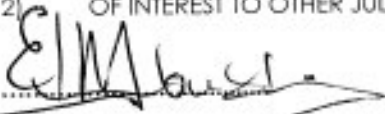




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 28221/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	
E.M. KUBUSHI	DATE: 12-02-2021

In the matter between:

JANUSZ JAKUB WALUS

Appellant

and

MINISTER OF JUSTICE & CORRECTIONAL SERVICES

First Respondent

THE SOUTH AFRICAN COMMUNITY PARTY

Second Respondent

MRS LIMPHO HANI

Third Respondent

THE MINISTER OF HOME AFFAIRS

Fourth Respondent

JUDGMENT

KUBUSHI J

This judgement is handed down electronically by circulating to the parties' representatives by email and by uploading on Caselines.

INTRODUCTION

[1] On 15 October 1993, the applicant, JANUSZ JAKOB WALUS ("Mr Walus"), was convicted of one charge of murder [having shot and killed Mr Martin Thembisile Chris Hani ("Mr Hani")] and one charge of illegal possession of a firearm.

[2] Mr Walus was on such convictions sentenced to death for the murder and given five (5) years' imprisonment for the possession of the illegal firearm. The death sentence was on 7 November 2000 commuted to life incarceration, the court ordering that the sentence be *ante* dated to the date of sentence, 15 October 1993.

[3] Mr Walus is currently incarcerated at Kgosi Mampuru II Correctional Centre (formerly Pretoria Central Prison) and has accordingly been serving sentence since 15 October 1993 and, at the time of the hearing of this application, he had already served approximately twenty-seven (27) years of his sentence, in incarceration.

[4] The purpose of this application is to have the decision of the first respondent, the Minister of Correctional Services ("the Minister"), dated 16 March 2020, whereby Mr Walus' application for parole was refused, reviewed and set aside ("the review application").

[5] The review application is brought in terms of section 33 of the Constitution of the Republic of South Africa Act, 1996 ("the Constitution") read with section 6 of the Promotion of Administrative Justice Act,¹ ("PAJA").

THE RELIEF SOUGHT BY THE APPLICANT

[6] In the application, Mr Walus seeks an order in terms of the following:

¹ Act 3 of 2000.

- 6.1 that the decision of the Minister dated 16 March 2020 annexed to the founding affidavit as annexure 'JW1' whereby Mr Walus was refused parole, be reviewed and set aside;
- 6.2 an order in terms of section 8 (2) of PAJA that Mr Walus be placed on day parole, *alternatively* parole with immediate effect on such conditions as the court, *alternatively* the Department of Correctional Services ("the Department") may deem fit in terms of section 65 of the Correctional Services Act ("the 1959 Act"),² further *alternatively* that the matter be referred back to the Minister in order to make a fresh decision within sixty (60) days of the granting of this order;
- 6.3 that Mr Walus' continued incarceration be declared to be unlawful discrimination as provided for in section 9 (1) of the Constitution read with section 1, 5 and 6 of the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act.³

[7] The relief sought is opposed by the Minister, together with the second respondent, the South African Communist Party ("the SACP") and the third respondent, Mrs Limpho Hani ("Mrs Hani").

[8] At the time of his death, Mr Hani was the General Secretary of the SACP. Mrs Hani is the spouse of Mr Hani. No relief is sought against her but she is cited in these papers by virtue of the direct and substantial interest she has in the current application.

[9] The SACP and Mrs Hani are represented, *pro bono*, by the same counsel and have filed a composite answering affidavit. The answering affidavit has been filed out of time but there seem to be no opposition to the condonation applied for and consequently, on consideration, the condonation application

² Correctional Services Act 8 of 1959.

³ Act 4 of 2000.

ought to be granted. For ease of reference I shall, as also indicated in their heads of argument, refer to both the SACP and Mrs Hani collectively as the SACP.

[10] The composite affidavit is deposed to by Mrs Hani who sets out the basis of her opposition as well as that of the SACP to the relief claimed by the Applicant. Mr Walus' counsel placed the authority of Mrs Hani to represent the SACP in these proceedings, in dispute. I find it not necessary to delve into this dispute because no specific relief is sought against the SACP. In any event, even if I can rule in favour of Mr Walus on this point, I still have to consider the affidavit in respect of Mrs Hani.

[11] As *per* the prayers in the notice of motion, the relief sought against the fourth respondent, the Minister of Home Affairs, was conditional upon the granting of the main relief sought by Mr Walus, but was abandoned at the hearing of the application.

THE SALIENT FACTUAL MATRIX

[12] As earlier stated, Mr Walus was convicted and sentenced on 15 October 1993. At the time of his conviction and sentence, the law that applied to the application for placement on parole of offenders, was the Correctional Services Act⁴ ("the 1959 Act") together with the Departmental policy that applied then.

[13] In terms of the policy of the Department, which applied during the period August 1987 to 1 March 1994, like the other offenders who were sentenced to life incarceration, the minimum period which Mr Walus had to serve before he became eligible to be considered for placement on parole was 13 years and 4 months. This period was also advanced by credits in terms of s 22 (A) (1) of the 1959 Act, as well as Presidential amnesties granted to him during his period

⁴ Act 8 of 1959.

of incarceration. The effect of which was that Mr Walus became entitled to be considered for placement on parole after serving 12 years and 4 months of his sentence of life incarceration, that is in 2005.

[14] It is common cause that Mr Walus has applied for placement on parole on several occasions, but such applications have been repeatedly refused by the Minister. This application, as such, is heralded by a long history of such applications. In order to place the current application into perspective it is necessary that Mr Walus' previous parole applications, and the reasons for the Minister's decisions in respect thereof, be highlighted.

The Parole Applications

[15] Mr Walus' first parole hearing was held in 2011. There appears to be a dispute as to whether or not the Parole Board recommended that Mr Walus be considered for placement on parole. However, due to Mrs Hani's absence at the parole hearing, the erstwhile Minister (Minister Mapisa-Nqakula) on 22 June 2011 declined Mr Walus' application for placement on parole providing the following reasons:

"The placement of the offender on parole is not approved at this stage. The victim's family and another interested party must be given an opportunity to provide either a victim impact statement or a statement of opposition."

[16] When Mr Walus next appeared before the Parole Board in November 2013, Mrs Hani and her daughter were, together with their legal representative, present at the hearing, to make representations to the Parole Board. The Minister declined to approve his placement on parole.

[17] On 10 April 2015, Mr Walus was again considered for placement on parole by the erstwhile Minister (Adv TM Masutha) which was also declined. In his decision, the Minister recommended the following:

"DECISION

1. *The placement of the offender on parole is not recommended at this stage.*
2. *A further profile of twelve (12) months is hereby approved.*
3. *In the interim, the Department is to assist the offender in the following: -*

3.1 *Restorative Justice Process:*

It appears from the various reports that the offender has indicated a willingness to be afforded an opportunity to personally apologize to the victim's family. In the light of this, I am of the view that it is crucial that he be afforded this opportunity to participate in this restorative justice process. This process will, to an extent, restore the balance and the harm caused to the victim's family hopefully, as well as the community as a whole. Furthermore, I am certain that this process will also assist the offender to come to terms with the crime committed as well as to accept responsibility for the crime and thereby contribute towards his own healing and rehabilitation pathway. This can be achieved either through the VOD and/or VOM process or whichever process is deemed appropriate by the qualified professionals.

3.2 *Security*

The Department, together with other relevant structures should advise on the security threats, if any, that might exist should the offender be released out on parole.

[18] In essence the Minister recommended further steps to enhance the Restorative Justice Process which, in his view would restore the balance for the harm caused to the victim's family as well as the community as a whole. He recommended further that the Department or other relevant structures advise on the security threats that might exist should Mr Walus be released on parole.

[19] Mr Walus, not satisfied by the decision, launched a review application against the Minister's decision during which Janse van Nieuwenhuizen J ordered that Mr Walus be released on parole within fourteen (14) days of the order. The Minister conceded at the hearing of this review application that in essence his reason for refusing to place Mr Walus on parole was the nature of the crime committed and the sentencing remarks of the trial court. In upholding the review application, the court was of the view that the Minister's decision overemphasised the nature of the crime committed by Mr Walus and the remarks of the sentencing court (which harshly criticised it) and failed to balance, fairly and equally, all the criteria for parole selection, which it was satisfied Mr Walus met.

[20] The Minister appealed Janse van Nieuwenhuizen J's judgment and order, to the Supreme Court of Appeal which made a finding on the procedural irregularities based on the Minister's omission to consider the victim impact report that was submitted by Mrs Hani to the Parole Board. Consequently, the matter was remitted to the Minister for a fresh decision within ninety (90) days of the order, to consider whether Mr Walus should be placed on parole, taking into account Mrs Hani's victim impact statement dated 30 October 2013 and Mr Walus' response, if any, thereto.

[21] It is important to note that the Supreme Court of Appeal was silent on the reasons advanced by the Minister and/or Janse van Nieuwenhuizen J's findings on such reasons, in respect of the sentence remarks of the sentencing court, but limited its judgment to the failure of the Minister to afford Mr Walus proper and due procedural rights.

[22] Following the decision of the Supreme Court of Appeal, a new parole hearing was held on 26 October 2017 where Mrs Hani and members of the SACP were present and made submissions to the Parole Board. The Parole Board made new recommendations to the Minister. On 17 November 2017,

the Minister by way of a press release announced that he had refused Mr Walus' application for release on parole. The reasons proffered this time by the Minister were that the offender should undergo individual psychotherapy with the psychologist to assist in addressing his political ideologies, which have been highlighted as a risk factor in the psychologist report.

[23] Following this decision, Mr Walus again launched successful review proceedings before Baqwa J raising a number of procedural irregularities. In the main, Mr Walus complaint about the Minister's failure to comply with the directions of the judgment of the Supreme Court of Appeal of 18 August 2017; the failure by the Parole Board to afford Mr Walus the right of reply prior to filing the record of the parole proceedings with the Minister; the failure to consider the reports furnished to him on 3 November 2017 and to include these reports in the profile report furnished to the Minister.

[24] Baqwa J in upholding the review application, remitted the matter to the Minister for a fresh decision regarding Mr Walus' placement on parole taking into account a response (if any), to the profile report filed by the Chairman of the Parole Board to the Minister prior to the reconsideration of the matter together with other relevant information. A new decision was to be taken by the Minister within one hundred and twenty (120) days of the order being granted.

[25] On 16 January 2019, the erstwhile Minister, (Adv Masutha), again reconsidered Mr Walus' parole application following on the judgment of Baqwa J. This time, the Minister again refused to place Mr Walus on parole on the following grounds:

"The placement of the offender on parole is not granted. It is directed that a further profile be submitted within six (6) months of this decision for my consideration.

1. *In the light of the conflicting psychological reports from Zelda Buitendag and Joel Mbhele it is difficult for me to*

make a decision. I therefore direct that the two professionals jointly assess the inmate and file a joint report on the issues concerning risk and remorse.

2. *The offender should undergo individual psychotherapy with the psychologist to assist in addressing challenges which have been highlighted on paragraph 5.2.5 of Zelda Buitendag's report dated 15 October 2018. These challenges include depression and explosive anger episodes."*

[26] Following the refusal of the application, Mr Walus had to approach court again in order to set aside the decision of the Minister. In setting aside, the Minister's decision, Kollapen J found that the Minister's decision was not rational nor reasonable in the circumstances on the basis that the characterisation by the Minister of 'conflicting psychological reports' was an overstatement of the position, as the difference in opinion expressed [in the three psychologists' reports] was largely on a peripheral issue that had clearly been attended to and resolved. The matter was again remitted to the Minister for a fresh reconsideration to place Mr Walus on parole.

[27] In essence, Kollapen J was of the view that the decision of the Minister would not pass the test of rationality nor reasonableness on the grounds provided and stands to be reviewed and set aside in particular on the basis that on the information before the Minister it could not be said that the refusal of parole was justified by the contents of the totality of the reports before him or that it was a decision that given the nature of the information before him no reasonable decision maker would have taken. He found that the requirement by the Minister that Mr Walus undergo individual psychotherapy would not serve as a basis for the Minister's refusal of placement on parole but rather as one of the conditions to be complied with pre-release and would not have the

effect of salvaging the Minister's decision under review as it stood on a different footing.

[28] Having reviewed and set aside the decision of the Minister of the 16 January 2019, Kollapen J was of the view that there would accordingly be no requirement for a joint assessment as contemplated in the Minister's decisions. On the matter of risk, the Minister was required to accept that all three experts placed the risk of re-offending as low and that on the matter of remorse all the experts conclude that the expression of substantial and significant remorse and empathy by Mr Walus and that the limited dissent as it were by one of the psychologists was properly explained in the later reports. It was within that framework on risk and remorse that the Minister was then required to consider those aspects and make a fresh decision.

[29] On 16 March 2020, the present Minister (Mr Lamola) made a new decision in accordance with the judgment and order of Kollapen J. This time, the Minister's decision to refuse parole were essentially based on the nature of the crime and the sentence remarks of the trial court. It is this decision of the Minister that Mr Walus now challenges by way of judicial review, in these proceedings.

[30] Against this background I deem it necessary to set out, hereunder, an overview of the applicable statutory instruments and some of the important court judgments that regulate parole applications in respect of the offenders who have been sentenced to life incarceration before 1 October 2004.

THE LEGAL FRAMEWORK GOVERNING PAROLE APPLICATIONS

[31] The law governing parole applications is contained in the Correctional Services Act ("the 1998 Act"),⁵ which repealed the Correctional Services Act ("the 1959 Act").⁶

[32] The salient provisions pertaining to parole applications are contained in section 136 of the 1998 Act. The section provides that an offender serving a sentence of incarceration before the commencement of Chapters IV, VI and VII of the 1998 Act, is subject to the provisions of the 1959 Act relating to her or his placement under community corrections, and is to be considered for such placement in terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of those Chapters.

[33] Chapter IV of the 1998 Act came into operation on 31 July 2004 whilst Chapters VI and VII came into operation on 1 October 2004. The operative date for purposes of section 136 of the 1998 Act (by way of an offender being considered for placement under community corrections in terms of the 1959 Act, and the policy and guidelines applied by the former Parole Boards) is accordingly 1 October 2004.

[34] The Constitutional Court has held that offenders sentenced to incarceration prior to the commencement of Chapters IV, VI and VII of the 1998 Act are eligible to be considered for placement on parole in terms of the policy and guidelines of the Department of Correctional Services that were applicable at the date of commission of the crime for which such offenders were sentenced (rather than at the date of sentence);⁷

⁵ The Correctional Services Act No. 111 of 1998.

⁶ See fn. 7.

⁷ *Phaahla v Minister of Justice and Correctional Services and Others* 2019 (7) BCLR 795 (CC); *Cornelius Johannes Van Wyk v Minister of Correctional Services & Others* 40915/10 date of judgment 15 July 2011; *Van Vuuren v Minister of Correctional Services & Others* 2010 (12) BCLR 1233 (CC).

[35] It follows that in terms of the 1998 Act, all the provisions of the 1959 Act regarding parole for persons serving life sentences were repealed, however, in accordance with the provisions of section 136 of the 1998 Act the provision of the 1959 Act together with the policy and guidelines applied by the former Parole Boards prior to the repeal of the provisions of the 1959 Act dealing with parole,⁸ remained intact.⁹

[36] Consequently, offenders (like Mr Walus), who were convicted for offences committed prior to the coming into operation of the parole provisions under the 1998 Act (which provision with regard to parole came into operation on 1 October 2004), are to be dealt with in terms of the parole provisions of the 1959 Act. This being the case, the provisions of the 1959 Act concerning parole (in particular section 65 [6]), are and remain of application to offenders who were sentenced to life imprisonment prior to the coming into operation of the parole provisions in of the 1998 Act.

[37] In terms of section 65 (6) of the 1959 Act, the Minister may, after considering recommendations from the Parole Board, authorize the placement of an offender on parole subject to any condition which she/he may determine and as from a date determined by her/him, up to a date of such prisoners' death. It is, however, important to note that in the event Mr Walus is placed on parole he would be required to serve only two (2) years of his sentence on parole. This is so because prior to the coming into operation of section 65 of the 1959 Act, that is on 1 March 1994, the period to be served on parole was governed by Chapter VI (5) (k) (v) of the Correctional Services B-Order. The said B-Order, provided that offenders sentenced to incarceration for crimes committed prior to 1 March 1994 including offenders sentenced to life incarceration, the parole of such offenders is not to exceed three (3) years, less

⁸ Namely, the Parole Board's Manual set out in Chapter VI of Correctional Services B Order, referred to as the Parole Board Manual.

⁹ See *Derby-Lewis v Appellant of Correctional Services and Others* 2009 (6) SA 205 (GNP).

any period of amnesty or special remission of sentence which falls to be deducted from the parole period of three (3) years. Mr Walus has received the benefit of two (2) Presidential amnesties on 31 May 2005 and 27 April 2012, in each case being amnesty of six (6) months.

[38] The policy and guidelines dealing with day parole or parole applied by the former Parole Boards prior to the repeal of the provisions of the 1959 Act are contained in Chapter VI of the Correctional Services B-Order, colloquially referred to as the "Parole Board Manual". The purpose of the manual is to serve as a consistent guideline/directive for Parole Boards when considering an offender's placement on day parole or parole. This is the document that ought to be applied by the Parole Board when assessing and/or recommending offenders for parole and consequently the Minister as well when she/he considers the Parole Board's recommendation that an offender be placed on parole.

[39] As the eligibility for parole of an offender should be determined by the parole provisions which were in effect at the time of the commission of the offence it means that, since Mr Walus committed the crime of murder on 10 April 1993 for which he is serving a sentence of life incarceration, the provisions of the 1959 Act and the policy and guidelines applicable then should, accordingly, be applicable to Mr Walus' parole application.

[40] The salient provisions of the Parole Board Manual applicable when considering placement of offenders on parole contain various factors that are to be taken into account when a case is being considered. The following, *inter alia*, are to be considered:

- 40.1 any remarks made by the court during the imposition of sentence.
- 40.2 the sentence imposed by the court;
- 40.3 placement policy, community interests and public interest;

- 40.4 crime prognosis as it manifests in physical/psychological abilities to commit crime again;
- 40.5 behaviour and adjustment in the prison (as, inter alia, reflected by allocated credits);
- 40.6 the degree to which a prisoner participates in the multi-disciplinary programme and benefits from it; custodial and privilege classification;
- 40.7 achievements that were obtained in prison (scholastic, academic, technical and so forth);
- 40.8 the crime pattern of a prisoner (present and previous) and the threat that it imposes to community after release;
- 40.9 the degree which a prisoner has shown that opportunities granted to him/her were utilized, for example with regard to suspended sentences, postponed sentences and previous placements;
- 40.10 the probability of recidivism viewed against the background of criminal history, crime rate, time lapse since previous placements/release, the number of previous convictions; and
- 40.11 previous non-compliance with conditions of parole provisions.

THE GROUNDS OF REVIEW

[41] It is worthy to note that this is an application for review and not an appeal against the Minister's decision. Sight should not be lost of that distinction, which is very important and should be kept in mind at all material times during the consideration of this application. The court is not called upon to decide whether the Minister was wrong or right in reaching the decision but to determine whether he complied with the relevant legal prescripts in reaching the decision. The focus is on the process, and on the way in which the decision-maker came to the challenged conclusion.¹⁰

¹⁰ Rustenburg Platinum Mines (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration 2007 (1) SA 576 (SCA) para 31.

[42] The parties agreed that this matter does not concern any procedural irregularities as beset the other applications before it. It is, thus, common cause that what is to be determined in this matter are the merits, based on the grounds of review raised by Mr Walus.

[43] The grounds of review upon which Mr Walus relies in support of the relief sought for setting aside the decision of the Minister is that

43.1 the decision is not rationally connected to the information which was before the Minister and the reasons given by him for the decision (section 6(2)(f)(ii) of PAJA) *alternatively* that the decision is so unreasonable that no person in the position of the Minister could have made such a decision (section 6(2)(h) of PAJA).

43.2 The decision is arbitrary and capricious

43.3 The decision is unlawful and discriminatory

I deal hereunder with the grounds of review in turn.

The decision taken is irrational alternatively that it is so unreasonable that no reasonable decision-maker would reach such a decision

[44] While the test for rationality and reasonableness differ, they also overlap and it thus convenient to deal with these grounds of review together.

[45] The court in *Rustenburg Platinum Mines*,¹¹ had this to say about a review application:

"In a review, the question is not whether the decision is capable of being justified...but whether the decision-maker properly exercised the powers entrusted to him or her. This is not to lose sight of the fact that the line between review and appeal is notoriously difficult to draw. This is partly because process-related scrutiny can never blind itself to the substantive merits of

¹¹ *Rustenburg Platinum Mines (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) para 31.

the outcome. Indeed, under PAJA the merits to some extent always intrude, since the court must examine the connection between the decision and the reasons the decision-maker gives for it, and determine whether the connection is rational. That task can never be performed without taking some account of the substantive merits of the decision."

[46] What the court is required and permitted to do in the application of this nature, is merely to ask itself whether the decision-maker acted rationally in making the decision she or he made, and for that purpose one looks at the reasons given by the decision maker for the decision she or he made.

[47] Mr Walus' eligibility for placement on parole, under the transitional provisions of section 136 of the 1998 Act, is common cause between the parties. It is also not in dispute that the guidelines contained in Chapter VI of the Correctional Services B-Order, commonly referred to as the Parole Board Manual, particularly the 'Criteria for Parole Selection' set out in Chapter VI (1A) (19) thereof, should be applied in the consideration of the placement on parole of offenders in Mr Walus' position. The essential issue is whether the Minister applied these criteria properly when he made the decision.

[48] As stated in paragraph [40] of this judgment, it is important for the decision maker, in this instance the Minister, who is faced with the task of deciding whether or not to grant the placement on parole of an offender who is serving a sentence of life imprisonment, to consider both the positive and negative factors provided for in the Parole Board Manual.

[49] In essence, when considering whether the decision of the Minister was rationally connected to the reasons he provided alternatively whether it was reasonable, the question for determination is whether the decision was an irrational decision which a reasonable authority could make by way of achieving

a reasonable equilibrium between the positive factors in favour of the placement of Mr Walus on parole and the negative factors which militates against his placement on parole.

[50] The reasons for the Minister's decision have been stated before. The placement on parole of Mr Walus is refused because of the nature of the crime and the remarks of the sentencing court. The said remarks have been extensively set out in the parties' respective papers, as such, there is no need to repeat them here.

[51] The submission by the counsel for Mr Walus is that the Minister has, in making the decision sought to be reviewed, disregarded all the previous reasons given by his predecessors and, in particular, the import of the judgment of Kollapen J, and now seeks to place reliance upon the sentence remarks and the nature of the crime made by the trial Judge some twenty-seven (27) years ago. According to counsel, this reasoning is fatally flawed for the following reasons:

- 51.1 He contends that in principle Mr Walus will never be eligible for day parole or parole as the sentence remarks and nature of the crime will never change;
- 51.2 the Minister failed to properly apply the equilibrium principle by failing to assign the correct weight to the factors he relied upon and similarly failing to assign the correct weight to the positive factors influencing Mr Walus' rehabilitation;
- 51.3 the Minister relies on the reasons which will never change Mr Walus' release on day parole or parole and which depends entirely on the capricious exercise of the Executive's (Minister) discretion leaving him free to consider such a possibility at a time which pleases the Executive.

[52] The submission is that, having regard to the fact that the ground relied upon by the Minister in refusing to place Mr Walus on parole will never change, the Minister clearly incorrectly applied the equilibrium principle regarding the weighing up of the various applicable factors and, therefore, there is no rational basis for his decision. Accordingly, it is argued, the Minister's decision stands to be reviewed and set aside in terms of section 6(2)(f)(ii) of PAJA on this ground.

[53] I am not in agreement with counsel for Mr Walus when he says that the Minister has ignored all the previous reasons given by his predecessors and, in particular, the import of the judgment of Kollapen J.

[54] Even though it would appear that the Minister in refusing Mr Walus' placement on parole provided different reasons on each application, however, the litigation history that follows such decisions demonstrates that all the Minister's decisions, until now, were effected by procedural irregularities and would have in any event not passed muster. The Minister had to deal with those procedural irregularities, as well, and correct them.

[55] On the other hand, the judgment of Kollapen J was never ignored by the Minister. The matter was referred back for a fresh decision on the issue of risk and remorse. The Minister's papers, particularly the replying affidavit, are replete with his concession of risk and remorse. He has on a number of times admitted that he has accepted that Mr Walus has shown remorse and that he is no longer at risk of reoffending.

[56] The reason why the Minister and the SACP continues relying on the nature of the crime and the remarks of the sentencing Judge even after the passage of some twenty-seven (27) years of Mr Walus' incarceration, is because they consider the time spent by Mr Walus in prison to be inadequate punishment for the crime he committed. Even though the Minister has accepted

the positive factors favouring the placement of Mr Walus on parole, he together with the SACP insists that the nature of the crime and the sentencing remarks of the trial court and subsequently the remarks by Supreme Court of Appeal outweighs the positive factors in favour of placing Mr Walus on parole.

[57] According to the Minister's counsel, on considering Mr Walus' placement on parole, the Minister was enjoined to have due regard to the nature and seriousness of the crime of murder committed by Mr Walus and the remarks made by the court at the time of sentencing. The crime of murder is said to have involved the coldblooded assassination of a prominent political leader for which careful preparations were made in advance and Mr Walus was convicted of murder with no extenuating circumstances.

[58] Conversely, the SACP's counsel argues that the crime committed by Mr Walus was unlike many others in South Africa in that it shook the very core of society at the time when South Africa was trying to build a democratic and free society. The society was put at the brink of war. As such the public's perception of how the prisoner was dealt with must come to the fore when parole is considered. A further argument was that the death of such a prominent leader demands retribution and deterrence and the offender must therefore serve his whole life in jail.

[59] The crux, in both arguments of the Minister and the SACP, is that on being granted parole, Mr Walus will spend only two years on parole unlike other lifers who under the 1998 Act will spend the rest of their lives as parolees. Serving only two years of his remaining life sentence, is according to them inadequate punishment particularly in the light of the nature of the crime he committed and the remarks of the sentencing court.

[60] Without having to reinvent the proverbial wheel, I am inclined to agree with the reasoning of Janse van Nieuwenhuizen J when dealing with this point in her judgment, where she remarks as follows:¹²

"[16] Punishment, however, has various purposes. In Guide to Sentencing in South Africa, SS Terblanche, 2nd edition, the purposes of punishment are listed as deterrence, prevention, rehabilitation and retribution [p 155 and further].

[17] Deterrence, prevention and retribution will no doubt play an important role during the initial years of serving a sentence. This is evident from the fact that prisoners sentenced to life imprisonment only qualify for parole after having served 15 years of their sentence.

[18] During this time the prisoner have an opportunity to rehabilitate. The various factors taken into account when parole is considered confirms the importance of rehabilitation during the years of imprisonment.

[19] The philosophy of parole [VI (1A) (15) (b)] set out supra, confirms that the focus of punishment shifts with the passing years and ultimately more weight is attached to rehabilitation. It is, inter alia, an internationally accepted method and based on compassion. Although parole does not imply proof of rehabilitation [VI (1A) (15) (c) supra], it is certainly a step in the rehabilitation process.

[20] It is, however, important to bear in mind that parole is still a form of punishment. Strict conditions are imposed on a prisoner on parole and parole will be withdrawn should the prisoner not adhere to such conditions. In a nutshell, parole is a means of serving the remainder of the sentence outside prison. In the present instance the applicant will serve his sentence until death.

¹² Walus v Minister of Correctional Services and Others (41828/2015) [2016] ZAGPPHC 103 (10 March 2016).

- [21] *The criteria for parole selection [V1(1A) (19) supra] entails an attempt "to evaluate prisoners **fairly and justly** for parole, to submit well-considered recommendations and to effectuate the highest possible form of professionalism." (own emphasis). The report by the second respondent is an excellent example of the application of the aforesaid criteria. If one has regard to the policy considerations applicable to a decision to place a prisoner on parole, the applicant complies overwhelmingly with all the criteria.*
- [22] *I am mindful of the fact that the nature of the crime and the sentencing remarks is a factor to be taken into account when considering an application for parole. This is, however, one of seven factors and to my mind, all factors should be weighed up equally according to their merits."*

[61] I must however hasten to mention that although parole itself is a form of punishment which in terms of the 1998 Act, is a means of serving the remainder of the sentence outside prison, however, in the circumstances of this matter Mr Walus would only be on parole for two years. This is actually the Minister and the SACP's main bone of contention which Janse van Nieuwenhuizen J failed to take into consideration.

[62] As stated in the remarks of Janse van Nieuwenhuizen J, the criteria for parole selection entails an attempt "to evaluate prisoners fairly and justly for parole, to submit well considered recommendations and to effectuate the highest possible form of professionalism."

[63] In circumstances where the decision-maker is given a discretion that is dependent on the consideration of a range of competing factors, like in this case, the Constitutional Court in *Bato Star*,¹³ speaking of the Marine Living

¹³ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC), para 49.

Resources Act,¹⁴ provided some direction as to the approach to be adopted on what is to be done by the court in a judicial review of an administrative action when a variety of factors are to be considered by a decision-maker, as follows:

"...That decision must strike a reasonable equilibrium between the different factors but the factors themselves are not determinative of any particular equilibrium. Which equilibrium is the best in the circumstances is left to the decision-maker. The court's task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances."

[64] It follows that firstly, none of the factors placed before the decision-maker are determinative of any equilibrium. Secondly, which equilibrium is best under the circumstances of each case, is left to the decision-maker to determine. The court's task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances.

[65] The Minister concedes that when considering the placement of Mr Walus on parole, he took into account all the positive factors that are in his favour. He also accepted that through the various programmes Mr Walus has undergone in prison, he has rehabilitated, he has shown remorse and is no longer at risk of re-offending. He is also satisfied that there is no longer any opportunity of a restorative process that can be undertaken.

[66] Nevertheless, in addition to those favourable factors he also had to consider the negative factors that militates against the placement of Mr Walus on parole. Those factors, that he considered, are the heinous crime Mr Walus committed and the scathing remarks of the sentencing court and the fact that Mr Walus will serve only two (2) years of his sentence on parole. In applying

¹⁴ Act 18 of 1998.

the equilibrium principle, he concluded that the negative factors outweigh the positive factors, hence his refusal to place Mr Walus on parole.

[67] I am satisfied that the Minister has applied the equilibrium principle correctly and has applied the correct weight to the factors he relied upon for refusing Mr Walus' placement on parole as well as on the positive factors influencing Mr Walus' rehabilitation. In understanding the remarks of the sentencing court, it is clear that the intention was to keep Mr Walus incarcerated for life. Of course he is entitled to be placed on parole but parole is not a right but a privilege and can only be granted by the Minister on consideration of all the facts before him.

[68] Mr Walus' actual complaint is that the Minister in applying the equilibrium principle, placed more weight on the negative factors which will never change, than the positive factors. Sight should, however, not be lost of the fact that what weight is attached to what factors, is for the Minister as the decision-maker to determine. And once such determination has been made it is not for the court to replace it with one that it is favourable to it.¹⁵

[69] In *Clairison's*¹⁶, the Supreme Court of Appeal held that the determination of the weight to be applied to each factor lies with the decision-maker and not the court.

"What constitutes a reasonable decision on the part of the decision-maker will depend on the circumstances of each case. In making determinations on reasonableness, the courts "should take care not to usurp the functions of administrative agencies" by way of the review of administrative decisions "to prefer their own views as to the correctness

¹⁵ MEC for Environmental Affairs and Development Planning v Clairison's CC 2013 (6) SA 235 (SCA), paras 20 to 23.

¹⁶*Ibid*

of the decision, and thus obliterate the distinction between review and appeal."

[70] It means therefore that what constitutes a reasonable decision on the part of the decision-maker will depend on the circumstances of each case and in making the determination on reasonableness, the courts should take care not to usurp the functions of administrative agencies. I, in that sense cannot change the factors which the Minister considers to be more- weighty than the others.

Does the Minister's refusal to place Mr Walus on parole infringes his right not to be subjected to inhuman or degrading treatment or punishment?

[71] Mr Walus' counsel argues that in view of the reasons provided by the Minister, in the face of the facts which confirms that Mr Walus has rehabilitated, Mr Walus' sentence potentially constitutes a life-long imprisonment, which infringes his right not to be subjected to cruel, inhuman or degrading treatment or punishment, in terms of section 12 (1) (e) of the Constitution, which infringement is not justifiable in terms of section 36 of the Constitution and in terms of international law.

[72] The contention is that this conduct of the Minister is unconstitutional and unlawful and, therefore, falls to be reviewed and set aside in terms of the provisions of section 6 (2) (i) of PAJA.

[73] The Minister's counsel in argument contends that Mr Walus' averment that the decision of the Minister amounts to cruel, inhuman and degrading punishment is unsubstantiated.

[74] It is trite that the possibility of parole saves an offender's sentence of life imprisonment from being inhuman and degrading punishment. That the decision amounts to cruel inhuman and degrading punishment is equally

misplaced. It is indeed so that parole is a non-custodial measure and a form of supervision in the community which is less burdensome than incarceration. The placement on parole or refusal of parole falls within the ambit of punishment as was held recently in *Phaahla*. The test to be applied in determining whether implementation of a sentence of incarceration amounts to cruel inhuman or degrading punishment is;

"Whether the punishment prescribed is so excessive as to outrage standards of decency. The effect of that punishment must not be grossly disproportionate to what would have been appropriate and I underline the words grossly disproportionate. In this regard it is not mere disproportionality between the sentence legislated and the sentence merited by the offence which would lead to elimination of the section 12(1)(e) right but only gross disproportionality."

[75] Factors to be taken into account in determining whether punishment or treatment is cruel, inhuman or degrading for purposes of Section 12(1)(e) of the Constitution includes:

"Its effect which must not be grossly disproportionate, the gravity of the offence, the personal circumstances of the offender and the particular circumstances of the case."

[76] I am inclined to agree with the proposition by the Minister's counsel that regard being had to the nature of the crime committed by Mr Walus; the scathing sentence remarks of the trial court taken together with the fact that when placed on parole, Mr Walus would only be required to serve a period of two years of his sentence of life incarceration on parole, the Minister's decision cannot be described as punishment which is so excessive as to outrage standards of decency, or punishment which is grossly disproportionate to what would have been appropriate. That Mr Walus has not been placed on parole yet, does not mean that he will never be placed on parole, and his illegibility for

parole alleviates the sentence of life imprisonment and makes it not inhuman and degrading punishment.

The decision is arbitrary and capricious

[77] The argument by the Minister's counsel is that the Minister's decision does not fall to be reviewed and set aside on the basis that it is arbitrary and capricious. According to counsel the contention by Mr Walus is the fact that the Minister cannot undo the decision of the trial court and thus resulting in Mr Walus never qualifying for parole, has no merit. According to counsel, it is not the Minister's stance that Mr Walus will never qualify for parole. The Minister's stance is that in the light of the sentence remarks of the court at the time of the imposition of the sentence, it is not appropriate that Mr Walus be placed on parole presently, that is, not now.

[78] Fact is, as argued by Mr Walus' counsel, the negative factors will never change. However, that does not mean that Mr Walus would never be placed on parole. The Minister's argument is that Mr Walus will be considered for parole but cannot be placed on parole just yet. In placing more weight on the negative factors, the Minister considered the fact that the twenty-nine (29) years (the twenty-seven (27) years already spent incarcerated and the two (2) years on parole, if granted) that Mr Walus will serve as his sentence, is inadequate punishment for the crime he committed and can therefore never be outweighed by the positive factors – in particular by the fact that he has rehabilitated.

[79] Janse van Nieuwenhuizen J, who had the opportunity to consider the merits of the review application and in particular the same reasons of the Minister as pertains in this application, when granting Mr Walus placement on parole, erroneously took into account that Mr Walus will spend the rest of his life on parole, which is not correct. Mr Walus will be on parole for only two years and after that he shall have served his entire sentence.

[80] As found by Kollapen J¹⁷ there is no set period prescribed within which an applicant for parole must be released. It all depends on the facts and circumstances of each case and on the rationality and reasonableness of the decision maker, in this case the Minister.

The decision is discriminatory

[81] According to Mr Walus' counsel, the decision by the Minister to place reliance upon the sentence remarks to the exclusion of positive factors in favour of Mr Walus' release and ignoring his rehabilitation, constitutes bias and unfair discrimination, especially in light of other offenders with similar sentence remarks who have been released on parole such as Juan Van Wyk, Ferdie Barnard, Eugene De Kock, Casper Greeff, Zhu Hong, Jin Wang and Gabriel Makoe who all committed heinous crimes including murder and who were released, some serving only 13 years and 4 months being the minimum sentence period which also applies to Mr Walus.

[82] The submission is that the application of the parole policy by the Minister is clearly at odds with the application in respect of other similar offenders referred to above.

[83] The contention is that the reasons and the inconsistent application of the parole policy by the Minister with the resultant effect as set out above clearly disadvantages Mr Walus and undermines his human dignity. To this end the decision of the Minister is said to be clearly discriminatory in nature without any justification and it constitutes unfair discrimination in accordance with provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Counsel concludes his argument by saying that he can safely state that the court in respect to the offenders who were released, also made

¹⁷ Walus v Minister of Correctional Services and Others (14694/19) [2019].

scathing remarks as to the conduct of these prisoners in respect to the various crimes committed.

[84] Counsel for the Minister submits that the decision not to place Mr Walus on parole does not amount to unfair discrimination. According to counsel it does not avail Mr Walus to compare his case to those of other offenders sentenced to life incarceration and who have been placed on parole because each case is dealt with on its own individual merits

[85] The merits of the cases of the persons Mr Walus' counsel is referring to do not form part of the papers before me, nor are the reasons on which the court decided to release them on parole. I cannot, therefore, in earnest comment on whether the refusal by the Minister to place Mr Walus on parole is discriminatory as I cannot make a comparison.

Executive Bias

[86] The contention by counsel for the Minister is that the averment by Mr Walus that the Minister's decision falls to be reviewed and set aside ostensibly in terms of the relevant section of PAJA on the basis of executive bias because Mr Walus is treated as the person who committed a political assassination of a prominent and revered leader, is without merit.

[87] The submission by Mr Walus that there is substantial institutional pressure on the Minister not to disappoint or betray the executive and specifically the partners in the tripartite alliance; and that the manifest bias sways judgment and the Minister is thus unable to exercise his function impartially in this particular case; and that no Minister is prepared to accept political fallout by the release of Mr Walus and thus fortifies Mr Walus' apprehension of executive bias, is unsubstantiated and at best is just mere speculation.

[88] There are no facts in the papers which bear these averments. The statement of the National Executive Committee of the African National Congress, on which Mr Walus seeks to rely for this argument has no bearing on the averments. It is clear from the reading of that statement that it was made merely as a comment in relation to a judgment of the court that was granted in a matter that related to one of the cases of Mr Walus. It cannot be said that the statement was made as a threat to the Minister not to exercise his functions.

[89] As regards the question of bias. I align myself with the view taken by Kollapen J, in his judgement when he expressed himself as follows on this point:

"That the decision was motivated by bias on the part of the First Respondent.

[19] *The stance of the Applicant in advancing the case for review is that the conduct of the First Respondent over the period within which the Applicant's parole applications were considered suggested a constant shifting of the goalposts by the First Respondent which demonstrated bias. In support of this argument the Applicant seeks to compare the changing nature of the reasons offered from time to time by the First Respondent for refusing to place the Applicant on parole.*

[20] *While the reasons in support of the decisions of the First Respondent has changed over time, there has also been some consistency in the issues identified by the First Respondent as being obstacles and they include the matter of restorative justice as well as the matter of the Applicant constituting a security risk. Without at this stage suggesting that they offer cogent justification for the decisions of the First Respondent (a matter I will return to), I am not convinced that they demonstrate a shifting of the goal posts and the presence of bias as the Applicant has suggested.*

[21] *The litigation history which has been outlined above*

*demonstrates that even in those instances when the Courts reviewed and set aside the decisions of the First Respondent, it was effected on procedural grounds without any suggestion of the presence of bias. One would need to be careful in embracing a conclusion of bias as the Applicant has urged this Court to do in the absence of clear evidence to that effect."*¹⁸

[90] Janse van Nieuwenhuizen J in her judgment had made a finding of bias against the Minister on the basis that the Minister had shown bias by stating that representations made by the deceased's family opposing the respondent's release, which had not been placed before him when he made the decision, would have only fortified his decision not to grant parole. This finding was in a way set aside by the appeal court when it referred the matter back to the Minister for a fresh decision taking into account the deceased's family representations.

IRRELEVANT MATTERS

[91] I am inclined to agree with counsel for the Minister that the interview on Radio 702 with Mr Chison Phiri ("Mr Phiri"), the spokesperson of the erstwhile Minister, is irrelevant for purposes of these proceedings. Mr Walus's reliance on this interview in support of his argument that the Minister's decision was influenced by this interview, is misplaced.

[92] Firstly, the comments made by Mr Phiri during the interview were his own views, perhaps it might be said that they were the views of the Minister at the time but certainly they cannot be attributed to the current Minister. Secondly, at the time of the interview the present Minister was not in office. To

¹⁸ Walus v Minister of Correctional Services and Others (14694) [2019] ZAGPPHC 1029 (12 December 2019).

say that he was influenced by what was said in that interview or to attribute what was said in that interview to him, is far-fetched.

THE CONCLUSION

[93] I have to conclude that based on the aforementioned reasons, Mr Walus' review application has no substance and falls to be dismissed.

[94] The Minister's counsel argued for costs which costs should include costs of two counsel, in case the matter is decided in the Minister's favour. As the successful party, the Minister is entitled to costs of this application. In my opinion the costs of two counsel are justified in the circumstances of this matter and should be granted.

THE ORDER

[95] Consequently, the following order is made:

1. Condonation for the late filing of the second and third respondents' answering affidavit is granted.
2. The application is dismissed.
3. The applicant is ordered to pay the costs of the first respondent which costs must include the costs of two counsel.



E.M KUBUSHI

JUDGE OF THE HIGH COURT

Appearance:

Applicant's Counsel	: Adv. R. du Plessis SC Adv L. Kellermann SC
Appellant's Attorneys	: Julian Knight and Associates Inc.
1 st Respondent's Counsel	: Adv. M T K Moerane SC Adv. G Bester SC Adv. N Mteto
1 st Respondent's Attorneys	: The State Attorneys, Johannesburg.
2 nd & 3 rd Respondents' Counsel	: Adv. G. Malindi SC Adv. N. Nyembe
2 nd & 3 rd Respondents' Attorneys	: Thaanyane Attorneys
4th Respondent's Counsel	: No appearance
4th Respondent's Attorneys	: The State Attorneys, Pretoria
Date of hearing	: 10 November 2020
Date of judgment	: 12 February 2021