



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

- (1) REPORTABLE: Yes ☒ / No ☐
(2) OF INTEREST TO OTHER JUDGES: Yes ☒ / No ☐
(3) REVISED: Yes ☐ / No ☒

Date: 28 October 2024


WJ du Plessis

In the matters between:

Case No 2024/00411

LAZARUS TSHIDISO MAZINGANE

Applicant

and

THE MINISTER OF CORRECTIONAL SERVICES

1st Respondent

**THE CHAIRPERSON OF THE NATIONAL COUNCIL
OF CORRECTIONAL SERVICES**

2nd Respondent

**THE CHAIRPERSON OF THE PAROLE BOARD
LEEUEWKOP MEDIUM**

3rd Respondent

**THE CHAIRPERSON OF CASE MANAGEMENT
COMMITTEE LEEUEWKOP MEDIUM C**

4th Respondent

THE HEAD OF LEEUEWKOP MEDIUM C CENTRE

5th Respondent

In the matter between:

Case no 2024/00414

MARIUS BAPELA

Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	1 st Respondent
CHAIRPERSON, NATIONAL COUNCIL FOR CORRECTIONAL SERVICES	2 nd Respondent
CHAIRPERSON OF LEEUWKOP PAROLE BOARD CHAIRPERSON OF LEEUWKOP MEDIUM C:	3 rd Respondent
CASE MANAGEMENT COMMITTEE	4 th Respondent
In the matter between:	Case no 2024-00353
JABULANI MBUKENI MBHELE	Applicant
and	
MINISTER OF CORRECTIONAL SERVICES	First respondent
CAROL MOBU (Correctional services official)	Second respondent
In the matter between:	Case no: 2024-00360
TSHEPO DUNCAN KHUMALO	1st Applicant
BONGANE ISAAC KUBHEKA	2nd Applicant
HURBERT MARTIN MMTHEMBU	3rd Applicant
MATTHEW BUTI LESHORO	4th Applicant
ISAAC ZULULAKHE MDAKANE	5th Applicant
LUCKY SIKHOSANA	6th Applicant
and	
THE MINISTER OF CORRECTIONAL SERVICES	1st Respondent
THE NATIONAL COUNCIL OF CORRECTIONAL SERVICE	2nd Respondent
THE CHAIRPERSON PAROLE BOARD LEEUWKOP	3rd Respondent
THE CHAIRPERSON CASE MANAGEMENT LEEUWKOP MEDIUM C CENTRE	4th Respondent

In the matter between:

Case No 037664/2022

HLOMPHO HUMPHREY LEHPAILA

Applicant

And

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

1st Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL OF
CORRECTIONAL SERVICES**

2nd Respondent

Coram: Du Plessis AJ

Heard on: 22 August 2024

Decided on: 28 October 2024

Summary: Parole of people sentenced to life imprisonment – constitutional rights implicated - process – legitimate expectation to be considered – no right to be released on parole – administrative review of decisions – failure to take a decision – inordinate delays in the process – remedies.

JUDGMENT

DU PLESSIS AJ

Introduction

[1] On 22 August 2024, I heard applications from sentenced offenders in a number of prisons. In most cases, I granted various orders during that week and indicated that the reasons would follow. These are the reasons, and in the case of Mr Lephaila, also the order.

[2] This judgment deals with the applications relating to the parole process. I deal with them all in one judgment, as many issues overlap. Also, the judgment of the

Constitutional Court of *Walus v Minister of Justice and Correctional Services*¹ seems to have spurred new hope in many sentenced offenders serving life sentences (“lifers”) that they may apply to the court directly for parole. I thought they could benefit from a consideration of that decision's implications for their own cases.

[3] The applicants all represented themselves. This, at times, required a pragmatic approach and generous construction of their affidavits.² I also asked questions from the Bench to clarify the applicants' complaints and the respondents' answers. Counsels acting for the respondents were helpful, making concessions where concessions needed to be made and assisting me in drafting orders in most instances. It is not a perfect process, but in the interests of justice and fairness to all parties, imperfections can be excused.

[4] Many of the cases cited the same respondents. In all cases, the first respondent was the Minister of Correctional Services, who is the executive in government responsible for correctional facilities. In the case of lifers, he also has the ultimate power to decide whether a sentenced offender will be released on parole.

[5] The other respondent often cited is the chairperson of the National Council of Correctional Services (NCCS), which is the body that considers the profiles of sentenced offenders. The Minister makes a decision based on the advice of the NCCS, as will be explained later in the judgment.

[6] In some instances, the chairperson of the parole board (CSPB) is cited as the chairperson of the body that makes recommendations to the NCCS based on the profiles. Every prison has its own chairperson. Another respondent commonly cited is the Chairperson of the Case Management Committee (CMC), who scrutinises the files of sentenced offenders and compiles a report on their progress in the specific

¹ [2022] ZACC 39.

² *Xinwa v Volkswagen of South Africa (Pty) Ltd* [2003] ZACC 7; 2003 (4) SA 390 (CC).

correctional centre. Lastly, the head of every prison is responsible for running the correctional facility.

[7] What follows is a brief explanation of each of the ten applicant's applications who appeared before me. I will set out the case they made out in the affidavit, and the State's answers to it. After discussing all the facts and argument, I will discuss the law applicable to the ten cases in detail.

Lazarus Tshidiso Mazigane

[8] Mr Mazigane approaches the court for assistance with his parole application, asking an order that the Minister facilitate the applicant's parole process, compel the respondents to provide written feedback within a stipulated time and protect him from further delays.

[9] He states the following: he is incarcerated at Leeuwkop Medium C Correctional Centre, serving a life sentence. He was convicted and sentenced to life imprisonment on 27 November 1998 and has thus far served almost 26 years. He calculates his parole consideration date as 27 November 2013 in terms of the *Van Wyk* judgment,³ minus six months. During the hearing, he stated that he has now been in prison for a long time and that "every time promises are made, he will be released on parole, but it does not happen". He wants to know when he will be released.

[10] The head of his correctional centre states that two warrants govern Mr Mazigane's incarceration – one with a sentencing date of 27 November 1998 and the other with a sentencing date of 3 December 2002. He applied for placement on parole, and on about 26 August 2021, the NCCS considered the application. They did not recommend him to be placed on parole at that stage and recommended that the matter be placed before the NCCS after 24 August 2023, giving Mr Mazigane a profile date of 31 January 2024. Again, it was recommended that Mr Mazigane complete further

³ *Van Wyk v Minister of Correctional Services* [2011] ZAGPPHC 125.

programmes. He did so, and the CMC received further reports during February, March and April 2024. The NCCS is thus waiting for updated reports. Once the reports are received, the process will continue.

[11] The applicant emphasises his right to just administrative action. He also states that he completed all the Department's required programmes and acquired carpentry skills. His heads of argument state that he has been deprived of a fair parole process, as his consideration date was in 2013, and that the chairperson of the CMC ignored the time frame for him to be considered for parole before the referral to subsequent processes by the CSPB and the NCCS. A legitimate expectation has been created regarding the minimum detention period stipulated in the Act.

[12] He obtained a Court order in October 2018 compelling the chairperson of the CMC to comply with the Minister's recommendations within 60 days and for a comprehensive report to be compiled to be submitted to the chairperson of the parole board. In his draft order dated 3 October 2023, he asks the court to order the respondents to give him feedback on his application for parole and to order the Minister not to delay in giving the feedback.

[13] After listening to Mr Mazigane, it became clear that this application was brought prematurely as he has not yet made a fresh parole application after 31 January 2024. What was outstanding was the social worker's report. It is thus not possible to order the respondents to give feedback or to order the Minister to make a decision.

[14] Moreover, even on a generous interpretation of the application, and even after questions in court, it is not clear what the *legal* basis is for Mr Mazigane's request or the facts he relied on. Mr Mazigane's last words to the court were, "They tell my family that I will come out. Can I ask when I am going home?" This is a poignant question – but Mr Mazigane failed to include the second sentencing date in his affidavit (seemingly for a second offence), which may or may not impact the calculation of his parole date. The respondents provided information regarding his parole application. The court

would have benefited from more facts regarding the process and the reasons for the previous decisions to make the appropriate orders to ensure that Mr Mazingane's parole process was fair. In the absence of those facts, no order can properly be made.

Marius Bapela

[15] Mr Bapela was sentenced to life imprisonment on 31 October 2006. He states that he was due to be considered for parole after serving 13 years and four months. He has been incarcerated for almost 18 years, and he has thus already served the minimum detention period. He states that the respondents have delayed his application parole as he waited three years for feedback or a response from the Minister on his parole. Mr Bapela sought an order to compel the chairperson of the CMC to compile his profile and re-submit it to the chair of the parole board for parole placements and that the chairperson of the NCCS and the Minister must give a response and/or feedback within 21 days after the profile was submitted.

[16] The head of the correctional centre states that the fact that the applicant reached the minimum detention period does not entitle him to be released on parole. He has no right to parole. Thus, his detention remains lawful unless reviewed and set aside. He states that Mr Bapela's parole application was considered around 26 August 2021, but the Minister's decision was only made 17 months later, in April 2023, after the NCCS considered the application. It was recommended that he not be released on parole but that he should instead undergo further treatment and programmes. He has given feedback regarding the attendance of the programmes and has been assessed by the social worker on 30 July 2024. The respondents are awaiting the report.

[17] The respondent states that if he was not happy with the decision that he should be further profiled, he should have approached the court seeking that the administrative decision be judicially reviewed. One cannot simply disregard the decision that he must be further profiled. Due to the nature of the process, he also believes that a 21-day turnaround time from submitting the profile to the feedback or response is simply not possible.

[18] The respondent continues that the Minister can consider Mr Bapela's release on parole only after receiving a recommendation from the NCCS. There are no facts before the court that the Minister delayed deciding what he was empowered to decide under s 78(1) of the 1998 Act. Likewise, Mr Bapela did not make a case to review the decision of the Chairperson of the NCCS, which considered Mr Bapela's readiness and then made recommendations.

[19] After hearing submissions it became evident that the relief that Mr Bapela sought was no longer competent because, in the meantime, the NCCS made a decision and advised the Minister, after which the Minister also made a decision. However, this process took 17 months. He was given a further profile date of 31 January 2024, and there has "been movement" since. Thus, a new parole process is underway. The CMC is waiting for the social worker's report.

[20] While, on the facts, the relief Mr Bapela sought was no longer competent, to ensure progress in the current process, I ordered that the social worker provide their report within 30 days of the order.

Jabulani Mbukeni Mbhele

[21] Mr Mbhele sought an order that the Minister consider his application within ten days of the court order. He is currently serving a life sentence at Modderbee Correctional Centre. In March 2024, he had served 22 years. According to his calculation and in line with the old parole regime, which applies because he was sentenced before 1 October 2004, he was eligible for parole on 12 January 2015.

[22] He was first considered for parole in March 2017 and again in October 2018. On both occasions, it was recommended that he complete more programmes. He complied by completing the programmes and obtained a qualification. He has been to both the CMC and the Parole Board. It was then recommended that he be placed on parole in March 2020.

[23] His file was considered by the NCCS and submitted for final decision to the Minister in July 2020. However, it took the Minister four years to make a decision. Mr Mbhele states that this delay is unwarranted, unreasonable and unjustifiable; it violates his constitutional rights to freedom and security and to just administrative action. Lastly, it violates his right to be considered for parole when he has served the required minimum detention period and completed all the programmes. He states that while parole is not a right, the right to be considered is not merely a privilege. He states that he has exhausted his internal remedies. Due to her unresponsiveness, he is specifically aggrieved by the treatment he received from Ms Carol Mobu, the employee in the then Minister's office tasked with the administration of lifers' parole processes.

[24] He thus asks that two decisions be reviewed: that of the Minister and that of Ms Mobu. He bases this on ss 5 and 6 of PAJA, in that he has not been afforded reasons for the delay in the process. His draft order asks the court to order the Minister to consider his parole application within ten days.

[25] Ms Mobu's answering affidavit states that the two parole consideration recommendations were not made by the Minister but by the NCCS. She admits Mr Mbhele was recommended for placement on parole but denies that there is a prescribed period in which the Minister must decide. She also denies that the delay was unwarranted, unreasonable, and unjustifiable but rather due to the large number of applications that the Minister receives. However, they tried to locate the file, which they could not do. Also, the change in administration and the change in ministers (from Lamola to Groenewald) led to a further delay in the process.

[26] Ms Mobu denies she caused delay, stating she does not have the power to make the decision and she cannot tell the Minister how to do his job. Furthermore, she states that Mr Mbhele cannot review the Minister's decision because it was not taken. What he should have done instead was to request written reasons why the decision was not taken.

[27] On the day of the hearing, a decision from the Minister, dated 25 July 2024, was uploaded onto CaseLines, indicating that Minister Groenewald did not approve his parole, requiring that he undergo more psychotherapy and that the matter be placed before the NCCS after 12 months. The relief sought thus became moot.

[28] Should Mr Mbhele wish to take the Minister's current decision on review, he can now do so, provided that he provides the court with the necessary information and indicates clearly on which section of PAJA (as discussed below) he relies.

Tshepo Duncan Khumalo, Bongane Isaac Kubheka, Hurbet Martin Mthembu, Matthews Buti Leshoro, Isaac Zululakhe Mdakane, Lucky Sikhosana

[29] The six applicants brought one application, which should have been six separate applications. They complain that the respondents have failed to consider their applications for parole and have delayed feedback for more than 38 months, while, in terms of PAJA, it should be no more than 180 days. I must thus review the decision of the Minister to not make a decision.

[30] Mr Khumalo was sentenced to life in 2005 and is serving his sentence at Leeuwkop Medium C. He submitted his profile in October 2020 and, to date, has not received feedback. This affected his reasonable expectations since no decision was taken for 40 months. He has done all he could to find out what is happening (which he terms as exhausting all his internal remedies). He states that this is irrational. He thus requires a review in terms of s 6 of PAJA for the Minister's failure to take a decision in terms of s 65(6) of the 1959 Correctional Services Act. They specifically quote s 6(2)(g) of PAJA and the Minister's failure to approve and release the applicants on parole.

[31] Mr Kubheka is also serving a life sentence in Leeuwkop, having served 18 years and seven months. He states that he has not been released despite the *Phaahla* and *Walus* judgments. He received his profile and has been given a date of 14 March 2024.

[32] Mr Mthembu and Mr Mdakane are in a similar situation and repeat Mr Kubheka's averments, with a 14 March 2024 date. Mr Leshoro repeats the same, with a profile date of 31 January 2024. Mr Sikhosana repeats the averments made and adds that he has been repeatedly required to do the same programmes as before.

[33] The joint heads of argument contend that the Minister recommending further profiles and seeking the same rehabilitative courses that have already been completed means that the Minister is acting arbitrarily and unjustly. They also first state that the respondent (presumably the Minister) erred in not making a decision, but then also state that when the decision was made, not all the factors were sufficiently considered. I am mindful that the applicants are lay persons. Still it remains difficult to understand what exactly the argument is.

[34] They also argued that this is a circumstance where the Court may substitute its own decision for that of an administrative functionary – they need not wait for the NCCS to consider their parole application and then wait another 40 months for the Minister to make a decision.

[35] The respondents point out that the applicants do not indicate what decisions they seek to review. They state that Mr Khumalo's profile was submitted in October 2020. However, he does not indicate which internal remedies he followed. Be that as it may – the respondents say they have, since the previous hearing, considered Mr Khumalo for parole and made recommendations to the Minister. Minister Groenewald made a decision the day before the hearing. The relief sought is thus moot. To ensure no delay, I ordered that the decision be communicated to him within 15 days of the court order.

[36] Mr Kubheka was recommended by NCCS for parole on 14 May 2024, and his profile was submitted to the Minister for final decision-making on the same day. The respondents contend that this process should run its course, after which Mr Kubheka can review the decision if necessary. Stopping the process now will prejudice Mr

Kubheka. However, he has also not made a proper case for review in terms of PAJA and Rule 53.

[37] Mr Mthembu's profile is due to be submitted after the report for the Social Worker is received. He questions the profiling, but he does not state what the problem is with it and why it should be reviewed. He also does not place the necessary facts before the court to enable an informed decision. Without grounds for review, his application cannot succeed. During the hearing, he replied that the problem is not so much with the profile but with the time it takes the NCCS to decide, and then and the Minister, once the profile is submitted to the Minister. He states that they must decide in 60 days, but it takes much longer.

[38] Mr Leshoro was "further profiled" on 31 January 2024, which means his parole was declined and subjected to a further application. It was after he was informed of further profiling (since it was decided he needs to undergo more therapy) that he approached the court for a review. The respondents did provide him with reasons, but he did not engage with the reasons so as to inform the court of what he disagreed with. He is required to attend anger management courses and psychotherapy, after which the report from the psychologist will be submitted, and he will be further profiled again. The relief he seeks is thus premature.

[39] However, during the hearing, he pleaded with the court whether it is possible that, if he does submit his documents now, it is possible for the decision-makers not to take three years to provide feedback.

[40] Mr Mdakane was further profiled on 14 March 2024, and the decision was communicated to him on 6 June 2024. He did not challenge it internally. He has since subjected himself to further assessment, and his profile will then be sent to the CSPB once he completes the programmes. The decision was thus taken, meaning that the relief sought is moot.

[41] Mr Skhosana was also recommended for further assessments. He did not dispute the respondents' reasons for further profiling. He is required to submit his profile again in March 2025. His application is thus premature. His complaint seems to be that he is subjected to the same programmes for the second time. Yet this was done on the strength of the professionals who profiled him. There were no other specific facts before the court or grounds for review to indicate on what basis the court should review the decision, for example, why it is irrational.

[42] The second to sixth applicants did not meet the requirements of PAJA, mainly due to the lack of facts before the court. Even if the court should review it, the second respondent states that the decision not to place the applicants on parole was rational and lawful. This was not possible to assess. The court would have benefited from the reports, recommendations and reasons given.

Hlompho Humphrey Lephaila

[43] Mr Lephaila seeks a mandamus to compel the Minister to consider his placement on day parole within 30 days. He relies on s 3(1) of PAJA. He states that 180 days is more than sufficient for the NCCS to act in terms of s 136(3)(b) of the Act.

[44] He states that his rights have been adversely affected by the Minister's unreasonable delay to act in terms of s 136(3)(c) of the Act. He acts in his own interest but also in the interest of other "lifers" and asks the court to set a benchmark in terms of the duration that the Department of Correctional Services has to take to decide on a sentenced offender's parole in terms of s 136(1) of the Act.

[45] He appeared before the CSPB on 20 April 2021, after which his file was submitted to the NCCS and then to the Minister. The CSPB has recommended him for parole, and his file was submitted to the Minister. The Minister, however, delayed making a decision. More than 200 days have passed, which prompted him to approach the court on 19 July 2022.

[46] The NCCS met in March 2022, after which parole was not recommended, and the profile should be placed before the NCCS again in 24 months (i.e., March 2024). Mr Lephaila was to attend more programmes. The Minister signed the recommendations on 18 September 2022, shortly after Mr Lephaila launched the application. Since the Minister has already “made his decision”, the application is moot. What is left is the question whether the court can lay down general rules for timeframes for the NCCS and the Minister to make decisions.

[47] The respondents state that the courts cannot prescribe a timeframe for the executive to execute its work. The Minister is exercising his discretion in terms of legislation, ensuring that offenders are only placed on parole after completing certain rehabilitation and integration programmes. This is done after assessing the individual offender. If Mr Lephaila wanted to challenge the current procedure, he should have brought such a challenge instead. However, it is not for the courts to impose procedures on the Executive. During the hearing, the respondents indicated that the applicant is due to appear before the CSPB and that one cannot predict the decision. It is thus impossible to compel the Minister to make a decision within a certain time when the process has not reached that stage.

[48] During the hearing, Mr Lephaila indicated his frustration by constantly being told to do programmes in order to be released on parole, only to be told again to do the *same* programmes a few years later. He wants to know when he can go home. He also asks that the Minister not take more than three months or three years to make the decision once he receives the file. I have not made an order on the day – the order is at the end of this judgment.

The law

[49] The parole process consists of various stages.⁴ The state is represented by the Department of Correctional Services and its organs and officials, including the CMC (CMC), the Correctional Supervision and Parole Board (CSPB), the Correctional Supervision and Parole Review Board (CSPRB), the National Council of Correctional Services (NCCS) and the Minister. These organs act in terms of the relevant provisions in the Correctional Services Act 111 of 1998 (“the 1998 Act”). The organs must always act within what the 1998 Act, the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) allows.

[50] The legislature in South Africa acknowledges the principle of parole, and that sentenced offenders can be released before their prison sentence expires. This is, of course, subject to certain parole or correctional supervision conditions. Parole does not shorten the sentence; it merely allows for the release from prisons subject to certain conditions. Thus, the sentenced offender is still serving his sentence, but outside prison, and subject to the supervision and authority of the Department for the remainder of their sentence.

General remarks regarding parole for “lifers”

[51] Since all the applications dealt with people serving life sentences, the focus will be on the process of incarcerated offenders serving life sentences. Generally, the parole principle in South Africa has undergone some change from the 1959 to the 1998 Act. The 1959 Correctional Services Act (“the 1959 Act”, previously named the Prisons Act) emphasised the release of sentenced offenders. The 1998 Act (after its 2004 amendment), however, seems to focus more on the incarceration of sentenced offenders – a shift from rehabilitation to deterrence. The latter is a more punitive approach.

[52] The point of departure is that a lifetime of incarceration means that a sentenced offender will spend the rest of their natural life in prison. However, in terms of s

⁴ For a thorough explanation of the process and the law on parole, see Moses J (2012) *Parole in South Africa*.

73(6)(b)(iv) of the 1998 Act, such a person may be considered for parole after 25 years. This differs from the previous Act that still applies in certain instances.

[53] In terms of s 136(1) and (3), different regimes are applicable depending on when the crime was committed. This was set out in *Van Vuren v Minister of Correctional Services*⁵ where the Constitutional Court had to interpret s 136(1) and (3) to determine whether the non-parole period is 20 years as per s 136(3), or 10 to 15 years, as per s 136(1) that referred to the policy guidelines applied by the former parole boards before the 1998 Act. The Court stated that sentenced offenders who were sentenced at a time when the release on parole was possible after 10 or 15 years could not be subjected to a non-parole regime of 20 years, as this would amount to retrospectively and would offend the foundational values of constitutional supremacy and the rule of law. This means that there are three distinct periods, each with their own parole regimes:

- a. Under s 73 (6) of the 1998 Act, those who were sentenced to life incarceration after its commencement (1 October 2004) will have to serve 25 years. In *Phaahla v Minister of Correctional Services*⁶ the Constitutional Court declared that the distinction based on the date when sentence was imposed amounts to irrationality as well as unfair discrimination and that s 136(1) of the Act should, for sentencing purposes, instead refer to the date of the commission of the offence.
- b. Those sentenced between 1 March 1994 and 3 April 1995, when the 20-year parole minimum was introduced and the commencement of that Act, are entitled to be considered after 20 years.
- c. Those who were sentenced before 1 March 1994 or 3 April 1995 have to serve 15 years, although parole is also possible after 10 years in exceptional circumstances.

⁵ [2010] ZACC 17 paragraph 59.

⁶ [2019] ZACC 18.

[54] Those sentenced before 30 September 2004 were part of a scheme of remissions and credits for good behaviour that could shorten 20 years based on good behaviour.⁷

[55] S 73 of the 1998 Act contains the power under which those sentenced after 1 October 2004 may be released on parole. The provisions applicable to “lifers” are quoted below:

73. Length and form of sentences.—(1) Subject to the provisions of this Act—a sentenced offender remains in a correctional centre for the full period of sentence; and an offender sentenced to life incarceration remains in a correctional centre for the rest of his or her life.

[...]

(4) In accordance with the provisions of this Chapter a sentenced offender may be placed under correctional supervision, day parole, parole or medical parole before the expiration of his or her term of incarceration.

(5) (a) A sentenced offender may be placed under correctional supervision, on day parole, parole or medical parole—

[...]

(ii) in the case of an offender sentenced to life incarceration, on a date to be determined by the Minister.

(b) Such placement is subject to the provisions of Chapter VI and such offender accepting the conditions for placement.

[...]

(b) A person who has been sentenced to—

[...]

(iv) life incarceration, may not be placed on day parole or parole until he or she has served at least 25 years of the sentence; or

[56] S 73(5) thus expressly provides that a sentenced offender can be released on parole before the expiry of the actual term of imprisonment once they comply with certain eligibility requirements and accept the conditions of their release on parole, as

⁷ *Groenewald v Minister of Correctional Services* 2011 (1) SACR 231 (GNP) paragraph 10.

determined by the Minister. However, there is a process that precedes the Minister's decision.

[57] The two distinct stages in the parole process are conducted by different institutions within the Department of Correctional Services: the assessment of the sentenced offender and their consideration for parole eligibility.

Assessment: Case Management Committee (CMC)

[58] Before a sentenced offender has served the minimum qualifying period, the CMC at the correctional centre where the person is detained must compile a profile of the offender as per s 42 of the 1998 Correctional Services Act. This process starts upon the sentenced offender's reception. It continues until the CMC eventually makes a recommendation regarding the specific person.

[59] The CMC makes an assessment six months before the qualifying period for parole. This profile includes specialist reports from social workers, psychologists, psychiatrists, etc. It considers remarks made during sentencing and facilitates victim-offender dialogue (VOD) where possible. It also collects information regarding the offender's training and certificates.

[60] This assessment focuses on the general conduct and adjustment of the sentenced offender whilst in prison. It is noted and recorded in a correctional sentence plan regarding the specific sentenced offender by the CMC. This assessment will eventually inform the recommendation made by the CSPB regarding the sentenced offender's suitability for parole.⁸ This assessment, along with representations made by the sentenced offender and other information at the CSPB's disposal, helps the CSPB determine whether the sentenced offender is eligible to be released on parole.

⁸ See s 38 read with s 42 and s 45 of Act 111 of 1998, as amended by ss 30, 34 and 37 of the Correctional Services Amendment Act 25 of 2008.

Consideration: Correctional Services Parole Board

[61] The Correctional Services Parole Board (CSPB) then considers the profile based on the information collected by the CMC, and interviews with the offender, victims or secondary victims. Their powers are set out in s 75:

75. Powers, functions and duties of Correctional Supervision and Parole Boards.

—(1) A Correctional Supervision and Parole Board, having considered the report on any sentenced offender serving a determinate sentence of more than 24 months submitted to it by the Case Management Committee in terms of section 42 and in the light of any other information or argument, may—

[...]

(c) in respect of any sentenced offender serving a sentence of life incarceration, make recommendations to the Minister on granting of day parole, parole or medical parole, and, subject to the provisions of section 52, the conditions of community corrections to be imposed on such an offender.

[...]

(3) [...]

(b) A person or sentenced offender referred to in subsection (1) (c) must be informed by the Board of its recommendations and must confirm that the recommendations have been conveyed to him or her.

(c) In cases referred to in subsections (1) (c) and (2) (c) the Board must allow the person or sentenced offender to submit written representations with regard to the recommendation of the Board, and the Board must submit the representations, together with its report to the court.

[...]

(5) If, after the Board has approved a sentenced offender being placed under correctional supervision or being granted day parole, parole or medical parole, and, prior to the implementation of the decision of the Board, the Case Management Committee reports to the Board that the circumstances of such an offender have changed to such an extent that it is not advisable to implement the decision, the implementation shall be deferred until the Board authorises it.

[...]

(8) A decision of the Board is final except that the Minister, the National Commissioner or the Inspecting Judge may refer the matter to the Correctional Supervision and Parole Review Board for reconsideration, in which case—

the decision of the Board is suspended pending the outcome of the decision of the Correctional Supervision and Parole Review Board; and

the record of the proceedings before the Board must be submitted to the Correctional Supervision and Parole Review Board.

[...]

(10) A matter referred to the Correctional Supervision and Parole Review Board, in terms of subsection (8), must be finalised within 4 months of such referral

[62] Thus, in the case of “lifers”, the CSPB makes a recommendation to the NCCS.

Consideration: National Council of Correctional Services

[63] The NCCS was established in terms of s 83 of the 1998 Correctional Services Act, with its responsibilities set out in s 136(3)(b) of the Act. It is a body consisting of 18 persons with expertise in different fields. The chairperson is a judge in the High Court. It considers the offender’s profile and the remarks and recommendations of the CSPB. S 84 of the Act sets out how they should go about their decision-making:

84. Functions and duties of National Council.—(1) The primary function of the National Council is to advise, at the request of the Minister or on its own accord, in developing policy in regard to the correctional system and the sentencing process.

[...]

(5) The National Council must fulfil any other function ascribed to it in this Act.

[64] And

136. Transitional provisions.—(1) Any person serving a sentence of incarceration immediately before the commencement of Chapters IV, VI and VII is subject to the provisions of the Correctional Services Act, 1959 (Act No. 8 of 1959), relating to his or her placement under community corrections, and is to be considered for such release and placement by the Correctional Supervision and Parole Board in terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of those Chapters.

(2) When considering the release and placement of a sentenced offender who is serving a determinate sentence of incarceration as contemplated in subsection (1), such

sentenced offender must be allocated the maximum number of credits in terms of section 22A of the Correctional Services Act, 1959 (Act No. 8 of 1959).

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

(b) The case of a offender contemplated in paragraph (a) must be submitted to the National Council which must make a recommendation to the Minister regarding the placement of the offender under day parole or parole.

(c) If the recommendation of the National Council is favourable, the Minister may order that the offender be placed under day parole or parole, as the case may be.

(4) If a person is sentenced to life incarceration after the commencement of Chapters IV, VI and VII while serving a life sentence imposed prior to the commencement, the matter must be referred to the Minister who must, in consultation with the National Council, consider him or her for placement under day parole or parole.

[65] After a joint decision, the NCCS can either request further information, which will be obtained and include the offender's profile (referred to as a further profile) or recommend that the offender be placed on parole. In the latter case, it submits the profile and its recommendation to the Minister. The Minister then decides whether to place the sentenced offender on parole.

[66] A reading of s 136(3)(c) suggests that the offender will be placed on parole only if the recommendation is favourable. This raises the question of whether an unfavourable NCCS recommendation is an administrative action, as the profile is only submitted to the Minister if the recommendation is that the person must be placed on parole. S 136 is silent on what happens in such a case and if the Minister still retains the discretion to place a sentenced offender on parole if the NCCS recommendation is unfavourable. However, this is not a question I was asked to determine, and the comment should thus be regarded as obiter.

The Minister of Correctional Services

[67] Once the NCCS recommends that the sentenced offender be released on parole, the Minister will then decide whether or not to place the offender on parole, as provided in s 78 of the 1998 Correctional Services Act.

78. Powers of Minister in respect of offenders serving life sentences.—(1) Having considered the record of proceedings of the Correctional Supervision and Parole Board and its recommendations in the case of a person sentenced to life incarceration, the National Council may, subject to the provisions of section 73 (6) (b) (iv), recommend to the Minister to grant parole or day parole and prescribe the conditions of community corrections in terms of section 52.

(2) If the Minister refuses to grant parole or day parole in terms of subsection (1), the Minister may make recommendations in respect of treatment, care, development and support of the sentenced offender which may contribute to improving the likelihood of future placement on parole or day parole.

[68] This is an administrative action.

[69] A sentenced offender has a right to be informed by the CSPB of what it recommends to the Minister, and the Minister must confirm whether the recommendations were sent to him. A sentenced offender can then submit written representations to the Minister regarding the CSPB's recommendations, which the CSPB is obliged to allow and obliged to submit with its report to the Minister. The Minister must consider all this information. The Minister can then decide to either release the person on parole (perhaps subject to community corrections) or refuse to grant parole. After a refusal, the sentenced offender has the right to have their case reconsidered by the Minister within two years.⁹

⁹ Section 78(4) of Act 111 of 1998.

A right to parole?

[70] The principle that offenders may be released on parole is an integral and necessary part of the South African criminal justice system. The decision-making bodies that form part of the parole process are exercising public power and must thus comply with the Constitution, which includes the principles of legality and just administrative action. Sentenced offenders retain their constitutional rights when sentenced, subject to the limitation clause.¹⁰

[71] Without the possibility for “lifers” to be released on parole, life imprisonment in South Africa would be unconstitutional as it would contravene ss 10 and 12 of the Constitution.¹¹ This is because a life sentence without possibility of review and release denies sentenced offenders the right to hope, their humanity, capacity to change and ability to atone. This is degrading and violative of human dignity. In addition, irreducible life sentences violate the principle of proportionality and that detention be based on legitimate grounds, because offenders may remain in prison even if the justification for their sentences no longer exists.

[72] There is thus a legitimate expectation to be assessed and considered for parole when a sentenced offender becomes eligible. Mujuzi¹² states it as follows

“[...] although the release on parole is not a right, the offender has a legitimate expectation that he will be considered for parole and will be placed on parole should he fulfil all of the requirements, for example, that he has served the non-parole period and has been rehabilitated. In cases where the offender meets all of the requirements for placement on parole and is not placed on parole, courts may intervene and order that he be placed on parole, as was the case in *Motsemme v Minister of Correctional Services and Others*.”

¹⁰ *Minister of Justice and Constitutional Development v Ntuli (Judicial Inspectorate for Correctional services intervening as amicus curiae)* [2023] ZASCA 146.

¹¹ *S v Makwanyane* 1995 (3) SA 391 (CC) paras 123 and 134; *S v Bull*; *S v Chavulla* 2002(1) SA 535 (SCA) para 23. See also SK Surajpal “When Life Means Life – Considerations of Rationality, Dignity, and Freedom and Security of the Person in the Lifer Parole Process” 2024 (Forthcoming in the Constitutional Court Review).

¹² Mujuzi, J. D. (2011). “Unpacking the law and practice relating to parole in South Africa.” *PELJ* 14(5).

[73] S 73(5)(ii) of the Act provides that a sentenced offender *may* be placed under correctional supervision, on day parole, or on parole on the date determined by the Minister, on the advice of the NCCS. The sentenced offender thus has a right to be considered for parole but not a right to be placed on parole. As Mr Mhbele stated: parole is not a right, but to be considered is not merely a privilege. The right to be considered for parole encompasses the requirements that the parole process must be substantively and procedurally fair.¹³ If the sentenced offender disagrees with the Minister's decision, they may review the decision under PAJA by providing the court with the necessary facts, including the reasons by the various bodies and the grounds on which the decision should be reviewed.

[74] Does a sentenced offender have a legitimate expectation of being released on parole if they served the non-parole period, complied with all the internal rules, disciplinary codes and requirements of the prison authorities, and received positive recommendations based on the internal assessments? This is less clear. Moses suggests this is indeed the case.¹⁴ Such an understanding is in line with the Constitution and the principle set out above that a life sentence without the possibility of parole would be unconstitutional.¹⁵

[75] Once a person has been incarcerated for a long time and has satisfied all the principles and the requirements for parole, they should not continue to be incarcerated when they have become eligible for parole unless the Minister has legitimate reason to deny parole. In the absence of sound reasons, denials of parole applications of this kind may rob prisoners of hope as they are left with no clear way to demonstrate rehabilitation and earn their freedom. A decision not to release a sentenced offender under these circumstances may be irrational in that the evidence and information do not

¹³ In terms of PAJA. The case of *Vinter v United Kingdom* ([GC], nos 66069/09 and 2 others, ECHR (2013) at para 118 deals with this requirement in the context of international law.

¹⁴ Moses J (2012) *Parole in South Africa* p 168.

¹⁵ *S v Nkosi and another* 2003 (1) SACR 91 (SCA).

support the decision and do not justify the decision-maker's conclusion. It can thus be reviewed in terms of PAJA on such grounds.

[76] Thus, crudely summarised, “irrational” refers to decisions taken without adequate evidence or reasoning. This should be distinguished from a legitimate expectation that entails the expectation of a fair procedure being followed (at the very least), or that a certain outcome will be afforded, but only if this can be based on a reasonable basis, arising from an undertaking given by an administrator or an administrator’s long-standing practice.¹⁶

[77] A common concern raised in court (Mr Sikhosana, Mr Mbehele and Mr Lephaila expressly so) was that a requirement is repeatedly imposed that the sentenced offenders must repeat programmes they have already completed and can be considered again for parole only after 18 – 24 months. The requirement that an offender redo a successfully completed rehabilitation programme in order to be eligible for parole may in the absence of other warranting factors be arbitrary, capricious and possibly irrational.¹⁷ If the effect of repeated recommendations is that the inmate will never be placed on parole, this may well conflict with the Constitution.

[78] Mr Mbhele indicated that the CMC, the CSPB and the NCCS recommended him for parole, but the Minister decided not to place him on parole (after taking 4 years to make the decision). It is not clear from the affidavits on behalf of the Minister why the Minister disagreed with the recommendations. This may well afford a basis for concluding that the decision is irrational, but Mr Mbhele did not make out this case before me, even on a generous interpretation of his affidavit. What would have been helpful is if he provided the recommendations to the court, stating expressly how he complied with the recommendations, together with the recommendation and reasons of the Minister, setting out why the Minister’s decision was not rational. The Minister

¹⁶ *National Director of Public Prosecutions v Phillips* 2002 (4) SA 60 (W) para 28.

¹⁷ See, for instance, *Williams v Minister of Correctional Services* Case no 3025/2021, Eastern Cape High Court, Gqeberha.

would then have to explain why the decision was rational. Only once the court has all this information, can the court review the decision.

The applicability of PAJA

[79] What is clear is that the Minister's decision is an administrative action. PAJA defines an administrative action as –

“administrative action” means any decision taken, or any failure to take a decision, by—

(a) an organ of state, when—

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include—

[...]

Failure to make a decision

[80] Under PAJA, failure to make a decision can also be an administrative action. The decision is then defined as a decision that is proposed or required to be made under an empowering provision. This element of decision implies a finality in administrative action and will apply to the entire process. The Minister's failure to make a decision is also an administrative action.

[81] In terms of ss 6(2)(g) and s 6(3) of PAJA, a court may review an “administrative action” – including a failure to make a decision – if there is a duty on the administrator to make a decision and they have not done so.

[82] The words “may” in contradistinction to “shall” may sometimes indicate a mere power as opposed to a duty on the administrator to act. This must, of course, be viewed in light of the purpose of the empowering provision, which must be interpreted in light

of the Constitution. While s 78 of the 1988 Act grants the Minister the power to decide based on favourable advice from the NCCS, s 75(3) uses the word “may” to indicate the Minister's power to release an offender on parole on a stipulated date. “May” in this instance refers to the Minister’s discretion to place a person on parole (or not), not whether he may make a decision or not. It is clear, also in light of the constitutional rights involved as set out above, that the Minister *must* make a decision. He has a duty to decide. However, there is no indication that the Minister has a duty to decide *within a stipulated time*.

[83] In the instances where there is no time prescribed for making a decision, the timeframe is “a reasonable time” (i.e. if there has been an unreasonable delay as per s 6(3)). This will, of course, depend on the facts of each.

[84] An argument about what is an “unreasonable delay” needs a proper factual basis for the court to determine whether a reasonable time has passed.¹⁸ Mr Bapela waited two years for a decision. Mr Mbhele and Mr Khumalo waited four years. Mr Mthembu also showed his frustration with having to wait so long for an outcome, raising the issue that they wait a long time for an answer from the Minister, only to hear that their application was rejected and that they must do more programmes that also take time. Mr Lephaila, who pertinently raised this issue, presented various facts regarding the delay in his initial application before the court. After the CSPB submitted their recommendation, the Minister took 17 months to make a decision. The issue might be moot because the decision was taken, but Mr Lephaila will likely face the same frustrations and possible delays. Thus, on the facts presented by Mr Lephaila, I am inclined to give a structured order (under alternative relief) with set timelines to ensure that the process progresses without an unreasonable delay. If the decisions are not taken within the stipulated times, the presumption is that the Minister failed to make a decision, and Mr Lephaila can rely on s 6(2)(g) to review the failure.

¹⁸ *Sibiya v Director-General: Home Affairs and 55 Related Cases* 2009 (5) SA 145 (KZP) paras 19 and 24.

[85] It should be noted that where there has been an unreasonable delay, a just and equitable order may require the court to do something more than order that the decision be made.¹⁹ No person should wait four years for a decision from the Minister, and it is difficult to conceive of a factual scenario in the parole process in which such a delay will be reasonable. Again, it should be reiterated that a life sentence without the possibility of parole is unconstitutional. While the sentenced offender does not have the right to be placed on parole, they have a right to be considered for parole. That consideration cannot be delayed unduly as that can possibly infringe on the sentenced offenders s 12 Constitutional rights.

[86] Other than a “just and equitable order,” s 8(2) provides the remedies when a decision is not taken. It also allows for an order declaring the parties' rights in relation to the decision, including directing the party to make a decision.

[87] I have considered the respondents’ contention in the case of Mr Lephaila that the courts cannot prescribe a timeframe for the executive to do its work. As the Minister is exercising his discretion in terms of legislation, his powers are set out and circumscribed in terms of legislation. The court should indeed exercise deference when exercising its overview functions, mindful of the specific roles of each arm of the state. The legislature can, if it sees the need, prescribe certain time limits for the CSPB, NCCS, and the Minister to make and communicate their decisions.

[88] However, the absence of stipulated timeframes this does not give the Minister a free pass to delay. The requirement in s 6(3) is that the delay must be reasonable. S 237 of the Constitution also states that all constitutional obligations must be performed diligently, and without delay. Without specific timeframes set out in legislation, what is reasonable will depend on the facts. The court can thus review a delay in terms of s 6(3) and is empowered in terms of PAJA to review a decision and order appropriate remedies in terms of s 8(2) if it finds that the delay is “unreasonable”.

¹⁹ See for instance *Mahambehla v MEC for Welfare, Eastern Cape* 2001 (1) SA 342 (SE).

[89] The four-year delay in some of the cases was deplorably and clearly unsustainable. Sentenced offenders such as Mr Lehpaila are justly dissatisfied with their own treatment, but also the treatment of “lifers” in a similar position than them in general. This inertia does not comply with the constitutional requirement that the obligations be performed diligently and without delay.

Grounds of review: PAJA

[90] Once a decision is finally taken, the decision itself can be reviewed on the usual PAJA grounds of review of reasonableness, lawfulness and procedural fairness. To review a decision, the decision and the reasons for the decisions must be provided to the court, along with an affidavit stating why the applicant regards the reasons to fall short of a just administrative decision.

[91] Reasonableness²⁰ relates to the question of the decision is one that a reasonable decision-maker could reach. It considers the nature of the decision, the identity and expertise of the decision-maker, the factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.²¹ Various specific grounds relate to “reasonableness”, such as where there is an abuse of discretion, when a decision taken was irrational, where the decision is not proportional, where it is vague, and where it is generally unreasonable. In previous parole cases,²² the rationality test²³ was employed. Rationality requires that the action be rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator or the reasons given for it by the administrator. This is why applicants need to make sure that they request reasons for the decision (as they are entitled to in terms of s 3 of PAJA) and to provide the court with those reasons if they seek the

²⁰ PAJA ss 6(2)(f)(ii), 6(2)(h) and 6(2)(e)(vi).

²¹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) par 45.

²² See, for instance, *Walus v Minister of Justice and Correctional Services* [2022] ZACC 39.

²³ S 6(2)(f)(ii).

decision to refuse parole or to require more programmes to be taken on review. It is not enough to simply provide the court with their own conclusions based on the facts known to them, but not the court.

[92] Lawfulness²⁴ requires the administrative action to align with the authorisation (the empowering provision). Under a lawfulness inquiry the questions “what was authorised” and “who was authorised to take the decision” and “how did the authorisation say the action must be taken” is asked.

[93] Procedural fairness²⁵ as a ground of review provides an applicant with a remedy if the administrator performs an administrative action without complying with the demands of s 3 and or 4 of PAJA.

[94] It is important to note that administrative review does not grant courts the power to decide whether decisions are correct (i.e. appeal). Courts cannot decide on the merits of an application. Not only because it is within the powers of the executive to make the decision but also because judges are often not qualified to make the administrative decision with reference to the facts and policy considerations required to decide on the matter. Judges can weigh up the evidence and settle the disputes, judges can review decisions based on administrative law principles.

What steps can be reviewed?

[95] In terms of PAJA’s definition of “administrative action”, the recommendations of an administrator and /or body fall outside the parameters of PAJA, because of the requirement that such an action must have a “direct” legal effect,²⁶ and some degree of finality. It has been acknowledged before those preliminary decisions may have serious consequences.²⁷ Still, in the case of “lififers,” the CSPB and CMMC recommendations

²⁴ PAJA ss 6(2)(a)(i), (ii), 6(2)(b), 6(2)(d), 6(2)(e), 6(2)(f)(i), 6(2)(g), 6(2)(i).

²⁵ As set out in PAJA s 3 and 4 with grounds of review in ss 6(2)(a)(iii), 6(2)(c).

²⁶ *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA).

²⁷ *Oosthuizen’s Transport (Pty) Ltd v MEC, Road Traffic Matters, Mpumalanga* 2008 (2) SA 570 (T) para 25.

cannot be reviewed in terms of PAJA. However, it remains possible to review them on common law grounds or in terms of the Constitution (such as legality).

[96] There remains a possibility that the process can be considered more holistically in that the recommendations can be reviewed as part of the Minister's administrative act. Until then, if those steps are questioned, they would have to be questioned on common law or constitutional review grounds, such as the principle of legality, for being unreasonable or unfair.²⁸ This then refers to the CMC's recommendation or the CSPB's consideration and recommendation, as these assessments and considerations ultimately inform the eventual decision of the NCCS, the CSPB, the Minister, or the court.

Internal remedies

[97] Judicial oversight differs from internal oversight, and in general the court may not entertain an application for judicial review if all internal remedies have not been exhausted. S 7(2) of PAJA might thus also be applicable in parole applications.

[98] The respondents in many applications raised the process set out in s 21 of the 1998 Act: Firstly, the applicant must lay a complaint at the Head of Prison about the unreasonable delay.²⁹ Secondly, if the Head of Prison does not give a satisfactory response, the complaint must be referred to refer to the National Commissioner.³⁰ Thirdly, if the applicant is not satisfied with that response, they must refer the complaint to the Independent Correctional Centre Visitor,³¹ a public functionary appointed by the Inspecting Judge.³² Where internal remedies have not been exhausted, the court must direct the person to exhaust these remedies before instituting review proceedings.

²⁸ Hoexter *Administrative law in South Africa* 2nd ed p 443.

²⁹ S 21(1).

³⁰ S 21(3).

³¹ S 21(5).

³² S 92.

[99] It should be noted that exhausting internal remedies also requires that they be available and effective. To be effective, it must provide the complainant with appropriate relief comparable to what a court can grant upon review.³³ This obligation can also be bypassed (s 7(2)(c)) if the applicant applies for an exemption and the court deems it in the interest of justice to do so.

[100] S 21 is a general complaints procedure, not a parole specific procedure. Neither the Head of Prison nor the National Commissioner (or the Inspecting Judge or the Independent Correctional Centre Visitor) have the power over parole applications. It is not clear why this general complaint procedure is regarded as an appropriate and effective remedy for challenging parole decisions for “lifers”. Normal parole decisions can, of course, be considered by the CSPRB under the circumstances set out in the Act. But the CSPRB cannot review the Minister’s decision. There seems to be no specific internal remedy in the 1998 Act for this – judicial review thus seems to be the only option.

[101] Should s 21 apply, the court would benefited in some of these applications if the applicants set out whether they have exhausted the internal remedies and, if not, why the court should exempt them from this requirement or indicate why the circumstances are exceptional and an exception should thus be granted. Simultaneously, it should be noted that an over-formalistic reliance on this requirement in the case of self-represented litigants who seek to protect their constitutional rights will not always pass muster. It remains a delicate balance that every judge will have to consider based on the facts.

Case law where the court ordered release on parole

[102] Various cases were cited in the applications before me supporting the prayers that I should release them on parole. In *Gwebu v Minister of Correctional Services*³⁴

³³ *Reed and Others v Master of the High Court of South Africa and Others* [2005] 2 All SA 429 (E) para 25.

³⁴ [2013] ZAGPPHC 205; 2014 (1) SACR 191 (GNP)

Ebersohn AJ considered an application in which the applicant (serving a determinate sentence) “qualified to be released on parole.”³⁵ Previous court orders ordered the CSPB to finalise the applicant's parole hearing, with the last order ignored by the respondent. The judge then ordered that the CSPB must place the applicant on parole within 30 days, on the conditions they laid down. The judgment does not indicate how the court came to the specific conclusion. From the history of the matter, it seems that it was due to a delay in the CSPB's decision-making.

[103] In *Motsemme v Minister of Correctional Services*³⁶ the CMC recommended the candidate for parole. It was clear that the candidate complied with most requirements and had positive recommendations. However, the CSPB regarded the seriousness of his crime and the sentence length and concluded that he was not a suitable candidate for parole. The court did not refer the matter back to the administrative authority for decision-making and instead ordered the applicant to be released on parole. The decision seems to be based on the argument that the length of the sentence and the seriousness of the crime will never change, and that but for those two requirements, the applicant would be released.

[104] Lastly, in *Walus v Minister of Correctional Services*,³⁷ Mr Walus was serving a life sentence for the murder of a prominent South African political figure, Mr Chris Hani. The murder was a pivotal moment in South African history that fuelled tensions that were already high during the transitional period from Apartheid. Mr Walus became eligible for parole in 2005. He applied and was denied parole six times. The courts reviewed the decision and set it aside three times, remitting the matter to the Minister for reconsideration.

[105] The last decision, made in 2020, was the subject of the review that made it to the Constitutional Court. In the Constitutional Court, he argued that the effect of the

³⁵ Par 3.

³⁶ *Motsemme v Minister of Correctional Services* 2006(2) SACR 277(W).

³⁷ *Walus v Minister of Correctional Services* [2022] ZACC 39.

Minister's decision was that he was serving an indeterminate sentence (by then, he had spent 28 years in prison). He stated that the factors that the Minister took into account, namely the nature of the crime, the seriousness of the crime and the sentencing court's remarks (as well as the fact that Mr Hani's surviving spouse opposed his release on parole), are factors that would never change.

[106] The court reviewed the Minister's decision on the grounds of rationality, and found that the decision was not rationally connected to the purpose of his power. The court set the decision aside. In light of the history of the case, the court stated that the CSPB recommended the applicant for parole more than a decade ago already, that various Ministers rejected this, and that the decisions have been set aside numerous times. The court thus found that in *that* case, it was in as good a position as the Minister to determine whether to release *Walus*.

[107] What is notable from the *Walus* judgment, and what was lacking in the applications before me, is that there were enough facts before the court to support a decision to release Mr Walus on parole. In other words, the positive recommendations from the CSPB justified such a decision. Applicants who seek to rely on the *Walus* judgment to argue that the court must decide to place them on parole will, at the very least, have to show a history of unlawful decisions by the Minister, along with the facts that would justify such a decision.

Conclusion

[108] The various applications in this judgment highlights some common fault lines in the parole system for "lifers". Some of these fault lines were also highlighted in countless other cases such as *Motsemme v Minister of Correctional Services*,³⁸ *Dlomo v Minister of Correctional Services*,³⁹ *Williams v Minister of Correctional Services*⁴⁰

³⁸ 2006(2) SACR 277(W).

³⁹ Case no 3025/2021, Eastern Cape High Court, Gqeberha.

⁴⁰ Case no 3265/2021, Eastern Cape High Court, Gqeberha.

and *Mabuse v Minister of Justice and Correctional Services*,⁴¹ relating to inexcusable delays and irrational decision-making. If these issues are not effectively addressed, the courts will continue to be inundated with applications such as these, by people who are justifiably frustrated. In that regard, I echo what Wilson J said in *Mabuse*:

“The law [...] recognises that incarceration, even incarceration of people who have committed very serious offences, ought not to continue for longer than it can be justified. The necessary complexity of the process for considering the fitness for release of a person serving a life sentence ought not to be allowed to obscure the need for prompt and diligent attention to their circumstances. In each of the applicants’ cases, there is reason to believe that the necessary complexity of the task the respondents face has not been met with the level of care, administrative capacity or attention to detail the law requires (see, in this respect, section 237 of the Constitution, 1996).”

[109] This is also rings true in these cases.

Orders

[28] The following orders were given on 22 August 2024:

Case No 2024 - 00411

- 1) The application is dismissed.
- 2) No order as to costs.

Case No 2024-00414

- 1) The 4th respondent must ensure that the social worker provides a report within 30 days of being served with this order.
- 2) No order as to costs.

Case no 2024/00353

- 1) The application is dismissed.
- 2) No order as to costs.

⁴¹ [2024] ZAGPJHC 345.

Case no 2024-00360

- 1) Within 15 days of the court order, the second respondent must provide the first applicant with the outcome of the Minister's decision on 21 August 2023.
- 2) The applications of the second to sixth applicants are dismissed.
- 3) No order as to costs.

The following order is given on the date of this judgment:

Case no 037664/2022

- 1) The Case Management Committee is directed to give consideration to and to prepare recommendations as they should, within 30 days of this order;
- 2) The Correctional Services Parole Board must prepare their report within 30 days of receiving the recommendations;
- 3) The National Council for Correctional Services is directed to consider the applicant's application for parole at its next sitting after they have received the recommendations in (2);
- 4) The Minister of Correctional Services must consider the National Council for Correctional Services recommendations in (3) as soon as possible, but no later than 30 days after receipt of them, and communicate his decision to the applicant within 5 days of making the decision.
- 5) No order as to costs.


WJ du Plessis
Acting Judge of the High Court

All the applicants represented themselves. Counsel for the respondents were the following:

Case no:	Counsel for the Respondents
2024-00411	T Maluleka
2024-00414	O Mulaudzi
2024-00360	O Mulaudzi
2024/00535	T Maluleka
2022/037664	M Moropa