

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 10780/2025

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

30 January 2026 _____

DATE

SIGNATURE

In the matter between:

ISAAC LEPARA CHAUKE

First Applicant

LAZARUS LERATO PHOHLELE

Second Applicant

and

MINISTER OF CORRECTIONAL SERVICES

First Respondent

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

Second Respondent

JUDGMENT

DOMINGO, AJ

Introduction

- [1] This is an unopposed application by the applicants who are serving sentences of life imprisonment to review the respondents' decisions regarding the

applicants' parole which they allege were taken in contravention of the terms of the old Correctional Services Act 8 of 1959 ("the 1959 Act") and the new Correctional Services Act 11 of 1998 ("the 1998 Act) and the principles of administrative justice.

- [2] The application was served on the respondents on 11 July 2025 wherein they were afforded the opportunity to oppose the application and file both the notice of intention to oppose and opposing affidavits, which they elected not to do. There was no appearance by the respondents on the day of the hearing. The second respondent is cited as the chairperson of the National Council of Correctional Service ('NCCS") which is the body that considers the profiles of sentenced offenders. The first respondent, the Minister makes a decision based on the advice of the NCCS. The applicants are commonly referred to as "lifers" as they have been sentenced to life imprisonment.

Grounds for Review

- [3] This is an application in terms of Rule 53 of the Uniform Rules of Courts in which the applicants sought to review the respondents' actions relying on section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The applicants have relied on the following grounds of review to have the court intervene and as averred by the applicants vindicate their rights which they claim have been violated by the respondents:

- 3.1 Failure to comply with section 78(4) of the 1998 Act
- 3.2 Legitimate Expectation
- 3.3 Violation of the *audi alteram partem* rule
- 3.4 Retroactive application of the Law
- 3.5 Principle of Legality

- [4] The applicants are also seeking the constitutional invalidity of section 42(3) and section 136(3)(b) of the 1998 Act.

Relief Sought

[5] The applicants sought the following relief:

- 5.1 An order reviewing and setting aside the respondents' decision to refuse parole which was taken in November 2024 owing to its unlawfulness and irrationality.
- 5.2 Ordering the exclusion of the respondents from further participation in the applicants' parole reconsideration for failure to comply with s78(4) of the 1998 Act.
- 5.3 The court substituting the Minister, reconsidering the applicants' parole and ordering their release within a period of 10-days from the date of this order.
- 5.4 Declaring s42(3) and section 136(3)(b) of the 1998 Act to be invalid to the extent of its inconsistency or applying a reading-down method to save the provisions.
- 5.5 Ordering the respondents to pay the costs of this application jointly and severally, the one paying the other to be absolved.

Internal Remedy

- [6] Section 21 of the 1998 Act provides for internal procedures that must be followed by an inmate in lodging a complaint if he or she is not satisfied with the outcome of a decision.
- [7] An exercise of public power may be impugned in terms of either a PAJA or legality review. PAJA only applies to administrative actions. Upon a reading of the applicants founding affidavit, it appears that this review application is a hybrid one as the arguments raised by the applicants are grounded on PAJA, legality review and constitutional invalidity. According to s7(2)(a) of PAJA, no court shall review an administrative action in terms of PAJA unless any internal remedy provided for in any other law has been exhausted.
- [8] It was averred by the applicants that the internal remedies only afforded them an opportunity to lodge a complaint up to the National Commissioner's Office

and the Office of the Independent Correction Centre Visitor. It was further averred by the applicants that the complaints and request procedures available do not allow for an inmate to communicate to the respondents' offices. The applicants therefore request the court to exempt them from exhausting internal remedies, as the available mechanisms prevents them from exercising their right to complain directly to the respondents' offices.

- [9] From a reading of the 1998 Act and 1959 Act there are no internal remedies provided for to deal with an adverse decision made by the Minister. In the premises, I am of the view that applicants' matters can be reviewed by the court in terms of PAJA.

Condonation

- [10] It was submitted by the applicants that they are aware that in terms of s7(1) of PAJA that they are expected *ex lege* to institute an application for judicial review within a period of 180 days (6 months) subject to paragraph (a) and (b) of that particular provision. The applicants submitted they are bringing this application for review taking into account the date of the decision by the first respondent which is 21 November 2024, allegedly outside the 180 days period and thus requested the delay to be condoned by the court on the basis of the following reasons:

10.1 That although the first respondent took the decision on 21 November 2024 that decision was only communicated to the applicants on 12 December 2024. According to the applicants this is standard practice at centre level, which was similar to the previous parole decisions taken, whereby the first applicant's decision by the first respondent taken on 18 January 2023 was only communicated to the applicant in May 2023 and the second applicant's decision by the first respondent on 23 March 2023, was only communicated to the second applicant on 6 July 2023.

10.2 It was averred by the applicants that the administrative procedure which is followed for a lifers profile to reach the office of the first respondent, is burdensome as it passes to the Correctional

Supervision Parole Board (CSPB), Area Commissioner, Regional Commissioner, Head Office, NCCS and finally to the first respondent's office (Minister). It is submitted by the applicants that the same procedures are followed when the files are returned to the centre where the applicants are housed. It was furthermore, averred by the applicants that once the file is returned back to the centre level, the Case Management Committee (CMC) will keep the profile documents for days in their office while assessing the first respondent's decision and finally handing it over to the CSPB who will in turn follow its own process to summon the applicant to appear before the board to be able to convey the decision of the Minister.

- 10.3 The applicants contended that after this whole administrative process, they are left in a state of uncertainty as they would be confused by the decision of the Minister and by the fact that they would in most cases be required to redo the programs they have already undergone for the second or even third time.
- 10.4 It was submitted by the applicants that since the first respondent's decision was taken on 21 November 2024 and only communicated to both the applicants on 12 December 2024, that the December date should be when the administrative decision became effective after it was communicated to the applicants or when the applicants became aware of the decision.
- 10.5 It is averred by the applicants that on the basis of the date that the decisions were communicated to both applicants, it can be safely inferred that the applicants have acted within the boundaries of s7(1) of PAJA as they would only be regarded as having acted outside the 180 days on 12 July 2025.

[11] Having regard to the above averments made by the applicants, I am persuaded that they could have only made an application upon knowing the outcome of the Ministers decision, thus the proverbial clock started ticking from 12 December 2024. This is aligned to s7(1)(b) of the PAJA where it is stated that

the 180-day could commence where “*the person was informed of the administrative action, became aware of the action and the reasons for it...*” The application for judicial review was served on the respondents on 11 July 2025; I am satisfied that the application can be condoned.

Background

[12] The applicants are both sentenced inmates serving life imprisonment at Kgosi Mampuru II Pretoria Central Correctional Centre. They have been in custody serving their respective sentences for more than 20 years, with the first applicant having served 22 years and the second applicant having served 20 years.

[13] It is submitted by the applicants that they committed their offences during the operation of the 1959 Act and subsequently sentenced during the operation of the 1959 and the 1998 Act. The first applicant was sentenced in December 2002 while the second applicant was sentenced in June 2005.

(a) First Applicant

[14] The applicant is a 50-year-old male who was arrested for two counts of murder and robbery. The first applicant's offences were committed on 25 May 1999. The first applicant was sentenced to two life imprisonment terms on 13 December 2002 and has served to date a total of 22 years.

[15] According to the first applicant, following his date of sentence, he was admitted into custody and care of the first respondent at Pretoria New-Look Correctional Centre (B-Section), which is an admission centre for inmates who have been recently sentenced and who are to be transferred to other centres in accordance with their needs and development. It was submitted by the first applicant that he was only housed for two weeks and subsequently transferred to Zonderwater Maximum Correctional Centre. Upon admission at Zonderwater Correctional Centre in Cullinan, a correction sentenced plan was prepared by the officials which outlined how the first applicant should serve his sentence and specifically, which rehabilitation programs he should engage in. According to the first applicant, he was housed for a period of 10 years until 2021 when he

was transferred to Kgosi Mampuru II Management Area, Pretoria Central Correctional Centre wherein he has been imprisoned for 13 years.

[16] It was submitted by the first applicant that upon his arrival at Pretoria Correctional Centre in 2012, he had continued his rehabilitation journey by attending further rehabilitation programmes which included amongst others the following:

- 16.1 Changing Lanes Program
- 16.2 HIV/AIDS Program
- 16.3 Anger Management Program
- 16.4 Life Skills Program
- 16.5 Substance Abuse Program
- 16.6 Restorative Justice Program
- 16.7 Alpha Course Program
- 16.8 Ukuphula Iketanga Program
- 16.9 Searching Issues Program
- 16.10 Welding
- 16.11 Food Preparation Level 1 and 2

[17] It was submitted by the first applicant that he was only considered for possible placement on parole or day parole in February 2018, that is after a period of 16 years since he was incarcerated in December 2002. It is averred by the first applicant that he was meant to be considered for possible placement on parole after the conclusion of 20 years¹ which was reduced to 12 years and 4 months following a number of court challenges, one of which declared s136(1)

¹ See section 136(3)(a) of the 1998 which reads: “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.”

constitutionally invalid on the grounds that the use of the date of the sentence rather than the date of the commission of the offence violated the right to equal protection of the law and also the right to the benefit of the least severe punishment.²

- [18] It was submitted by the first applicant that he was “*lucky*” as he benefitted from the credit system in terms of s22A of the 1959 Act which was introduced by an amendment in 1993 wherein inmates could earn credits for good behaviour. The effect of this was that inmates sentenced to life incarceration between 1 March 1994, and 1 October 2004 became eligible for parole after having served a minimum period of 13 years and 4 months of their life sentence. It was subsequently reduced to 12 years and 4 months when taking into consideration the two separate presidential remissions which deducted 6 months each.
- [19] **First further profile:** It was submitted by the applicant that he appeared before the CSPB in 2017 and his profile was positively recommended for parole and forwarded to the second respondent for further recommendation and finally to the first respondent for a decision. On 1 February 2018, the first respondent’s advisory body chaired by the second respondent recommended at its meeting against placing the first applicant on parole and decided that the matter should be reconsidered within 18 months. It was submitted by the first applicant that the decision by the second respondent to recommend “first further profile” which was approved by the Minister was communicated to the first applicant after the actions of both respondents wherein the first applicant was not actively involved. Since the decision was approved and signed by the first respondent on 1 February 2018 and taking into account that reconsideration should have been within 18 months, the first applicant expected that the matter would be reconsidered by 1 February 2020.
- [20] **Second Further Profile:** It was submitted by the first applicant that the second respondent’s sitting that dealt with the first applicant’s profile for the second time was a meeting that took place between the 23 to 26 March 2021. The

² *Phaahla v Minister of Justice and Correction Services and Another (Tlhakanya intervening)* [2019] ZACC 18, 2019 (7) BCLR 795 (CC).

Council recommended that the first applicant should not be placed on parole and that the matter should be placed before the council again after 31 March 2022. It is submitted by the first applicant that in the interim, the council recommended that the first applicant undergoes programs. It is averred by the first applicant that what is of concern was the fact that after the first applicant's profile was seen by the council on 26 March 2021, the date for which the recommendation was signed on behalf of the council, the first respondent took a decision and approved the council's recommendation after a period of 22 months later, on 18 January 2023.

- [21] **Third Further Profile:** It was submitted by the first applicant that his third further profile was signed by the first respondent on the advice of the council headed by the second respondent on 21 November 2024. The first applicant was given a further 12 months wherein the first respondent provided that he will reconsider his decision after 12 months. It is averred by the first applicant that he has been subjected to three further profiles since 2018 wherein the first one was decided by the first respondent in February 2018, the second decided in January 2023, with the last one decided in November 2024. It is further averred by the first applicant that in all these further profiles, the CMC and CSPB had made positive recommendations in favour of the release of the first applicant on parole. It was submitted by the first applicant that despite the strength of the recommendations of the CMC and CSPB, the respondents had not bothered to notify the first applicant prior to making any adverse decisions despite the positive recommendations.

(b) Second Applicant

- [22] The second applicant is a 42-year-old male who was arrested, charged and convicted for murder and robbery with aggravating circumstances. He committed these offences on 24 July 2003. The second applicant was convicted and sentenced to to life plus 15 years imprisonment term on 7 June 2005 and he has served a total of 20 years to date.
- [23] It was submitted by the second applicant that he was initially admitted to Leeuhof Maximum Correctional Centre in Vereeniging in Gauteng. This was the

same centre where he was housed while awaiting trial as an inmate for 2 years and subsequently after his date of sentence. It was further submitted by the second applicant that he was later transferred to Groenpunt Maximum Correctional Centre in the Free State in 2005 where he remained until 2013. In 2013, he was transferred to Pretoria Central Correctional Centre in Gauteng where he has been housed from 2013 to date, which is a period of 12 years.

[24] It was submitted by the second applicant that throughout his sentence up until the time that he was admitted to the Pretoria Central Correctional Centre, 12 years into his sentence, he had already engaged in rehabilitation programs and has up to date completed the following programs:

- 24.1 HIV and AIDS Awareness
- 24.2 Changing Lanes
- 24.3 Cross-Roads
- 24.4 Relapse Prevention
- 24.5 Positive Parenting Program
- 24.6 Personal Growth Program
- 24.7 TB Program
- 24.8 FAMSA Program
- 24.9 Self- Mastering and Interpersonal Skills
- 24.10 Substance Abuse Program
- 24.11 Anger Management Program
- 24.12 Gangsterism Program
- 24.13 Restorative Justice Program

[25] The second applicant also submitted that he has completed his grade 12 Senior Certificate, an investment in excellence course, electrical installation

course, N3 Mechanical Engineering course and a N6 Public Management course.

[26] It was submitted by the second applicant that he had served 18 years of his sentence when he was considered for the first time in 2018 for possible placement on parole or day parole. The second applicant submitted that he was initially meant to be considered for possible placement on parole after the completion of 20 years into his sentence. Here too, the second applicant benefitted from the *Phaahla*³ Constitutional Court ruling and like the first applicant the second applicant also submitted that he was “*lucky*” as he benefitted from the credit system in terms of s22A of the 1959 Act wherein inmates could earn credits for good behaviour.

[27] **First Further Parole:** It was submitted by the second applicant that he appeared for the first time before the CSPB in 2020, where his profile was positively recommended by both the CSPB and CMC for parole and forwarded to the second respondent for further recommendation and finally to the office of the first respondent for a decision that was taken on 23 March 2023. It was further submitted by the second applicant that the second respondent decided not to recommend parole and stated that the matter should be placed before the council in 12 months for reconsideration. The reason for the second applicant’s further profile in March 2023 as recommended by the second respondent’s council were set out as follows:

“That the applicant should undergo the individual psychotherapy to address offending behaviour”

“The applicant must undergo risk assessment by a non-treating psychologist.”

[28] **Second Further Profile:** It was submitted by the second applicant that following the decision in 2023, the first respondent reconsidered the second applicant’s possible placement on parole or day parole again on the 21 November 2024. It was further submitted by the second applicant that the first respondent, yet again on the recommendations of the second respondent

³ *Supra* note 2.

declined to grant the parole citing that the second applicant should do the following programs:

“Individual psychotherapy to address sexual offending behaviour and minimise the index crime.”

“Risk assessment by a non-treating psychologist.”

- [29] It is averred by the second applicant that he was recommended by the second respondent to undergo the same programs that were recommended in 2023. The first respondent also approved the recommendations. Thus, it is submitted by the second applicant that both the first and second respondent recommended that the second applicant undergo the same programs that were previously recommended which the second applicant said he successfully completed. It is further submitted by the second applicant that no reasons were provided for grounds that would have led the respondents to recommend the same programs within a period of 20 months. It is averred by the second applicant that the failure by the first and second respondents to engage him in allowing him to make representations before taking a decision of granting a further second profile, left him in the dark, especially since no reasons were proffered to explain the decision for him to redo the successfully completed programs.

Legal Framework

- [30] The legislature in South Africa recognises and acknowledges the principle of parole.⁴ The parole process has many stages which includes an assessment stage, consideration stage and then a decision-making stage. The stages of parole fall under the Department of Correctional Services and its organs/bodies and officials, which include the following: Case Management Committee (CMC), the Correctional Supervision and Parole Board (CSPB), Correctional Supervision and Parole Review Board (CSPRB), the National Council of Correctional Services (NCCS) and the Minister. These organs act in terms of the provisions the 1998 Act. They must also act within the prescripts of the Constitution and PAJA.

⁴ Moses J *Parole in South Africa* 2012.

[31] It was submitted by the applicants that the 1998 Act provides the guidelines that governs the treatment of sentenced offenders upon admission, throughout their rehabilitation journey, including their release on parole. The applicants directed the court to the following provisions:

31.1 Section 21(3),(4) and (5) of Act 1998 reads:

“If an inmate is not satisfied with the response to his or her complaint or request, the inmate may indicate this together with the reasons for the dissatisfaction to the head of the Correctional Centre, who must refer the matter to the National Commissioner.”

The response of the National Commissioner must be conveyed to the inmate.

If not satisfied with the response of the National Commissioner, the inmate may refer the matter to the Independent Correctional Centre Visitor, who must deal with it in terms of the procedures laid down in section 93”

31.2 Section 42(3) of Act 1998, provides for the following:

“(3) A sentenced offender must be informed of the contents of the report submitted by the Case Management Committee to the Correctional Supervision and Parole Board or the National Commissioner and be afforded the opportunity to submit written representations to the Correctional Supervision and Parole Board or National Commissioner, as they case may be.”

31.3 Section 75(1)(c) of Act 1998 in regard to the powers, functions and duties of the CSPB provides that:

“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 –

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.”

31.4 Section 78(1), (2), (3) and (4) provides for the powers of the Minister in respect of offenders serving life sentences as follows:

- (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 condition of community corrections in terms of section 52.*
- (2) *If the Minister refused to grant parole or day parole in terms of subsection (1), the Minister may make recommendations in respect of treatment, care, development and support of the sentenced offender which may contribute to improving the likelihood of future placement on parole or day parole.*
- (3) *Where a Correctional Supervision and Parole Board acting in terms of section 73 recommends, in the case of a person sentenced to life incarceration, that parole or day parole be withdrawn or that the conditions of community corrections imposed on such a person be amended, the Minister, on advice of the National Council, must consider and make a decision upon the recommendation.*
- (4) *Where the Minister refuses or withdraws parole or day parole the matter must be reconsidered by the Minister, on advice of the National Council, within two years.”*

31.5 Section 84(1) to (5) of Act 1998 provides for the functions and duties of the National Council of Correctional Services as follows:

- “(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.*
- (2) *The Minister must refer draft legislation and major proposed policy developments regarding the correctional system to the National Council for its comments and advice.*

- (3) *The National Commissioner must provide the necessary information and resources to enable the National Council to perform its primary function.*
- (4) *The National Council may examine any aspect of the correctional system and refer any appropriate matter to the inspecting Judge.”*

31.6 Section 136(1), (2) and (3)(a-c) of Act 1998 provides for the transitional provisions between the 1959 and the 1998 Act as follows:

“Any person serving a sentence for an offence committed before the commencement of Chapters IV, VI and VII is subject to the provisions of the Correctional Service 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.”⁵

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).

- (a) *Any sentenced offender serving a sentence of life incarceration for the offence committed 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.⁶*
- (b) *The case of an 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.*

[32] A reading of s136(3)(b) implies that after the NCCS has considered the profile of a lifer it must make a recommendation to the Minister regarding the placement of the lifer under parole. Section 136(3)(c) then follows to say that if

⁵ As amended by the Correctional Services Amendment Act No.7 of 2021. S136(1) substituted by s3(a) of Act 7 of 2021 with effect from 1 February 2025.

⁶ Section 136(3)(a) substituted by s3(b) of Act 7 of 2021 with effect from 1 February 2025.

the recommendation of the NCCS is favourable the Minister “may” order that the offender be placed on parole or day parole. The 1998 Act is silent on what happens in the case where the NCCS makes an adverse or unfavourable recommendation and in such a case does the Minister retain the discretion to place the sentenced offender on parole or day parole. A reading of the word “may” in s136(3)(c) of the 1998 Act suggests to me that the Minister does have a discretion to deny parole even where the NCCS has provided a favourable recommendation. It would therefore logically flow that should the NCCS provide the minister with a recommendation that is unfavourable the Minister will retain a discretion and may order that the offender be granted parole or day parole despite an unfavourable recommendation by the NCCS.

- [33] In *Anderson v Minister of Justice and Correctional Services and Another*⁷ the court held the following in regard to s136(3)(c) of the 1998 Act, with which I fully agree:

“It is not the duty of the Minister to rubber-stamp, as it were, the recommendation of the NCCS. In my view, the section cannot be interpreted to mean that the Minister may only exercise the discretionary powers once a favourable recommendation is made by the NCCS. Were that to be the case, the Minister will be nothing but a token. Such will also render the Parole Board Manual or Departmental Policy negatory. Since every exercise of statutory power ought to be objectively rational, if the Minister is a rubber-stamp, then rationality will hardly be achieved.”

- [34] Once the Minister makes a decision whether or not to place the offender on parole, as provided in s78 of the 1998 Act, this is an administrative action.
- [35] It is submitted by the applicants that PAJA serves to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to be given written reasons for administrative action contemplated in section 33 of the Constitution of the Republic of South Africa, Act 108 of 1996 (“Constitution”). It is further submitted by the applicants that the Constitution provides for the right to equality which extends to inmates despite their status of being incarcerated. It is averred by the applicants that sections 9(1) and (3) of

⁷ [2024] ZAGPPHC 1355 (23 December 2024) at para 24.

the Constitution protects everyone against any form of discrimination unless it can be justified by the limitation clause.

[36] PAJA defines an administrative action as follows:

“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 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 of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-...”

[37] In the premises it is clear that the Minister’s decision in this matter is an administrative action. However, an issue that does arise is whether the recommendations made by the NCCS to the Minister falls within the purview of an administrative action as provided for in PAJA. The NCCS does not make the final decision and therefore it could be argued that its actions do not fall within PAJA definition of an administrative action. Moses, in his book, *Parole in South Africa*⁸ sates the following in regard to this issue:

“[A]s Hoexter points out, the Constitutional Court in a final appeal in the New Clicks case⁹, declined to treat the two stages of the process -the recommendations (relating to a transparent pricing system) from the medicines pricing committee, and the subsequent regulations made by the Minister -as separate and independent decisions.

According to Moseneke J, it was one continuous process involving the committee and the Minister at different times.

The PAJA could, so it is argued, conceivably be interpreted so as to avoid this effect, which would be viewing multistage processes more holistically.

⁸ *Supra* note 4 at pages 92 and 93.

⁹ See *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang and Another* NNO 2005 (2) SA 530 (C).

But even if these preliminary stages are interpreted to fall outside the purview of the PAJA, and accordingly do not qualify as administrative action (as they are not final), this does not mean that they could not be tested on the other common-law or constitutional review grounds, such as not being in accordance with constitutional principle of legality, being unreasonable, or being unfair in the circumstances.”

[38] Having regard to the above, I am of the view that the recommendations made by the NCCS and the subsequent decision made by the minister should be viewed holistically. My reasoning is that the Minister makes his final decision, in consultation with the advice provided by the NCCS. Thus, the recommendations made by the NCCS is not independent from the final decision made by the Minister and is therefore reviewable under PAJA.

[39] As I stated earlier, upon a reading of the applicants’ founding affidavit, their application for review is hybrid as it is grounded on PAJA, legality review and constitutional invalidity review. Thus, the decision of the Minister in this matter can be reviewed on the PAJA grounds of review of reasonableness, lawfulness and procedural fairness. For a court to review a decision, the reasons for the decision must be provided to the court and the applicants must provide reasons why the decision made falls short of a just administrative decision. This matter was heard unopposed, so it is prudent to point out here that the failure by the respondents to oppose the matter does not in and of itself automatically lead to the review and the setting aside of the decision.

[40] The court in *Mazingane and Others v Minister of Correctional Services and Others*¹⁰ set out the requirements for reasonableness, lawfulness and procedural fairness as follows:

“Reasonableness 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. 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

¹⁰ [2024] ZAGPJHC at paras 91, 92 and 93.

where it is generally unreasonable. In previous parole cases, the rationality test 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 s3 of PAJA) and to provide the court with those reasons if they seek the 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.

Lawfulness 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 authorisations say the actions must be taken” is asked.

Procedural fairness as a ground of review provides an applicant with a remedy if the administrator performs an administrative action without complying with the demands of s3 and or 4 of PAJA.”

First Ground of Review: Failure to comply with S78(4) of the 1998 Act

[41] It was submitted by the applicants that s78(4) of the 1998 Act is a peremptory provision that compels the first respondent (the Minister), in the event that he has withdrawn or refused parole or day parole of an inmate serving life imprisonment to reconsider the matter on the advice of the NCCS within 2 years (24 months).

[42] It was averred by the first applicant that he was considered for parole for the first time in February 2018, reconsidered in January 2023 and subsequently reconsidered in November 2024. It was submitted by the first applicant that in terms of s78(4) of the 1998 Act, the first consideration took place in February 2018, thus, the Minister was compelled to reconsider the matter no later than February 2020, which would have been within the prescribed period of 24 months. It was averred by the first applicant that the Minister dismally failed to reconsider his parole within the 24-month period and only reconsidered him after a period of 4 years and 11 months.

[43] It was submitted by the first applicant that since the provision is peremptory (must), the Minister is therefore not empowered by the 1998 Act to cure any action taken *ultra vires* which would leave the only logical inference that any decision for reconsideration taken outside of the prescribed period of 24-months would be regarded as being unlawful. Thus, it was further submitted by the first applicant that the decision taken in January 2023 by the Minister is therefore unlawful and as a result any decision taken subsequently to the expiry of 24-months would also be unlawful. It is on that basis that the first applicant contended the review of the lawfulness of the Ministers decision taken 24 November 2024, citing that Minister was accordingly excluded from participating in the reconsideration of the first applicant's profile with effect from the expiry of the 24-month period in February 2020.

[44] The conundrum that faces the first applicant's argument as set out above in my view is that the Minister's January 2023 decision was not taken on a PAJA administrative review or legality review. A PAJA application has a 180-day prescription time period, while a legality review has no time limit. In regard to the Minister's powers as set out s78(4) of the 1998 Act, no legality review argument was put forth by the applicants. Instead in this matter, it was averred by the first applicant that the failure by the respondents to comply with s78(4) of the 1998 Act, to reconsider the first applicant's parole placement within a period of 24 months (between the 2018 and 2023 period) was a direct violation to a procedurally fair administrative action. It is further averred by the first applicant that the action of the first respondent (the Minister) is a direct violation of s6(2)(b) of PAJA, as an administrator, he acted *ultra vires* and that his actions do not comply with the mandatory and material procedure which is prescribed by the empowering provision, s78(4) of the 1999 Act in this instance. I am of the view that in terms of s7(1) of PAJA this court is bound to only review the Minister's 24 November 2024 decision in terms of the applicant's PAJA application. However, I must point out that a 4 year and 11 months reconsideration of the first applicant's parole is an inordinate length of time.

[45] Having regard to the Minister's November 2024 reconsideration decision it was made within the 24-month period of the empowering provision (s78(4) of the

1998 Act) following the Minister's previous decision which was made in January 2023. In the premises, I am satisfied that the respondents have not failed to comply with s78(4) of the 1998 Act.

[46] It was submitted by the second applicant that he was considered for parole for the first time in March 2023 by the first respondent, however, his profile was sent to the office of the Minister in October 2020, and he was given a 12 months further profile. It is averred by the second applicant that it took the first respondent 2 years and 5 months to make decision which goes against the principles of administrative actions. The second applicant was reconsidered for possible placement on parole or day parole in November 2024. Having regard to the papers placed on record, there is no evidence indicating that the second applicant's profile was sent to the office of the Minister in October 2020. The second applicant averred in his founding affidavit that his profile was positively recommended by both the CMC and CSPB in 2020 for parole and thereafter forwarded for further recommendation and finally to the office of the first respondent for a decision that was taken on 23 March 2023. Since the matter is unopposed, I have to rely on the documents provided by the second applicant. The NCCS' recommendation document was signed by the chairperson on 28 November 2022 and the Minister's made his decision on 23 March 2023. Furthermore, the March 2023 document reflecting the Minister's decision states the following:

"Parole is not recommended at this stage. This matter should be placed before the council after 12 months..."

[47] The PAJA application before this court is in terms of the Minister's 21 November 2024 decision and not the 23 March 2023 decision. Having regard to the 21 November 2024 decision the Minister made that decision within 1 year and 7 months which falls within the 24-month period provided for in the empowering provision of s78(4) of the 1998 Act. The 12-month period mentioned above refers to the matter being place before the NCCS after a 12-month period. In the premises, I am of the view that the respondents have complied with the provision of s78(4) of the 1998 Act.

Second Ground of Review: Legitimate Expectations

[48] It was submitted by the applicants that the transitional provision of the 1998 Act, s136(1) and (2) guarantees the applicants that their parole considerations would be considered in accordance with the laws (1959 Act) that was in place at the time when they committed their offences. Furthermore, it is submitted by the applicants that the 1998 Act guarantees that the applicants automatically benefit from the credit system which were allocated in terms of section 22A of the 1959 Act. It was averred by the applicants that the implication of these credits is that since they were expected to serve a period of 20-years before they could be eligible for parole consideration, that the 20-years was now reduced to 13 years and 4 months. This period was further reduced to 12 years and 4 months which was calculated by the reduction of two (6 month) by virtue of presidential remissions which they benefitted from in 2005 and 2012. The applicants have submitted that they have benefitted from s22A of the 1959 Act thus the credit system is not in dispute.

[49] It was submitted by the applicants that according to their correctional sentence plan they complied with the requirements set therein, the social worker, psychologist, CMC and CSPB had all positively recommended their release. It is further submitted by the applicants that they had made representations at Centre level before any decision was taken by the social workers, psychologists, CMC and CSPB in accordance with s42(3) of the 1998 Act. All these bodies recommended the applicants for release on parole, and it is averred by the applicants that any person or body that would subsequently make further recommendations that are contrary to those made at centre level, it would be expected that the applicants be afforded an opportunity to make representations before such decision could be finalised. I am in agreement with the applicants that there is a legitimate expectation that they should have been afforded the opportunity to make representations before a final decision was made. It would be fair and equitable, and in accordance with the constitutionally guaranteed rights of every person including a sentenced offender, that the offender be given the opportunity to make representations before the relevant Minister or NCCS, to make submissions or to argue the merits of his or her

case, and to adduce evidence particularly where substantial injustice may otherwise have occurred.¹¹

[50] It was submitted by the applicants that since the Minister had refused to release them on parole, that the Minister would reconsider their matters for possible parole considerations within a period of 24 months and that since they may have complied with the Minister's recommendations as contained in the further profile, that they would be released on parole. The applicants expected that in terms of s75(1)(c) of the 1998 Act "for their files to go directly to the Minister after the sitting with the parole board at centre level."

[51] The official document reflecting the Minister's January 2023 decision with regard to the first applicant reads as follows in respect of the recommendations made in the document:

"The above do not constitute reasons for the denial of parole."

[52] The "above" referred to the recommendations in regard to the activities or courses the first applicant needed to undertake. It can be inferred from the statement above that even if the first applicant successfully completed and complied with the all the recommendations set out there could not have been a legitimate expectation by the first applicant that he would be released on parole as the recommendations "*do constitute the reason for the denial of the parole*".

[53] Having regard to the 23 March 2023 NCCS further profile document of the second applicant which was also approved by the Minister, the second applicant was told to improve his situation and recommendations were also made therein. Regarding those recommendations the document reads as follows:

"Compliance with all of the above will not guarantee the offender a placement on parole."

[54] The above statement makes it very clear that the second applicant even if he complied with all the recommendations, it would not "*guarantee*" him a placement on parole when he was to be considered again for parole.

¹¹ Moses *supra* note 4 at pages 81 and 82.

[55] In terms of the argument made by the applicants that they believed their files would be sent directly to the Minister from the centre level; on a reading of s75(1)(c) of the 1998 Act, it would appear that they expected that it would not serve before the NCCS first before being sent to the Minister. However, upon a reading of s75(1)(c) the CSPB's report does serve before the Minister when he makes his decision.

[56] Since this matter is unopposed the only official documents that contains the Minister's 21 November 2024 decision that can inform this court states the following for the first applicant:

*"Having considered the documentation of the aforesaid offender and the recommendations of the NCCS, parole is **not approved**. This matter should be placed before the Council **after 12 months**. The offender is presently urged to improve his situation as follows:*

- 1. To undergo individual psychotherapy to further reduce his risk of offending.*
- 2. A risk assessment by a non-treating psychologist should be conducted indicating the risk level and tools, if any."*

[57] The official document that contains the Minister's 21 November 2024 decision in regard to the second applicant reads as follows:

*"Having considered the documentations of the aforesaid offender and the recommendations of the NCCS, parole is **not approved**. This mater should be placed before the Council **after 12 months**. The offender is presently urged to improve his situation as follows:*

- 1. To undergo individual psychotherapy to further reduce his risk of reoffending.*
- 2. A risk assessment by a non-treating psychologist should be conducted indicating the risk level and tools used, if any."*

[58] The averments made by the applicants is that the recommendations made by the Minister to improve their situation require them to undergo the same

programmes that they have already completed. In regard to the second applicant, the first further profile of the second applicant signed by the Minister in March 2023 required him to “ 1) undergo individual psychotherapy to address offending behaviour and 2) a risk assessment by a non-treating psychologist should be conducted.” Thus, *prima facie* if one looks at the improvement recommendations cited in the March 2023 decision and November 2024 decision, they appear the same. In regard to the first applicant, his 18 January 2023 further profile indicated that he was urged to improve his situation by 1) undergoing “individual psychotherapy to address his minimisation of the offence and his criminogenic needs and 2) a risk assessment by a non-treating Clinical Psychologist / Criminologist should be conducted. Once again, this *prima facie* appears to be the same requirements as set out in the first applicant’s November 2024 ministerial decision document.

[59] From all the above, it can be inferred that the Minister appears to have considered all the documents placed before him, which would have included the CSPBs report and the recommendations of the NCCS. There is no explanation of the minister’s reasons in the documents provided by the applicants. There is thus, no evidence before this court on how the Minister applied his mind to the applicants’s parole applications. *Prima facie*, it would appear from the documents provided to the court that the Minister simply endorsed the NCCS’ recommendations, which were the averments put forth by the applicants. Absent an explanation of the Minister’s reasons for his decisions, I am of the view that I cannot reach a conclusion that the Minister’s decisions were irrational or unlawful. In the *Walus v Minister of Justice and Correctional Services and Others*,¹² the Constitutional Court confirmed that the question of whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. It is thus an impossible task for this court to objectively enquire into the rationality of the Minister’s decisions absent evidence from the respondents, as this court is bereft of any facts from the decision maker (the Minister).

¹² [2022] ZACC 39, 2023 (2) SA 473 (CC).

[60] Furthermore, one of the grounds of relief sought by the applicants is that this court grant their release on parole. Having regard to the totality of evidence presented, I have not been provided with sufficient evidence and information to support the release of the applicants. Accordingly, this court is not in as good a position as the Minister to consider the granting of the applicants' parole. For these reasons, I cannot release applicants on parole.

Third Ground of Review: Violation of the *Audi Alteram Partem* Rule

[61] It was submitted by the applicants that the importance of the principle of the *Audi Alteram Partem* rule is to afford both parties an opportunity to be heard, thus tell their side of the story before any decision can be taken. It was averred by the applicants that this is part of the dictates of constitutional procedural fairness which is crucial in all decisions taken administratively. As stated earlier according to the applicants, they were afforded an opportunity to make representations at Centre level before a decision was taken by the social workers, psychologists, CMC and CSPB. The applicants contended that this opportunity to make representations should have been extended beyond centre level to the office of the first and second respondents. It was submitted by the applicants that the opportunity to make representations would have enabled them an opportunity to make representations to the respondents, which would have complied with the administrative requirement to give the party that may be affected by the intended decision an opportunity to make representations. It is averred by the applicants that a factor that necessitated them making representations to the respondents is premised on the positive recommendations made by the role players at centre level which the applicants averred were ignored by the respondents. It is averred by the applicants that a reasonable inference can therefore be drawn from the failure to afford the applicants an opportunity to make representations, that procedural fairness in the process of the respondents taking a decision was not adhered to. It is further averred by the applicants that the delay in taking the decision and the recommendations that the applicants should redo program that they had already previously done, is irrational.

[62] I am in agreement with the applicants that they should have been given the opportunity to make written submissions or representations with regard to the unfavourable recommendation made by the NCCS before the final decision was made by the Minister.

Fourth Ground of Review: Retroactive Application of the Law, Fifth Ground of Review: Principle of Legality and Constitutional Invalidity -Section 136(3)(b) of 1998 Act

[63] I have decided to deal with the applicants' fourth ground of review, (retroactive application), fifth ground of review (principle of legality) and their arguments for the constitutional invalidity of section 136(b) of the 1998 Act collectively below, because the crux of the applicants arguments deal with the issue of retrospectivity focusing on the the NCCS and s136(b) of the 1998 Act.

[64] It was submitted by the applicants that the NCCS, a structure that came into existence during the 1998 Act was officially afforded the authority to make recommendations to the Minister pertaining to the release of lifers on parole or day parole in October 2004. It was averred by the applicants, that this means that, the NCCS does not have the power to act or make recommendations on matters of the lifers that committed their crimes before October 2004. It was noted by the applicants that the transitional provisions of the 1998 Act (section 136) catered for the smooth transition of inmates who committed their offences during the operation of the old 1959 Act, who are to be treated in accordance with the old 1959 provisions of release on parole. It was submitted by the applicants that the validity of the transitional provision was challenged in various courts wherein and it was amended to ensure that it complied with constitutional prescripts. The applicants directed the court to the following cases: *Van Vuren v Minister of Corrections Services and Others*, *Minister of Correctional Services and Others v Seganoe* and the *Phaahla* case¹³ According to the applicants these cases make it explicitly clear that s136(1), (2) and (3) caters for the sentenced inmates who committed their offences before

¹³ *Van Vuren v Minister of Correctional Services and Others* [2010] ZACC 17, 2010 (12) BCLR 1233 (CC); *Minister of Correctional Services and Others v Seganoe* [2015] ZASCA 148, 2016 (1) SACR 221 (SCA) (1 October 2015) and *Phaahla* see *supra* 2.

October 2004, whose parole considerations should be regulated by the 1959 Act. Only subsection (4) caters for those who are serving a life sentence committed before the commencement of Chapters IV, VI and VIII and those sentenced to life for offences committed after October 2004.

- [65] It is averred by the applicants that the implication of s136(3)(b) of the 1998 Act is that it gives the NCCS the powers which are statutorily given in terms of s78(1) of the 1998 Act to make recommendations to the Minister pertaining to the release of a lifers after October 2004, that such powers (s136(3)(b)) allows the NCCS to make recommendations with retrospective effect to the lifers who are regulated by the 1959 Act. It is further averred by the applicants that according to South African law, legislation only applies to the future which means that legislation should not have a retro-effect. This is a standard practice in terms of the law in South Africa except when the retro-effect benefits the person being the subject of that application of that particular law.
- [66] It is submitted by the applicants that the NCCS is a body that is known for making adverse recommendations which are contrary to those made at the centre level and that the Minister has on many occasions relied on the NCCS' recommendations to refuse many lifers their release on parole or day parole. It is averred by the applicants that the application of s136(3)(b) is burdensome on them because the parole consideration of the lifers takes much longer now before a decision is made. It was further averred by the applicants that the reasons for the delays are firstly, that the NCCS' sittings take place during specified periods of the year and as a result thereof the inmates profiles lay in their offices for months or years before they are placed before the Minister to make a decision. Secondly, the delay caused by the NCCS hinders the Minister's ability to reconsider the lifers parole matters within a period of 24 months.
- [67] It is averred by the applicants that s75(1)(c) of the 1998 Act does not recognise the NCCS which makes their involvement in the parole consideration of the applicants unlawful as they committed their offences during the 1959 Act.

[68] It was submitted by the applicants that the principle of legality advocates for the notion that everyone deserves protection from retroactivity or retrospectivity of the law, especially where the result of such would be prejudicial. It was averred by the applicants that the retrospective effect resulting from the application of s136(3)(b) invokes the provision of s35(3)(n) of the Constitution, which is in favour of prospectivity rather than retrospectivity. It was further averred by the applicants that in their case where they committed their offences before the commencement of chapters IV, VI and VIII, that their parole consideration should be in terms of rules that were in place at the time they committed their offences as it was concluded in the case of *Van Vuren*.¹⁴ The exception would be in the circumstances where the applicants stood to benefit from the rules applicable in the 1998 Act.

[69] It was submitted by the applicants that s136(3)(b) of the 1998 Act violated the principle of legality by applying the law retrospectively by granting the NCCS the powers to make recommendations on the release of lifers who committed their offences before October 2004. Sentenced inmates who committed offences around the same period as the applicants were not subjected to the compulsory recommendations by the NCCS for their release as lifers. It is on that basis that the applicants contended that the application of s136(3)(b) on the lifers who committed their offences prior to October 2004 encroaches on their right to equality.

Discussion on the retrospective effect of the provision

[70] Section 35(3)(n) of the Constitution provides that every accused person has a right to a fair trial, which includes the right “*to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing*”. Parole has been recognised as forming part of punishment. In *Phaahla v Minister of Justice and Correctional Services and Another (Tlhakanye Intervening)*,¹⁵ it was stated:

¹⁴ *Supra* note 13.

¹⁵ *Supra* note 2 at para 34.

“Correctional supervision is a class of punishment, and so the rules prescribing correctional supervision prescribe a form of punishment. Parole is defined in substantively the same way, serves the same purpose, and is governed by the same rules as correctional supervision. In substance, therefore, the two are identical and parole, like correctional supervision, must surely be a type of punishment.”

[71] In *National Director of Public Prosecutions v Carolus and Others*,¹⁶ the Supreme Court of Appeal (SCA) affirmed that individuals must be afforded an opportunity to know what the law is in order to regulate their conduct accordingly. The court in *National Director of Public Prosecutions v Basson*,¹⁷ explained that: “A statute is said to operate retrospectively if it creates legal consequences for conduct only after that conduct has occurred”.¹⁸ The Court further held:¹⁹

“ ...section must thus be construed as operating only prospectively, with the result that a confiscation order may not be imposed in consequence of a conviction for an offence committed before the Act came into effect.”

[72] The Constitutional Court in *Van Vuren v Minister of Correctional Services and Others*,²⁰ emphasised that s 136 of the 1998 Act must be interpreted against the backdrop of the general presumption against retrospectivity.²¹

[73] The distinction between procedural and substantive provisions cannot always be decisive in the operation of the presumption against retrospectivity.²² As the court recognised in *Minister of Public Works v Haffejee NO*:²³

¹⁶ [1999] ZASCA 101; 2000 (1) SA 1127 (SCA) at para 36.

¹⁷ (131/2000) [2001] ZASCA 111; [2002] 2 All SA 255 (A); 2002 (1) SA 419 (SCA); 2001 (2) SACR 712 (SCA) (28 September 2001).

¹⁸ *Supra* at para 1.

¹⁹ *Supra* at para 17.

²⁰ *Supra* note 13 at paras 52-53.

²¹ *Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering, Metallurgical Industry and Others* [1994] ZASCA 143; 1995 (1) SA 563 (A) at 572E, where the court stated: “It is settled law that there is a strong presumption against retrospectivity of a statute, and that hence its operation should be construed as prospective only unless the Legislature clearly expressed a contrary intention.” See also *S v Mhlungu and Others* (CCT25/94) [1995] ZACC 4; 1995 (3) SA 867; 1995 (7) BCLR 793 (CC) (8 June 1995) at para 37.

²² *Veldman v Director of Public Prosecutions* (Witwatersrand Local Division) (CCT19/05) [2005] ZACC 22; 2007 (3) SA 210 (CC); 2007 (9) BCLR 929 (CC); 2006 (2) SACR 319 (CC) (5 December 2005) at para 28.

²³ [1996] ZASCA 17; 1996 (3) SA 745 (A) at 753B–C.

“[I]t does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If those substantive rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply.”

[74] Section 64 of the 1959 Act states as follows:

“64. Release of prisoner serving life sentence.

(1) A prisoner upon whom a life sentence has been imposed, shall not be released unless the National Advisory Council—

(a) after having been requested by the Minister to advise him in relation to that prisoner; and

(b) after considering a report of an institutional committee, with due regard to the interests of society, has made a recommendation to the Minister for the release of the prisoner and the Minister has accepted that recommendation.

(2) If the Minister accepts the recommendation for the release of such a prisoner, he may authorize the release of the prisoner on the date recommended by the National Advisory Council or on any other date, either unconditionally or, subject to any such condition as he may determine, on parole as he may direct.”

[75] Section 136(3) of the 1998 Act provides:

“....

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

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

[76] The Constitutional Court in *Van Vuren* held the following in terms of the pre-1998 Act position:²⁴

²⁴ *Supra* note 13 at paras 25 and 27.

“Prior to the enactment of the Act, the National Advisory Council of Correctional Services (National Advisory Council) submitted a provisional memorandum to the Minister. The National Advisory Council advised the Minister on general policy considerations, including the placement of sentenced offenders on parole. The final report recommended, in the case of offenders sentenced to life incarceration, that offenders sentenced to life should serve 20 years in prison, with life incarceration being equated with a determinate sentence of 40 years. The report also stated that an offender sentenced to life incarceration, upon reaching 65 years of age, should be entitled to be considered for parole provided that he or she should have served 15 years of the sentence. The National Advisory Council recommended further that any decision by the Parole Board recommending parole in the case of a person sentenced to life incarceration should be brought before it for a final decision.”

...

Section 64 of the Old Act, as amended, empowered the Minister to authorise the release of an offender sentenced to life incarceration on parole after having been advised by the National Advisory Council, the latter having considered the report of an institutional committee.”

- [77] The question is therefore whether the parole procedure in s 136(3)(b)–(c) of the 1998 Act constitutes such a fundamental departure from s 64 of the 1959 Act, thereby contravening s 35(3)(n) of the Constitution? No, I think not. Both retain the same essential structure: consideration by an institutional body, a recommendation to the Minister, and a final discretionary decision by the Minister. It is true that the composition of the National Council has been broadened,²⁵ so it differs from that of the former National Advisory Council.²⁶ The enquiry under s 35(3)(n) is whether s 64 of the old Act is “least severe” when compared with s 136(3)(b)–(c). In my view, the two frameworks are fundamentally equivalent. Any differences in institutional composition do not rise to the level of increased punishment, nor retrospectively attach new legal consequences to past conduct.

Section 42(3) of 1998 Act

²⁵ Section 83 of the 1998 Act.

²⁶ Section 1 read with section 7 of the Correctional Services and Supervision Matters Amendment Act 122 of 1991.

[78] It was submitted by the applicants that s42(3) of the 1998 Act provides for sentenced inmates with a right to make representations up to the National commissioner and provides no mechanism that allows for lifers to be able to make representations to the National Council for Correctional Services or the Minister. It was averred by the applicants that this prevents the applicants and other inmates in the same position the opportunity to be heard by either the NCCS or Minister before a decision can be taken beyond centre level. It is further averred by the applicants that s42(3) of the 1998 Act unfairly discriminates against applicants as it does not afford them with the right to make representations to the office of the NCCS or Minister and therefore should be amended to cater for the inmates in the same position as the applicants.

[79] The court in *Mazingane and Others v Minister of Correctional Services and Others*²⁷ held the following in regard to the submission of written representations by offenders:

“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 offender 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.”

[80] In the premises the 1998 Act is silent on the right of the sentenced offender to be informed by the NCCS of what it will recommend to the Minister, particularly where the NCCS has made an unfavourable recommendation. There is no provision made for a sentenced offender to submit written representations to the Minister regarding the NCCS’ recommendations.

[81] The court in *Block v Upington Correctional Supervision and Parole Board and Others*,²⁸ held the following:

²⁷ *Supra* note 10 at para 69.

“It is so that in terms of Section 42(3) of the Act, a sentenced offender must be informed of the contents of the reports submitted by the Case Management Committee to the Correctional Supervision and Parole Board or the National Commissioner and be afforded the opportunity to submit written representations to the Correctional Supervision and Parole Board or National Commissioner, as the case may be. A mere reading of the said Section reveals that it is a mandatory and a material procedural requirement or condition prescribed by the empowering provision.

....

...It follows that the applicant’s averments that he was not afforded any opportunity to make written representations or that he was not called to appear before the Case Management Committee for feedback, but was only called to the office of the Head of Correctional Centre for feedback, stand undisputed. In the premise, this Court finds that the impugned decision was arrived at in a procedurally unfair manner.”

[82] While the 1998 Act is silent on this issue of making representations to the Minister regarding the NCCS recommendations, I am not convinced by the constitutional argument made by the applicants in terms of s42(3) of the 1998 Act that it unfairly discriminates against them. Upon a reading of s42(3) of the 1998 Act, the section deals with the reports compiled by the CMC which is submitted to the CSPB or the National Commissioner. In this case the applicants submitted that they were afforded the opportunity to make representations to the CMC. The applicants noted that the outcome of the CMC regarding their release of parole was favourable. In terms of s75(3)(b) of the 1998 Act, the applicants must be informed by the CSPB of its recommendations and *“must confirm that the recommendations have been conveyed to him or her.”* As quoted above in the *Mazingane*²⁹ a sentenced offender has a right to be informed by the CSPB what it recommends to the Minister. The court then proceeds to say that the Minister must confirm whether the recommendations were sent to him or her. This point is also made by

²⁸ (893/2023) [2023] ZANHC 72; [2023] 4 All SA 295 (NCK) (15 September 2023) at para 98 and 100.

²⁹ *Supra* see note 10 and 27.

Moses in his book on Parole.³⁰ I beg to differ with both the *Mazingane* court and Moses, s75(3)(b) of the 1998 Act state the following:

“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.”

[83] My reading of the above section implies that the sentenced offender must be informed of the CSPB’s recommendations and the sentenced offender and not the Minister must confirm that the recommendations have been conveyed to him or her.

[84] Section 75(3)(c) of the 1998 Act provides the applicants with the opportunity to make representations to the recommendations of the CSPB, it states as follows:

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

[85] Having read the documents presented by the applicants in this matter, the further profile documents of the NCCS and the Minister, the section where the minister placed his signature reads as follows:

“Having considered the documentation of the aforesaid offender, and the recommendation of the NCCS,.....”

[86] *Prima Facie*, it does mean that the Minister takes into consideration all the documents before him including the recommendations of CSPB together with any written submissions made by the offender as those documents must be submitted to the final decision maker which is the Minister. As stated earlier, the 1998 Act is silent on the ability of the offender to make recommendations in regard to an adverse finding by the NCCS. The applicants argue that this silence should be remedied by this court declaring s42(3) of the 1998 unconstitutional or alternatively providing a reading-in to the Act. In the

³⁰ Moses *supra* note 4 at page 102.

premises I am not convinced that s42(3) of the 1998 Act is the correct place to remedy the absence of a provision providing the offenders a reasonable opportunity to put forth their side of the story where the NCCS has recommended a denial of parole. It could be included elsewhere in the 1998 Act, perhaps in Chapter VIII, which deals with the NCCS -however, alternative placements of a reading-in or the inclusion of a new provision elsewhere in the 1998 Act were not put forth by the applicants.

[87] Section 3(2)(b)(ii) of PAJA provides - “*a reasonable opportunity to make representations*”. Thus, in terms of PAJA, I am of the view that the applicants should have had a reasonable opportunity to make representations to the Minister in regard to the NCCS’ unfavourable recommendation, particularly where in this case the CMC and the CSPB have all recommended that the applicants be considered for release on parole. This may be especially necessary where given the fact that the circumstances of the offender may have changed materially in the period between the report and the recommendations of the CSPB, and the recommendations of the NCCS to the Minister and the Ministers decision.³¹ Thus, not providing the applicants this opportunity in my view amounts to procedural unfairness in terms of s6(2)(c) of PAJA as the applicants were not given a meaningful opportunity to make written submissions to the Minister in regard to the NCCS’ adverse recommendation of not recommending parole.

Conclusion

[88] Notwithstanding, that I am unable to determine the substantive lawful nature of the Minister’s decision not to grant parole to the applicants due to the absence of reasons; I find that the November 2024 decision of the Minister in regard to both applicants cannot stand because it was reached through a procedurally unfair process.

Order

³¹ See Moses *supra* note 4 at page 82.

[89] Having considered the totality of evidence, the papers filed and the submissions made by the applicants' counsel, I hereby make the following order:

- 89.1 The decision of the first respondent made on the 21 November 2024 in respect of the first applicant is reviewed and set aside.
- 89.2 The first applicant's matter is remitted to the first respondent for reconsideration within 90 days of the service of this order, in accordance with a procedurally fair process including but not limited to, affording the first applicant an opportunity to make written submissions with regard to the recommendations of the second respondent, and the second respondent is ordered to submit the written submissions, together with its report to the first respondent.
- 89.3 The decision of the first respondent made on the 21 November 2024 in respect of the second applicant is reviewed and set aside.
- 89.4 The second applicant's matter is remitted to the first respondent for reconsideration within 90 days of the service of this order, in accordance with a procedurally fair process including but not limited to, affording the second applicant an opportunity to make written submissions with regard to the recommendations of the second respondent, and the second respondent is ordered to submit the written submissions, together with its report to the first respondent.
- 89.5 The respondents are to pay the costs of this application jointly and severally, the one paying the other to be absolved.

W DOMINGO

**ACTING JUDGE OF THE HIGH COURT
PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. This matter was set down on the roll for 28 October 2025 but was postponed to the 30 October 2025. The matter was heard in open court on the 30 October 2025. The date for hand down is deemed to be 30 January 2026.

APPEARANCES:

For the Applicant: MS SEKOKOTLA instructed by MR KARABO
LEBYANA, LEBYANA ATTORNEYS

For the Respondents: NO APPEARANCE