurable lung cancer and after doctors have certified that he had very few months to live, that for a prisoner to be placed on medical parole, 'it is ... irrelevant what the nature of his conviction and the length of his sentence of imprisonment might be. It is equally irrelevant what period of imprisonment he has actually served'.⁹

The only requirement for a person to be considered for release on medical parole is therefore written evidence from the treating medical practitioner that he or she has diagnosed the prisoner as being in the final phase of any terminal disease or condition, so that such a release on parole or correctional supervision will enable that person to die a consolatory and dignified death. When a court or the National Council of Corrections or the Correctional Supervision and Parole Board (CSPB) is petitioned by the prisoner to be considered for placement on parole on any grounds, including medical parole, such a body should ensure that its decision reflects the 'well-established values of justice, fairness, and reasonableness'. Such a decision should also 'accord with the requirements of good faith and public interest'.¹⁰

One of the arguments that could be put forward by those opposing the placement on parole of prisoners who are patently in the final phase of their terminal illness would be that such a person, if they do not die in the shortest time possible after their being placed on parole, would re-offend.¹¹ However, the court seems to have cast doubt on that argument by holding that '... the commission of further crimes would be the last thing on the mind of any prisoner released on parole for medical reasons, particularly

when he knows that he has only a few months to live'.¹² While the Act requires that a prisoner may be considered for medical parole when they are in the final stages of a terminal disease so as to enable such a prisoner to have a consolatory and dignified death, this requirement has to be weighed in the light of the right to human dignity. In other words, the prison authorities should not wait for such a prisoner to be bedridden because, according to the court, '[t]o insist that he remain incarcerated until he has become visibly debilitated and bedridden can by no stretch of the imagination be regarded as humane treatment in accordance with his inherent dignity'.¹³

Other cases where prisoners have been released on medical parole by courts

In *Mazibuko v. Minister of Correctional Services and another*,¹⁴ the applicant, who was serving a life sentence for the offences of murder, assault with intent to do grievous bodily harm, theft and unlawful possession of a firearm and ammunition, applied to be placed on medical parole and was refused. The applicant sought review of the respondents' decision not to grant him medical parole. The High Court of the Transvaal Provincial Division found that the refusal to release the applicant on medical parole, who was dying of AIDS and whose medical condition was deteriorating daily, as submitted in evidence by his doctor, was 'unjust, unlawful, unreasonable, and procedurally unfair'.¹⁵ The Court ordered his release.

In *Du Plooy v. Minister of Correctional Services and others*,¹⁶ in which the respondents also refused to release the applicant who was dying of AIDS on medical parole, the High Court of Transvaal held that such a decision was in violation of the applicant's right not to be treated in a cruel and inhumane or degrading manner and his right to access medical care, that it was in violation of human dignity, and that it was also irrational and unreasonable.¹⁷

Number of prisoners who have been released on medical parole since 1996

Year	No. of prisoners released
1996	49
1997	47
1998	47
1999	59
2000	60
2001	51
2002	88
2003	117
2004	76
2005	64
2006	70
2007	58

Source: Office of the Judicial Inspectorate of Prisons, Cape Town, 18 September 2007.

Some of the contentious issues about medical parole in South Africa

Releasing offenders on medical parole in South Africa raises an important issue that needs to be addressed by the Correctional Services Act or the Department of Correctional Services, viz. what happens when a prisoner released on medical parole 'miraculously recovers' from his or her terminal illness? Is he or she arrested and sent back to prison to complete his sentence? There have been allegations in the media that a high-profile prisoner who was released on medical parole in March 2009 was seen dining out at an expensive restaurant in June 2009.¹⁸ There have also been media reports that an offender released on medical parole was arrested for allegedly committing other offences.¹⁹ The above two scenarios bring into the equation the need for the Department of Correctional Services to put measures in place (these could be legislative or administrative) to ensure that offenders released on medical parole are closely monitored, and should they miraculously recover they should go back to prison and serve their full sentences. This argument is based on two reasons. The first of these is that medical parole is based on the assumption or condition that the offender will die soon after release. Put simply, the offender is released on medical parole on two conditions: that he will remain terminally ill, or (the main condition) that he will meet his death soon. Recovering from his hitherto terminal illness means that he has breached his parole conditions – i.e. he has neither remained terminally ill nor died. He must therefore be returned to prison and serve his sentence. This scenario is analogous to any other parole condition. If an offender is released on parole on condition that he attends school, for example, his failure to attend school means that he has breached the condition on which his release was founded, and he should be arrested and sent back to prison to serve his sentence in full.

The second reason why an offender released on medical parole should be required to go back to prison should he recover from the once terminal illness is that the Department of Correctional Services will probably find it easier to release offenders on medical parole if there is a mechanism in place to ensure that such prisoners will return to prison should they recover. There will be no need for the Department of Correctional Services to wait for such prisoners to be bedridden before their release, or die in prison. However, the Department of Correctional Services should not use this as an excuse to 'refer' ill prisoners to their families for medical treatment only to require them to go back to prison after recovery. Put differently, the Department of Correctional Services should not hide behind the veil of medical parole to transfer its responsibility of providing medical care to prisoners, even those with serious ailments, to the prisoners' relatives.

Another contentious issue with regard to medical parole is section 75(8) of the Correctional Services Act, which provides that '[a] decision of the [Correctional Supervision and Parole] Board is final except that the Minister [of Correctional Services] or the Commissioner [of Correctional Services] may refer the matter to the Correctional Supervision and Parole Review Board for reconsideration, in which case the record of the proceedings before the [Correctional Supervision and Parole] Board must be submitted to the Correctional Supervision and Parole Review Board.' The contentious nature of section 75(8) of the Correctional Services Act came to light in March 2009 when, as mentioned earlier, a high-profile prisoner was released on medical parole in circumstances that left

many questions unanswered. Section 75(8) depends entirely on the discretion of the Minister of Correctional Services or the Commissioner of Correctional Services to decide whether to refer the matter to the CSPB or not. Despite all the pressure from civil society and opposition parties, the Minister of Correctional Services and the Commissioner of Correctional Services declined to refer Mr Shaik's medical parole release decision to the CSPB.²⁰

Conclusion

This article has dealt with medical parole, and the law governing the same has been discussed. It has been shown that under the law for a person to be released on medical parole it is not a requirement that they should not be in a position to re-offend. What is required is that the person has been diagnosed to be in the final stage of a terminal illness and that they should be released on parole in order to have a consolatory and dignified death. They do not have to be bedridden. It has been shown that courts of law are increasingly intervening to grant medical parole to prisoners where the Department of Correctional Services and the CSPBs have been reluctant to do so in a manner that is irrational, unreasonable and against the rights of prisoners. Parole is an administrative decision, and it must be exercised in a lawful, reasonable, and procedurally fair manner in line with section 33 of the Constitution and the relevant provisions of the Promotion of Administrative Justice Act.²¹

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References

1. For example, there was much interest in medical parole in South Africa in March 2009 when Mr Schabir Shaik, former financial advisor to the current South African President Jacob Zuma, was released on medical parole from Westville prison after serving less than 3 years of his 15 years' imprisonment for fraud. See Civil Society Prison Reform Initiative, *30 Days/Dae/Izinsuku* newsletters of March, April and May 2009 (medical parole) at <http://www.communitylawcentre.org.za/Civil-Society-Prison-Reform/newsletter/30-days-dae-izinsuku/> (accessed 21 June 2009).
2. Act 111 of 1998.
3. Chapters VI and VII of the Correctional Services Act.
4. *Du Plooy v. Minister of Correctional Services and others* [2004] JOL 12850 (T) Case No. 6399/04, para. 4.
5. Emphasis added. It should be recalled that section 55 of the Correctional Services Amendment Act, 25 of 2008 amends section 79 by substituting the 'court' with the 'Minister'. The coming into force of the amendment would mean that it would be the Minister of Correctional Services and no longer the court who would release on medical parole offenders incarcerated for life. The amendment to section 79 should be read with those to section 78 on parole.
6. See 'Parole only for terminally ill patients: Desai' *sabcnews*, 17 April 2007 at http://www.sabcnews.co.za/south_africa/general/0,2172,147337,00.html (accessed 20 April 2007). It has been observed that '... the purpose of medical parole is singular, namely to allow the prisoner concerned to die a "consolatory and dignified death". The purpose of medical parole is not to enable the prisoner to receive treatment, recover and lead a normal life.' See Lukas Muntingh, 'Medical parole: Prisoners' means to access anti-retroviral treatment?' (*AIDS Law Quarterly* March 2006; 8-10: 10). Emphasis in the original.
7. While interpreting section 69 of the 1959 Correctional Services Amendment Act (outlined in reference 8 below) in the light of the then proposed section 79 of the now Correctional Services Act, Judge Van Zyl of the High Court of the Cape of Good Hope Provincial observed that '[a]lthough the requirement that the prisoners should be in the "final phase of any terminal disease or condition" features strongly in the proposed amendment, it is not and has never been, a requirement in terms of section 69 of the Current Act. This may account for the reference to terminal illness in the standing correctional order "B" and the circular of 21 December 2001 ... It should be noted further that there are no requirements in section 69 relating to life expectancy, a state of being bedridden or the imminence of death. There is likewise no suggestion that the prisoner should be (physically or otherwise) unable to commit any crime should he be released on parole for medical reasons.' See *Stanfield v. Minister of Correctional Services and others* [2003] 4 All SA 282(C), p. 303, paras 85-86.
8. Section 69 provided that 'A prisoner serving any sentence in a prison: (a) who suffers from a dangerous, infectious or contagious disease; or (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 Commissioner: Provided that a prisoner sentenced to imprisonment for life shall not be placed on parole without the consent of the Minister.'
9. See *Stanfield v. Minister of Correctional Services and others* [2003] 4 All SA 282(C), p. 302, para. 82.
10. See *Stanfield v. Minister of Correctional Services and others* [2003] 4 All SA 282(C), p. 308, para. 102.
11. This is the same stand that was taken by the prosecution, the defence and the court in the case of *S v. Mazibuko* [1996] 4 All SA 720 (W). In this case the accused, a youthful and first offender, was found guilty of attempted murder, robbery with aggravating circumstances, and unlawful possession of a firearm and ammunition and sentenced to, among other sentences, 10 years' imprisonment. However, the accused had been severely injured by gunshots from the police when he fired back at them at the time when he committed the said offences and had as a result become quadriplegic. In recommending that the Department of Correctional Services should consider putting the accused on medical parole, the court observed that '[b]oth the state and the defence have asked me to recommend to the Commissioner of Correctional Services that an investigation be instituted as soon as possible to ascertain whether the accused is eligible for parole on medical grounds as provided for in section 69 of the Act. I believe that I should accede to such request. This is not the sort of case where the accused, if placed on parole, would be free to roam the streets and commit further crimes. The accused's condition speaks for itself. The accused should create no greater danger to the public than he would if he were kept in a prison. I was informed by Mr van Staden [the then Johannesburg Medium B Prison] that appropriate conditions will be placed on the granting of the parole which will service both the interests of the accused and safeguard the interests of the community' (p. 726).
12. *Stanfield v. Minister of Correctional Services and others* [2003] 4 All SA 282(C), p. 310, para. 110.
13. *Stanfield v. Minister of Correctional Services and others* [2003] 4 All SA 282(C), p. 314, para. 124.
14. [2007] JOL 18957 (T).
15. *Mazibuko v. Minister of Correctional Services and another* [2007] JOL 18957 (T) Case No. 38151/05, p. 11.
16. [2004] JOL 12850 (T).
17. *Du Plooy v. Minister of Correctional Services and others* [2004] JOL 12850 (T) Case No. 6399/04, para. 26.
18. See Liz Clarke, 'Shaik spotted in restaurant – claim', 29 June 2009 at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20090629062416776C851231 (accessed 29 July 2009).
19. See Dirk Kok, 'Mediese parool is 'n grap', *Volksblad* 21 July 2009 at http://jv.news24.com/Die_Volksblad/Nuus/0,,5-83_2540751,00.html (accessed 29 July 2009). The story was translated from Afrikaans to English in the *Legal Brief* of 22 July 2009.
20. The following links were all accessed on 29 July 2009: 'DA writes to Nqakula about Shaik', 20 May 2009 at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=nw20090520123246961C171526; 'DA wants medical parole reviewed', 22 May 2009 at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20090522054632117C764014; and 'No parole review for Shaik', 30 June 2009, at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=nw20090630194915508C591830.
21. Act No. 3 of 2000.